# FEDERAL TRADE COMMISSION DECISIONS

## FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2017, TO JUNE 30, 2017

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**MEMBERS OF THE FEDERAL TRADE COMMISSION**
**DURING THE PERIOD**
**JANUARY 1, 2017 TO JUNE 30, 2017**

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Took oath of office April 4, 2012.

TERRELL McSWEENY, *Commissioner*
Took oath of office April 28, 2014

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

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# FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2017, TO JUNE 30, 2017

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**IN THE MATTER OF**

# CENTRACARE HEALTH SYSTEM

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

*Docket No. C-4594; File No. 161 0096*
*Complaint, October 5, 2016 – Decision, January 6, 2017*

This consent order addresses the acquisition by CentraCare Health of certain assets of St. Cloud Medical Group, P.A. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act by substantially lessening competition for the provision of adult primary care, pediatric, and OB/GYN services in St. Cloud, Minnesota. The consent order facilitates former SCMG physicians finding alternate local employment by suspending enforcement of any non-compete provisions against any adult primary care, pediatric, or OB/GYN physician from SCMG to allow up to 14 such physicians to depart for another St. Cloud area practice; and requires CentraCare to provide sizeable departure payments to the first five physicians who leave CentraCare either to create a new medical practice or to join a small third-party medical practice in the St. Cloud area.

## *Participants*

For the *Commission*: *Robert Canterman, Malcolm Catt, Alpa Davis, Lisa De Marchi Sleigh, Charles Dickinson, Guia Dixon, Elisa Kantor, David Laing, Rohan Pai, Neal Perlman, Amy Posner, Maren Schmidt, Eric Sprague, Michael Turner* and *Steve Vieux.*

For the *Respondents*: *Ken Field* and *Doug Litvack, Jones Day; Timothy Johnson, Gray Plant Mooty.*

# COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent CentraCare Health ("CentraCare") and St. Cloud Medical Group P.A. ("SCMG") have executed a merger agreement ("Acquisition") in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

## I.
## Nature of the Case

1. CentraCare and SCMG are the two largest providers of primary care, pediatric care, and obstetrics/gynecology ("OB/GYN") services in St. Cloud, Minnesota. CentraCare's acquisition of SCMG would eliminate price and non-price competition, likely causing significant anticompetitive harm to residents and businesses in the St. Cloud area.

2. CentraCare and SCMG compete to be included in health insurance plans, and compete for patients within those health insurance plans. Health insurers and employers rely on the competition between CentraCare and SCMG to negotiate lower reimbursement rates, which are passed on to consumers through lower health insurance premiums and lower out-of-pocket costs. Competition also provides an incentive for CentraCare and SCMG to provide higher quality care and better services to patients.

3. CentraCare's acquisition of SCMG would substantially increase CentraCare's market share in three physician services sold to commercial health plans: (1) adult primary care; (2) pediatric primary care; and (3) OB/GYN. The levels of concentration in these markets that would result from the Acquisition create a strong presumption of anticompetitive harm under applicable case law and the U.S. Department of Justice and

Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"). By eliminating SCMG as a potential alternative for health plans in the St. Cloud area, the Acquisition will likely allow CentraCare to increase the reimbursement rates for the services of current SCMG physicians, and potentially secure more favorable terms from health insurance plans for CentraCare services.

4. The competition eliminated through the Acquisition will not be sufficiently replaced in a timely manner by other providers.

5. Respondent and SCMG cannot show cognizable efficiencies that would offset the likely and substantial anticompetitive harm from the Acquisition.

6. Respondent and SCMG have shown that SCMG is financially failing, with no access to credit, and that physicians are and will continue to leave the practice. They have further shown that no alternative purchasers other than CentraCare are interested in acquiring the entire SCMG practice group.

## II.
## Background

### A.

### Jurisdiction

7. Respondent and SCMG are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

8. The Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

### B.

### Respondent and SCMG

9. Respondent CentraCare is a not-for-profit health system organized under and by virtue of the laws of Minnesota.

CentraCare is headquartered at 1900 CentraCare Circle, St. Cloud, MN 56303. CentraCare owns and operates multiple clinics in the St. Cloud area that employ approximately 270 primary care and specialist physicians, including 55 adult primary care, 16 pediatric primary care, and 14 OB/GYN physicians. CentraCare also employs nearly 100 advanced practice providers ("APPs"). These clinics are vertically integrated with CentraCare's other holdings, which include six hospitals, 18 multi-specialty clinics, four pharmacies, and six nursing homes in central Minnesota.

10. SCMG is a for-profit, physician-owned, professional organization under Minnesota law that is headquartered at 1301 33rd Street South, St. Cloud, MN 56301. It owns and operates four clinics in the St. Cloud area and employs approximately 40 physicians who provide primary care and specialty practice medical services. Approximately 36 of these physicians focus on adult primary care, pediatric primary care, and OB/GYN services. SCMG also employs approximately 20 APPs.

## C.

## The Acquisition

11. As early as 2014, Respondent and SCMG began discussing a possible acquisition of SCMG by CentraCare. On February 29, 2016, the CentraCare board of directors entered into a definitive agreement to purchase SCMG's medical practice and its related building partnership.

12. Respondent and SCMG intend to finalize this acquisition as early as October 6, 2016, and begin integrating SCMG's operations into CentraCare immediately thereafter.

## D.

## Competition Between Healthcare Providers

13. Competition between healthcare providers occurs in two basic stages. In the first stage, providers compete to be selected by health insurers as their in-network provider. The in-network providers benefit by gaining access to the health insurers' members as patients. Health insurers seek to create provider

networks with geographic coverage and a scope of services that attract and satisfy employers who buy group insurance coverage for employees, as well as independent purchasers of "non-group" insurance.

14. To gain in-network status, a provider engages in bilateral negotiations with the health insurer. One of the critical terms that a provider and a health insurer agree upon during their negotiation is the reimbursement rate paid by insurer to health care provider for its medical services to the health insurers' members.

15. Health insurers act as employers' agents in creating provider networks that offer convenience, high quality care, and competitive reimbursement rates. This is true whether employers purchase fully-insured health plans or are self-insured. "Fully-insured" health plans require covered employees and the employer to pay premiums, co-pays, and deductibles in exchange for access to a provider network and for insurance against the cost of future care. These costs are linked to the reimbursement rates that health insurers negotiate with each health care provider in their provider networks. "Self-insured" health plans also provide access to a provider network but the employer rather than the insurer assumes the risk for the cost of future care. Self-insured employers must pay the entirety of their employees' health care claims (aside from member cost-sharing, such as deductibles and copayments) and, as a result, may immediately incur provider rate increases.

16. In the second basic stage of competition, providers compete with other independent providers in their networks to attract patients. Typically, health insurers offer multiple independent in-network providers, who compete to attract patients by offering better services, amenities, convenience, quality of care, and/or patient satisfaction.

## III.
## The Relevant Service Markets

17. There are three relevant physician service markets in which to analyze the effects of the Acquisition: adult primary care; pediatric primary care; and OB/GYN.

18. Adult primary care physician services are general physician services provided to commercially insured patients aged 18 and over by physicians who offer internal medicine, family medicine, and general medical services. Physicians in other specialties are generally not a substitute for adult primary care physicians.

19. Pediatric primary care physician services are general physician services provided to commercially insured patients aged 17 and younger by physicians practicing pediatrics. Pediatricians receive additional training to treat pediatric health issues and physicians trained for other specialties generally do not have this required expertise.

20. OB/GYN physician services are reproductive health services provided to commercially insured female patients. Generally, physicians without additional training in treating female reproductive health are not a substitute for physicians providing OB/GYN services.

21. Health care providers sell adult primary care, pediatric primary care, and OB/GYN physician services to health insurers and their members.

22. Alternative care delivery models, such as retail clinics and telehealth, are not functionally interchangeable with in-person physician services. Retail clinics and telehealth are not equipped to treat the same range of chronic or high-acuity acute conditions as a traditional primary care practice.

23. Because of patient preferences, and because alternative care providers can only address a limited scope of health concerns, health plans must include a sufficient number of in-network adult primary care physicians, pediatric primary care physicians, and OB/GYNs to create an attractive health plan network, even if the cost of these services increased by a small but significant and non-transitory amount.

## IV.
## The Relevant Geographic Market

24. The relevant geographic market in which to analyze the effects of the Acquisition in the relevant service markets is the greater St. Cloud, Minnesota residential area, which contains the following zip codes: 55320, 56301, 56303, 56304, 56320, 56329, 56377, 56379, and 56387. This roughly corresponds to a radius of 20 miles around downtown St. Cloud.

25. Patients in the St. Cloud area strongly value access to adult primary care, pediatric primary care, and OB/GYN services close to where they live. Given these patient preferences, health insurers must include a sufficient number of adult primary care physicians, pediatric primary care physicians, and OB/GYN physicians in the St. Cloud area to create an attractive health plan network for employers whose employees reside in the St. Cloud area.

26. Accordingly, a hypothetical monopolist that controlled a substantial portion of these physicians in the St. Cloud area could profitably increase rates by at least a small but significant amount because health insurers could not practicably offer primary and other routine medical services from providers outside the St. Cloud area to their members. Thus, the area in which health insurers can practically turn for alternative providers of adult primary care physician services, pediatric primary care physician services, and OB/GYN physician services is limited to the St. Cloud area.

## V.
## Market Structure and the Acquisition's Presumptive Illegality

27. The Merger Guidelines and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2500 and the merger increases the HHI by more than 200 points.

28. The HHIs that would result from the Acquisition confirm that it will lead to significant increases in market concentrations in already concentrated service markets. Each of the physician services markets have pre-merger HHIs of over 2500, and in each the HHI will increase well over 200 points. Indeed, CentraCare's post-Acquisition share in each of the physician service markets will be over 80%.

29. Accordingly, the Acquisition is presumptively unlawful. In each of the relevant markets, the market shares, post-merger concentration levels, and increase in concentration levels exceed the thresholds for a presumptively anticompetitive merger under the case law and the Merger Guidelines.

## VI.
## Anticompetitive Effects

### A.

### Elimination of Competition and Increased Bargaining Leverage of CentraCare

30. Health insurers must provide their members access to CentraCare or SCMG because they are the two largest providers of adult primary care, pediatric primary care, and OB/GYN services in the St. Cloud area. Competition between CentraCare and SCMG enables health insurers and employers to negotiate lower reimbursement rates and more favorable contract terms. SCMG is a low-cost provider of health care in St. Cloud, and health insurers have used the competition between CentraCare and SCMG to obtain more favorable contract terms from CentraCare, which is a higher cost health care provider. The Acquisition will eliminate competition between CentraCare and SCMG, substantially lessening overall competition in the relevant markets.

### B.

### Loss of Non-Price Competition

31. CentraCare and SCMG compete to attract patients. Competition provides an incentive for CentraCare and SCMG to provide higher quality care and better service to patients.

32. After the Acquisition, CentraCare will face substantially less competition in the St. Cloud area for adult primary care, pediatric primary care, and OB/GYN physician services. As a result, the Acquisition will diminish CentraCare's incentive to improve or continue to offer high-quality care and better services.

## VII.
## Countervailing Factors

33. Entry by a sufficient number of physicians to counteract the anticompetitive effects due to the Acquisition will not be likely, timely, or sufficient. In order to counteract the anticompetitive effect of the Acquisition, an entrant or current St. Cloud competitor would need to bring in a sufficient number of physicians in the relevant service markets to counteract the competition being lost through the Acquisition. No entrant or current St. Cloud competitor will be able to introduce such a large number of physicians in a timely manner because, inter alia, it takes time for a new physician to achieve the patient volume of an established physician.

34. Respondent and SCMG also cannot demonstrate cognizable efficiencies that would be sufficient to rebut the presumption and evidence that the Acquisition likely would substantially lessen competition in the relevant market.

35. Any alleged cost savings from the integration of CentraCare's operations with SCMG's are speculative, not verifiable, and not merger specific. Nor is there evidence that any such savings would be competition-enhancing.

36. The Acquisition also is not necessary to increase clinical efficiencies. SCMG does not need to merge with CentraCare to transition from fee-for-service contracting to a value-based

reimbursement model. Such a transition does not require a large number of physicians or an affiliation with a large integrated health system. Moreover, SCMG and CentraCare can integrate clinical services without merging, and in some respects have already begun to do so. Other independent practices in the St. Cloud area have integrated their electronic medical record systems with CentraCare successfully.

37. SCMG, however, has produced evidence that it is financially failing. SCMG's current financial status has weakened its standing with at least one lender, which froze the practice's only line of credit after reviewing its recent financial statements. The evidence indicates that certain SCMG physicians plan to leave the practice and possibly the St. Cloud area if the Acquisition is not consummated. Such physician departures would cause an immediate drop in revenues that could further destabilize the group.

38. After a good-faith, multi-year search, SCMG has been unable to find an alternative purchaser for the entire medical practice. At least one local provider, however, has expressed interest in expanding its practice by hiring some of SCMG's physicians. A number of SCMG's physicians are interested in joining that provider or other smaller, independent practices in the area.

## X.
## Violations Charged

39. The allegations of Paragraphs 1 through 38 above are incorporated by reference as though fully set forth.

40. The acquisition described in Paragraph 11 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

41. The Acquisition, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

By the Commission.

## ORDER TO SUSPEND ENFORCEMENT OF CENTRACARE HEALTH NON-COMPETES AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by CentraCare Health System of St. Cloud Medical Group, P.A. ("St. Cloud Medical Group"), and CentraCare Health System (hereafter referred to as "CentraCare Health" or "Respondent CentraCare Health") 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 CentraCare Health with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent CentraCare Health, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent CentraCare Health 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 CentraCare Health 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 CentraCare Health has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having

accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Suspend Enforcement of the CentraCare Health Non-Competes and Maintain Assets ("Order to Suspend Non-Competes and Maintain Assets"):

1. Respondent CentraCare Health is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its office and principal place of business located at 1406 Sixth Avenue North, St. Cloud, MN 56303.

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

## ORDER

### I.

**IT IS ORDERED** that, all the capitalized terms used in this Order to Suspend Non-Competes and 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. "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.

B. "Monitor" means any monitor appointed pursuant to Paragraph III of the Order to Suspend Non-Competes and Maintain Assets or pursuant to the Decision and Order.

C. "Suspension Period" means the time period that CentraCare Health is required to suspend enforcement of the CentraCare Health Non-Compete Provisions for either St. Cloud Physicians or CentraCare Physicians, if necessary, beginning when the Order to Suspend Non-Competes and Maintain Assets becomes final, until the end of the First Release Period or, if necessary, the end of the Second Release Period.

## II.
## SUSPEND NON-COMPETES

**IT IS FURTHER ORDERED** that:

A. For the duration of the Suspension Period, CentraCare Health shall not enforce any CentraCare Health Non-Compete Provisions against any St. Cloud Physician, or CentraCare Physician, if necessary, for any activity that the St. Cloud Physician or CentraCare Physician engages in that Relates To providing Termination Notification; *PROVIDED, HOWEVER*, that this Paragraph II.A does not prohibit CentraCare Health from enforcing any CentraCare Non-Compete Provisions against any St. Cloud Physician who terminates Contract Services prior to the date the Decision and Order becomes final and before the start of the First Release Period, or in the case of a CentraCare Physician before the start of the Second Release Period.

B. Within two (2) days of the Agreement Containing Consent Orders in this matter being placed on the public record, CentraCare Health shall send the letter attached as Appendix A to this Order by first-class

mail and by email, return receipt requested, to each St. Cloud Physician.

C. CentraCare Health shall inform the Monitor, in writing, that the notices sent pursuant to this Paragraph II have been sent and received.

D. For any activity Related To this Paragraph II, CentraCare Health shall waive all rights to seek or obtain legal or equitable relief for breach of contract or for violation by any St. Cloud Physician or CentraCare Physician of any CentraCare Non-Compete Provisions.

E. CentraCare Health shall not take any other action to discourage, impede, or otherwise prevent any St. Cloud Physician from seeking to terminate Contract Services, pursuant to this Paragraph II or pursuant to the Decision and Order, including, but not limited to, revoking any payments to the St. Cloud Physicians resulting from the Acquisition, or offering any incentive to the St. Cloud Physician to decline employment with Third Party Medical Practice, or to create a New Third Party Medical Practice.

F. The purpose of this Paragraph is to ensure that those St. Cloud Physicians and/or CentraCare Physicians who seek to terminate their Contract Services can offer Physician Services in a Third Party Medical Practice or a New Third Party Medical Practice in competition with CentraCare Health and to mitigate the lessening of competition alleged in the Commission's Complaint.

## III.
## ESCROW FOR DEPARTURE BONUSES

**IT IS FURTHER ORDERED** that at the time of the Acquisition, CentraCare Health shall deposit into an escrow account, pursuant to oversight and consultation with the Monitor, a sum of five-hundred thousand dollars ($500,000), that may be used as departure bonuses pursuant to and for the purposes set forth in Paragraphs II.G. and II.H. of the Decision and Order.

## IV.
## ASSET MAINTENANCE

**IT IS FURTHER ORDERED** that:

A. Until the end of the First Release Period, CentraCare Health shall:

1. Retain and maintain all office space and physical locations used by the St. Cloud Physicians as currently used before the Acquisition. *Provided, however,* that CentraCare Health may improve and supplement such spaces and locations, and add Physicians and staff to such locations;

2. Not transfer the St. Cloud Physicians, or decrease or change their workloads or practice areas from what the St. Cloud Physicians were practicing before the Acquisition including, but not limited to, allowing certain St. Cloud Physicians who are Adult Primary Care Physicians to continue to deliver babies in the same manner and locations as done before the Acquisition. *Provided , however,* that, after providing notice to the Monitor, CentraCare Health may determine, pursuant to its existing policies, to suspend a St. Cloud Physician from continuing all or part of his or her practice, if necessary, to protect patient safety;

3. Retain all St. Cloud Employees and support for the St. Cloud Physicians such that the St. Cloud Physicians seamlessly will be able to move to a Third Party Medical Practice, if they choose, or create a New Third Party Medical Practice. *Provided, however,* that CentraCare Health may make changes in personnel if the Monitor is notified of such changes, and the Monitor approves the changes after consultation with the Commission staff and the affected St. Cloud Physicians.

4. Not change Payer contracts or reimbursement rates or processes such that changes would affect a St. Cloud Physician's ability to move to a St. Cloud Medical Practice. *Provided, however,* that CentraCare Health may make changes in Payer contracts for the St. Cloud Physicians if the Monitor is notified of such changes, and the Monitor approves the changes after consultation with Commission staff and the affected St. Cloud Physicians.

B. The purpose of this Paragraph IV is for CentraCare Health to maintain those assets and personnel from the St. Cloud Medical Group such that, during the Suspension Period and the First Release Period, St. Cloud Physicians will easily be able to move to a Third Party Medical Practice or create a New Third Party Medical Practice with his or her patients and without any significant difficulties.

## V.
## FACILITATE ST. CLOUD EMPLOYEE INTERVIEWS

**IT IS FURTHER ORDERED** that beginning no later than the Acquisition Date until the end of the First Release Period, Respondent CentraCare Health shall, in a manner consistent with local labor laws:

A. facilitate employment interviews between any St. Cloud Employee, who has been requested to join a St. Cloud Physician who has submitted an Acceptable Termination, and any Third Party Medical Practice to which a St. Cloud Physician is hired or a New Third Party Medical Practice during the First Release Period ("Designated Third Party Medical Practice");

B. with respect to each St. Cloud Employee who receives an offer of employment from a Designated Third Party Medical Practice, not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the St. Cloud Employee from being employed by the Designated Third Party Medical Practice, and shall not offer any incentive to the St. Cloud Employee to decline employment with the Designated Third Party Medical Practice

C. eliminate any contractual provisions, confidentiality restrictions, or other restrictions entered into or imposed by

CentraCare Health that would otherwise prevent the St. Cloud Employee from being employed by the Designated Third Party Medical Practice, and

D. unless alternative arrangements are agreed upon with the Designated Third Party Medical Practice, retain the obligation for the benefit of any St. Cloud Employee who accepts employment with the Designated Third Party Medical Practice all accrued bonuses, vested pensions, and other accrued benefits.

## VI.
## MONITOR

**IT IS FURTHER ORDERED** that:

A. Richard Shermer of R. Shermer & Company shall be appointed Monitor to assure that CentraCare Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Suspend Non-Competes and Maintain Assets.

B. No later than one (1) day after this Order to Suspend Non-Competes and Maintain Assets issues, CentraCare Health shall, pursuant to the Monitor Agreement, attached as Appendix B and Confidential Appendix B-1 to this Order to Suspend Non-Competes and Maintain Assets, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order to Suspend Non-Competes and Maintain Assets.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of CentraCare Health, which consent shall not be unreasonably withheld. If CentraCare Health 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 CentraCare Health of the identity of any proposed Monitor, CentraCare Health 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, CentraCare Health 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 CentraCare Health's compliance with the terms of this Order to Suspend Non-Competes and Maintain Assets and the Decision and Order in a manner consistent with the purposes of the Orders.

D. CentraCare Health 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 CentraCare Health's compliance with the terms of this Order to Suspend Non-Competes and Maintain Assets, 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 to Suspend Non-Competes and Maintain Assets and in consultation with the Commission, including, but not limited to:

   a. receiving Termination Notifications from St. Cloud Physicians and CentraCare Physicians;

   b. notifying each Physician that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;

c. forwarding such Acceptable Terminations to CentraCare Health pursuant to the Decision and Order; and

d. assuring that CentraCare Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Suspend Non-Competes and Maintain Assets and the Decision and Order.

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 CentraCare Health's compliance with this Order to Suspend Non-Competes and Maintain Assets.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to CentraCare Health'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 CentraCare Health's compliance with its obligations under this Order to Suspend Non-Competes and Maintain Assets. CentraCare Health 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 CentraCare Health's compliance with this Order to Suspend Non-Competes and Maintain Assets.

5. The Monitor shall serve, without bond or other security, at the expense of CentraCare Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of CentraCare Health, 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. CentraCare Health 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. CentraCare Health shall report to the Monitor in accordance with the requirements of this Order to Suspend Non-Competes and 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 CentraCare Health and any reports submitted by a current or former St. Cloud Physician with respect to the performance of CentraCare Health's obligations under this Order to Suspend Non-Competes and Maintain Assets.

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, until the end of the Second Release Period, and otherwise as requested by the Commission, the Monitor shall report in writing to the Secretary of the Commission, with a copy to the Compliance Division, concerning performance by CentraCare Health of its obligations under this Order to Suspend Non-Competes and Maintain Assets.

9. CentraCare Health 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 VI.C., above.

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 Suspend Non-Competes and Maintain Assets.

H. The Monitor appointed pursuant to this Order to Suspend Non-Competes and Maintain Assets may be the same Person appointed as Monitor under the Decision and Order.

## VII.
## COMPLIANCE REPORTS

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Suspend Non-Competes and Maintain Assets becomes final, and every thirty (30) days thereafter until this Order to Suspend Non-Competes and Maintain Assets terminates, CentraCare 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 Suspend Non-Competes and Maintain Assets. *Provided, however,* that CentraCare Health may combine the reports required under this Order to Suspend Non-Competes and Maintain Assets with the reports required under the Decision and Order after the Decision and Order becomes final.

## VIII.
## NOTIFICATION

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

A. Any proposed dissolution of CentraCare Health,

B. Any proposed acquisition, merger or consolidation of CentraCare Health, or

C. Any other change in CentraCare Health, 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 to Suspend Non-Competes and Maintain Assets.

## IX.

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order to Suspend Non-Competes and Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to CentraCare Health, CentraCare Health shall permit any duly authorized representative of the Commission:

A. Access, during office hours of CentraCare Health 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 CentraCare Health related to compliance with this Order to Suspend Non-Competes and Maintain Assets, which copying services shall be provided by CentraCare Health at the request of the authorized

representative(s) of the Commission and at the expense of CentraCare Health; and

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

**X.**

**IT IS FURTHER ORDERED** that this Order to Suspend Non-Competes and Maintain Assets shall terminate when the First Release Period or Second Release Period terminates, whichever comes first.

By the Commission.

Order to Maintain Assets

# Appendix A

***APPENDIX A - Letter to St. Cloud Physicians***

Dear Physician:

CentraCare Health System ("CentraCare Health") has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisition of the St. Cloud Medical Group and employment of the Adult Primary Care Physicians (including Urgent Care Physicians), OB/GYNs, and Pediatricians will restrict competition in violation of Section 7 of the Clayton Act. Although CentraCare Health has not admitted liability or admitted that the facts alleged in the Commission's complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms that the Commission believes will ameliorate the competitive effects of the acquisition relating to these three practice areas.

For your convenience, CentraCare Health's obligations under the two FTC Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC's Orders and its Analysis to Aid Public Comment that are both attached to this letter. The two orders are (1) the "Order to Suspend Enforcement of CentraCare Health Non-Competes and Maintain Assets" or "Order to Suspend Non-Competes and Maintain Assets" and (2) the Decision and Order ("D&O").

**Nothing in this summary is intended to modify any of the terms of the Commission's Orders or to provide legal advice.**

**Suspension of Enforcement of CentraCare Health Non-Competes**

The first order establishes a period of time during which you, as a St. Cloud Physician (defined as an Adult Primary Care Physician, OB/GYN, or Pediatrician) currently employed by CentraCare Health, by virtue of the recent acquisition, may explore all employment and professional opportunities in the St. Cloud area, whether as an employee, a member of a medical group, or in private practice. You may enter into discussions and negotiations for new employment during this period. During this period, called the "Suspension Period," CentraCare Health cannot enforce any non-compete or non-solicitation provisions in your employment contract to interfere with your discussions with potential partners or employers.

**The Suspension Period does not apply to any physician practicing in areas other than the three practice areas of Adult Primary Care, OB/GYN, or Pediatrics.**

**Notice of Termination of Employment**

During this Suspension Period, you may submit your Termination Notice to the Monitor (identified below), but you may not actually terminate your employment before the "First Release Period" begins (described below). *If you terminate your employment with CentraCare Health **before** the First Release Period, CentraCare Health **may pursue** its non-compete or non-solicitation contract rights against you.*

## Order to Maintain Assets

If you submit a Termination Notice to the Monitor during this Suspension Period, and if the conditions below are met, your name will be included on the list of physicians terminating their employment with CentraCare Health in the event that the D&O is made final. (Until any list is provided to CentraCare Health, your Termination Notice will remain confidential with the Monitor.)

You *must* follow the procedures listed below, and the Termination Notice *must* contain certain critical information, in order to become an Acceptable Termination that allows you to leave CentraCare Health and continue practicing in the St. Cloud area without violating your employment contract:

- You must submit your Termination Notice to the Monitor.
- Your Termination Notice must contain a statement that you intend to practice in the St. Cloud area for at least two years after you leave CentraCare Health. The St. Cloud area includes the zip codes 56303, 56304, 56387, 56377, 56301, 56379, 55320, 56320, and 56329, including and surrounding St. Cloud, Minnesota.
- Your Termination Notice must contain either (a) a valid offer of employment or other affiliation with another medical practice that accepts commercial payers, *i.e.*, not a Veterans Affairs hospital, in the St. Cloud area for a period of at least one year, or (b) a detailed and verifiable business plan to begin a new medical practice in the St. Cloud area.

There is a limit to the number of Adult Primary Care Physicians, OB/GYNs, and Pediatricians who will be allowed to terminate under the FTC Orders (described below). The Monitor will keep track of the order in which doctors submit their Termination Notices. The Monitor will keep the names of the physicians who have submitted notices confidential from CentraCare Health until the notices forwarded to CentraCare Health as physicians permitted to terminate their employment with CentraCare Health pursuant to the FTC Orders.

**Termination Conditions – First Release Period**

The second order, the D&O, if made final by the Commission after a period allowing for public comment (usually around 30 days), will allow you to terminate your employment with CentraCare Health without penalty, subject to the conditions described in the D&O and the Order to Suspend Non-Competes and Maintain Assets. The Monitor will send you an email when the time starts allowing you to terminate your employment with CentraCare Health after an Acceptable Termination notice has been received. This time period is called the "First Release Period" and runs for up to ninety (90) days.

- During this ninety (90) day period, you may begin or continue discussions and negotiations for new employment. If you decide to terminate your employment, you may notify the Monitor of your intention, by following the procedures listed above.

- You must be or have been among the first fourteen (14) physicians to submit your notice to terminate employment. To protect the confidentiality of the doctors who want to leave, the Monitor will submit to CentraCare Health no more than the first fourteen (14) notices he receives.

- CentraCare Health must allow the first fourteen (14) physicians who have given notice to the Monitor and satisfied all of the conditions described above to terminate their employment without any penalty.

- You must leave employment with CentraCare Health within 60 days of CentraCare Health receiving your notice from the Monitor, but you may not leave prior to the Monitor delivering your notice to CentraCare Health.

- If at least eight (8) physicians terminate their employment with CentraCare Health by the end of the ninety (90) days, the First Release Period ends and no more employment terminations will be permitted under the Orders beyond a total of fourteen (14). After that, CentraCare Health may pursue its legal remedies against any employee who *subsequently* terminates employment with CentraCare Health in a manner that may violate that employee's contract.

- The Order to Suspend Non-Competes and Maintain Assets will continue in effect even after the Commission votes to accept (or reject) the D&O, the conclusion of this time period cannot be determined at this time. It will, however, not end until the requisite number of doctors leave CentraCare Health or ten years lapse from the date the D&O becomes final.

- If you are *not* among the first fourteen (14) physicians who submit Acceptable Termination notices, the Monitor will inform you of that fact

**Termination Conditions – Second Release Period**

If at the end of the First Release Period fewer than eight (8) doctors have notified the Monitor of their intent to terminate employment in accordance with the FTC Orders, the period in which physicians may continue to explore other employment opportunities and leave CentraCare Health's employment without penalty will remain open through a "Second Release Period." In the Second Release Period, physicians from CentraCare Health practicing in the three designated practice areas also will have the option to leave. This Second Release Period will remain open until eight (8) (rather than fourteen (14)) Adult Primary Care Physicians, OB/GYNs, or Pediatricians in total have terminated their employment with CentraCare Health in accordance with the FTC Orders, or ten years lapse from the date the D&O becomes final. *If you are not among the eight (8) physicians who submit Acceptable Termination notices during this period, the Monitor will inform you of that fact.*

Order to Maintain Assets

**Termination Conditions – Departure Bonuses**

The D&O requires CentraCare Health to pay departure bonuses to physicians who terminate their employment with CentraCare Health pursuant to the FTC Orders and who meet certain additional conditions. A $100,000 departure bonus is available to the first five (5) St. Cloud and/or CentraCare Physicians who choose to leave CentraCare and:

- Start his or her (or their) own medical practice in the St. Cloud area, **OR**
- Choose to be a part of a St. Cloud area medical practice consisting of fewer than five (5) Adult Primary Care Physicians, OB/GYNs, and Pediatricians at the time of the Orders.

Physicians receiving a departure bonus count towards the fourteen (14) or eight (8), depending on the Release Period, total physicians that CentraCare must allow to terminate their employment pursuant to the FTC Orders.

**Asset Maintenance**

The Order to Suspend Non-Competes and Maintain Assets also contains provisions requiring CentraCare Health to limit changes to the facilities you use and your medical practice, in general, to facilitate your decision to stay or leave CentraCare Health. The goal is to keep your medical practice as similar as possible to avoid disruptions while you make your decision. If you decide to leave CentraCare Health, the FTC Orders have provisions that will facilitate the transfer of patients with you to your new practice and the ability of those patients to have their medical information transferred as well. If you find that there are changes happening that are contrary to this goal, please notify the Monitor.

**Important Reminders**

- The Orders do not ***require*** any doctor to terminate employment with CentraCare Health or to work for any other entity.
- The Orders do not ***require*** CentraCare Health to fire any doctors.
- The Orders ***only apply to*** Adult Primary Care Physicians, OB/GYNs, and Pediatricians.
- The Orders prohibit CentraCare Health from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either left under the terms of the Orders or who sought other employment as allowed by the Orders but decided not to leave.
- If you terminate your employment at times or under terms not described in the

D&O, the D&O does not prohibit CentraCare Health from pursuing its contract rights.

- CentraCare Health will send an email to all CentraCare physicians (including the former St. Cloud physicians) when the time has closed for any more physicians to leave under the FTC Orders.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact:

Monitor:
Dick Shermer at 214-668-0294, or dshermer@rshermer.com, and
Kevin Wilson at 303-619-6938, or kwilson@rshermer.com.

You may also call Eric D. Rohlck, an attorney at the Federal Trade Commission, at 202-326-2681, if you prefer.

Order to Maintain Assets

# Appendix B

## MONITOR AGREEMENT (DRAFT)

Monitor Agreement (the "Agreement"), dated as of September 28, 2016, between CentraCare Health, ~~Inc.~~ System ("the Respondent"), and Richard A. Shermer of R. Shermer & Company, P.O. Box 294199, Lewisville, Texas 75029 (the "Monitor").

**Preliminary Statements**

WHEREAS the Federal Trade Commission (the "**Commission**") is considering for public comment an Agreement Containing Consent Orders with Respondent or its parent company, which provides, among other things, that Respondent…..and engage a monitor to monitor Respondent's compliance with its obligations under the Order

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitor pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and the Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, until the Order to Maintain Assets has been issued and this Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

**DEFINITIONS**

A. "Respondent" means CentraCare Health, ~~Inc.~~ System, with its principal place of business at 1406 Sixth Avenue North, St. Cloud, MN 56303, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CentraCare, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Order.

Order to Maintain Assets

**ARTICLE I**

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent's compliance with the Orders. No later than one day after the Order becomes final, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Order to Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor's powers and authority or Respondent' obligations under the Orders.

1.2 Monitor's Duties. Monitor shall monitor Respondent's compliance with the Orders, including, but not limited to:

a. Assuring that Respondent expeditiously complies with all of the obligations, and performs all of responsibilities, of Respondent as required by the Orders in this matter;

b. Monitoring Relevant Agreements; and

c. Assuring that Confidential Business Information is not received or used by Respondent or Other Parties, except as allowed in the Orders in this matter.

1.3 Duration of Monitor's Authority. Monitor shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

1.4 Confidential and Proprietary Information. Monitor shall enter into a confidentiality agreement, agreeing to be bound by the terms and conditions of the Orders. Monitor must retain and maintain all Material Confidential Information it receives from either Respondent or Other Parties on a confidential basis, except as is permitted by the Orders. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Other Parties with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of its duties under this Agreement and shall not disclose any confidential information relating thereto.

1.5 Restrictions. Monitor shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of the competing products of Respondent.

1.6 Reports. Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to

Order to Maintain Assets

Respondent's personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Orders.

**ARTICLE II**

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, (with the written prior approval of Respondent which shall not be unreasonably withheld) such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. Monitor shall be compensated by Respondent for his services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit A for time spent in connection with the discharge of its duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. Monitor shall provide Respondent with monthly invoices for time and expenses. Respondent shall pay such invoices within thirty (30) days of receipt. The Monitor and Respondent shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 To the extent available, Respondent will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

**ARTICLE III**

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify the Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by Monitor The Monitor's maximum liability to Respondents relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort) shall

be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent. Any claim arising from this Agreement that Respondents may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this 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. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. R. Shermer & Company disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fail to act diligently and consistent with the purpose of the Orders, Respondent shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the confidentiality provisions herein.

3.4 Termination: This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when the Respondent's last obligation under the Orders and the Relevant Agreements that pertains to the Monitors' service has been fully performed; provided, however, that the Commission may require that the Respondent extend this Agreement or enter into an additional agreement with the Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

3.5 Conflicts of Interest: If Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict.

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

**MONITOR:**

Richard A. Shermer

Richard A. Shermer
President, R. Shermer & Company

Order to Maintain Assets

**RESPONDENT:**

CentraCare Health, ~~Inc.~~ System

By: _____
Sr. V.P + General Counsel
_____

## NON-PUBLIC APPENDIX B-1 – MONITOR COMPENSATION

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

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by CentraCare Health System of St. Cloud Medical Group, P.A. ("St. Cloud Medical Group"), and CentraCare Health System (hereafter referred to as "CentraCare Health" or "Respondent CentraCare Health") 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 CentraCare Health with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent CentraCare Health, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent CentraCare Health 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 CentraCare Health 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 CentraCare Health has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Suspend Enforcement of CentraCare Health Non-Competes and Maintain

Assets ("Order to Suspend Enforcement and Maintain Assets"), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent CentraCare Health is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its office and principal place of business located at 1406 Sixth Avenue North, St. Cloud, MN 56303.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent CentraCare Health, 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. "CentraCare Health System" means CentraCare Health, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CentraCare Health, the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "St. Cloud Medical Group" means St. Cloud Medical Group, P.A., a multi-specialty medical clinic serving the St. Cloud, Minnesota, area. St. Cloud Medical

Group is located at 1301 33rd St S, St Cloud, MN 56301.

D. "Acceptable Termination" means any termination of employment with CentraCare Health resulting from:

1. a Termination Notification that, upon consultation between the Monitor and the Commission's staff, is submitted, after this Order becomes final, to CentraCare Health by the Monitor, and

2. Where the St. Cloud Physician or CentraCare Physician has a valid offer or contract to work for or Participate with a Third Party Medical Practice, other than CentraCare Health, for a period of at least one year after such termination, or the creation of a New Third Party Medical Practice.

E. "Acquisition" means the acquisition by CentraCare Health of St. Cloud Medical Group on or about October 1, 2016.

F. "Acquisition Agreement" means the February 29, 2016, Stock Purchase Agreement by and among CentraCare Health Services, St. Cloud Medical Group, P.A., and the Shareholders listed on Schedule 1 to the Stock Purchase Agreement.

G. "Adult Primary Care Services" means primary care Physician services that encompass general medicine, internal medicine, and family medicine provided to patients 18 years and older.

H. "CentraCare Health Non-Compete Provisions" means:

1. any provision in the Acquisition Agreement or other agreement Relating To the Acquisition or the employment of a St. Cloud Physician that impedes, interferes with, or prevents a St. Cloud Physician from interviewing, discussing employment or Participation with, or Participating in a Third Party Medical Practice or New Third Party Medical

Practice other than at CentraCare Health including, but not limited to, any provision:

a. as it Relates To disclosing the identities of, or communicating with patients treated by a St. Cloud Physician, and the status or transfer of health records of such patients; and

b. as it Relates To interfering with relationships between CentraCare Health and patients treated by a St. Cloud Physician.

2. any agreement Relating To the employment of a CentraCare Physician that impedes, interferes with, or prevents a CentraCare Physician from interviewing, discussing employment or Participation with, or Participating in a Third Party Medical Practice or New Third Party Medical Practice other than at CentraCare Health including, but not limited to, any provision:

a. as it Relates To disclosing the identities of, communicating with patients treated by a CentraCare Physician, and the status or transfer of health records of such patients; and

b. as it Relates To interfering with relationships between CentraCare Health and patients treated by the CentraCare Physician.

I. "CentraCare Physician" means a Physician who provides Adult Primary Care Services, Pediatric Services, or Obstetric Services in the St. Cloud Geographic Area as an employee of CentraCare Health, and is not a St. Cloud Physician.

J. "Contract Services" means any service performed pursuant to any Employment Agreement or Participation agreement between CentraCare Health and a St. Cloud Physician, a CentraCare Physician, or, for purposes of Paragraph V of this Order, other Physicians located in the St. Cloud Geographic Area.

K. "Employment Agreement" means any employment agreement or other agreement Relating To a St. Cloud Physician working for or Participating with CentraCare Health entered between CentraCare Health and a St. Cloud Physician on or about October 1, 2016, or any employment agreement or other agreement Relating To a CentraCare Physician working for or Participating with CentraCare Health.

L. "First Release Period" means ninety (90) days starting from the date this Order becomes final.

M. "Monitor" means the Person appointed to act as monitor by the Commission pursuant to Paragraph VII of this Order.

N. "New Third Party Medical Practice" means the creation of or proposal to create a new Third Party Medical Practice by a St. Cloud Physician or St. Cloud Physicians, or by a CentraCare Physician or CentraCare Physicians. The New Third Party Medical Practice must, to the Monitor's satisfaction after consultation with the Commission, have viable plans for a medical practice including, but not limited to, financial projections, suitable office location, staffing, and outfitting.

O. "Obstetric Services" means obstetric and gynecologic physician services Related To women's reproductive health, pregnancy and childbirth.

P. "Participate" in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including but not limited to, "participating," participated," "participation," and "participant."

Q. "Payer" means any Person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of physicians.

R. "Pediatric Services" means primary care Physician services provided to children under the age of 18.

S. "Person" means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government entity. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

T. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

U. "Physician Services" mean Adult Primary Care Services, Obstetric Services, and Pediatric Services.

V. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to. This definition applies to all tenses and forms of the word "relate to," including but not limited to," "relates to," and "related to."

W. "Second Release Period" means the period of time beginning on the date the First Release Period ends if the Commission has not received Acceptable Terminations of eight (8) St. Cloud Physicians, until eight (8) St. Cloud Physicians and CentraCare Physicians, in total, have submitted Acceptable Terminations, pursuant to this Order.

X. "St. Cloud Employee" means a person employed by St. Cloud Medical Group, not including a St. Cloud Physician, before the Acquisition.

**Y.** "St. Cloud Geographic Area" means the locations within the zip codes 56303, 56304, 56387, 56377,

56301, 56379, 55320, 56320, and 56329, including and surrounding St. Cloud, Minnesota.

Z. "St. Cloud Physician" means a Physician who provides Adult Primary Care Services, Pediatric Services, or Obstetric Services in the St. Cloud Geographic Area as an employee of CentraCare Health and who, prior to providing Contract Services for CentraCare Health, offered Physician Services as a Participant in St. Cloud Medical Group.

AA. "Suspension Period" means the time period that CentraCare Health is required to suspend enforcement of the CentraCare Health Non-Compete Provisions for either St. Cloud Physicians or CentraCare Physicians beginning when the Order to Suspend Enforcement and Maintain Assets becomes final until the end of the First Release Period or, if necessary, the end of the Second Release Period.

BB. "Termination Notification" means written notification submitted to the Monitor by a St. Cloud Physician or CentraCare Physician of that Physician's intention to terminate his or her Employment Agreement and intention to Participate in a Third Party Medical Practice for a period of at least two (2) years after such termination or create a New Third Party Medical Practice.

CC. "Third Party Medical Practice" means Physician Services offered in the St. Cloud Geographic Area by a Physician Participating in a medical practice or in an employment arrangement that accepts reimbursements from commercial Payers. A Third Party Medical Practice does not include, among other things, a Veterans Administration facility.

## II.

**IT IS FURTHER ORDERED** that CentraCare Health shall:

A. Suspend enforcement of any of the CentraCare Non-Compete Provisions against any St. Cloud Physician for any activity that the St. Cloud Physician engaged in during the Suspension Period through the First Release Period and, if necessary, the Second Release Period, that Relates To providing a Termination Notification and an Acceptable Termination; *provided, however*, that this Paragraph II.A does not prohibit CentraCare Health from enforcing any of the CentraCare Health Non-Compete Provisions against any St. Cloud Physician who terminates Contract Services prior to the First Release Period.

B. Within two (2) days of the Agreement Containing Consent Order in this matter being placed on the public record, send the letter attached as Appendix A to this Order by first-class mail and by email, return receipt requested, to each St. Cloud Physician.

C. Inform the Monitor, in writing, that the notices sent pursuant to this Paragraph II have been sent and received.

D. For each Termination Notification that is (1) submitted during the First Release Period and (2) received by CentraCare Health as an Acceptable Termination, terminate Contract Services of the St. Cloud Physician who submitted that Termination Notification, and allow that St. Cloud Physician to leave CentraCare Health's employment on or before sixty (60) days of CentraCare Health's receipt of such notification from the Monitor;

E. For any activity Related To this Paragraph II, waive all rights to seek or obtain legal or equitable relief for breach of contract for violation by any St. Cloud Physician of any of the CentraCare Health Non-Compete Provisions; and

F. Not take any other action to discourage, impede, or otherwise prevent any St. Cloud Physician from terminating Contract Services pursuant to this Paragraph II including, but not limited to, revoking any payments to the St. Cloud Physicians resulting from the Acquisition, or offering any incentive to the St. Cloud Physician to decline employment with a Third Party Medical Practice.

*Provided, however,* upon receipt by the Commission of CentraCare Health's verified report of Acceptable Termination of fourteen (14) St. Cloud Physicians, the First Release Period shall end immediately, CentraCare Health will not be required to release any additional St. Cloud Physicians, and the Second Release Period will not start. *Provided, further, however,* that, if during the First Release Period there are more than fourteen (14) Acceptable Terminations, the Monitor, after consultation with the Commission's staff and the Persons where the St. Cloud Physicians plan to Participate or be employed, shall forward to CentraCare Health the first fourteen (14) such notifications received by the Monitor and shall not reveal the identity of any of the additional St. Cloud Physicians who submitted Termination Notifications. *Provided, further, however,* that if at the end of the First Release Period, CentraCare Health has submitted a verified report to the Commission that it has Acceptable Terminations of eight (8) St. Cloud Physicians, the Second Release Period will not start pursuant to Paragraph III.

G. At the time of the Acquisition, deposit into an escrow account, pursuant to oversight and consultation with the Monitor, a sum of five hundred thousand dollars ($500,000), payable in individual, one hundred thousand dollar ($100,000) amounts as departure bonuses to up to five (5) St. Cloud Physicians or CentraCare Physicians who submit Acceptable Terminations during the First Release Period, or Second Release Period if there is one:

1. To move to a Third Party Medical Practice with fewer than five (5) Physicians offering Physician Services, as of the date the Order becomes final; or

2. For the creation of a New Third Party Medical Practice.

*Provided, however,* that if more than five (5) St. Cloud Physicians or CentraCare Physicians submit Acceptable Terminations pursuant to this Paragraph, the Monitor shall forward to CentraCare Health the first five (5) such Acceptable Terminations received by the Monitor. *Provided, further, however,* that any escrow amounts not distributed will be returned to CentraCare, with interest.

H. The purpose of this Paragraph II, including the departure bonus in Paragraph II.G., is to mitigate the competitive effects in the Commission's Complaint by giving individual physicians who formerly practiced in St. Cloud Medical Group or at CentraCare Health the incentive to leave CentraCare Health to practice Physician Services in competition with CentraCare Health. Acceptance of the departure bonus by an individual physician serves to ensure CentraCare Health's compliance with this Order. The departure bonuses provided for under this Paragraph II: (1) are not an exchange (or offer to exchange) of anything of value in an effort to induce (or reward) the referral of federal health care program business from any St. Cloud Physician or CentraCare Physician receiving such bonus to CentraCare; (2) are not considered to vary with or take into account the volume or value of any past or future referrals of federal health care program business referred by any St. Cloud Physician or CentraCare Physician to CentraCare Health; and (3) do not create any new or continuing financial relationship between the accepting St. Cloud Physician or CentraCare Physician and CentraCare Health for purposes of encouraging or expecting more referrals to, or medical tests from, CentraCare Health.

## III.

**IT IS FURTHER ORDERED** that, if after the expiration of the First Release Period, CentraCare Health has not received Acceptable Terminations for at least eight (8) St. Cloud Physicians:

A. CentraCare Health shall send a notice in a form similar to Appendix B of this Order by email and first class mail, return receipt requested, effectively giving notice to all CentraCare Physicians that there is one or more openings for CentraCare Physicians to leave CentraCare Health and practice at a Third Party Medical Practice or create a New Third Party Medical Practice, pursuant to this Order;

B. CentraCare Health shall inform the Monitor, in writing, that the notices sent pursuant to this Paragraph III have been sent and received

C. For a period of time until a total of eight (8) St. Cloud Physicians and CentraCare Physicians in total have given Acceptable Terminations, CentraCare Health shall not enforce, directly or indirectly, the CentraCare Health Non-Compete Provisions Relating To CentraCare Physicians against any CentraCare Physician seeking to provide Termination Notification;

D. Upon Acceptable Termination of any CentraCare Physician, CentraCare Health shall terminate Contract Services of each such CentraCare Physician and allow that physician to leave CentraCare Health's employment on or before ninety (90) days from the date such notification was received;

E. For any activity Related To this Paragraph III, CentraCare Health shall waive all rights to seek or obtain legal or equitable relief for breach of contract for violation by any CentraCare Physician of any of the CentraCare Health Non-Compete Provisions; and

F. CentraCare Health shall not take any other action to discourage, impede, or otherwise prevent any CentraCare Physician from terminating Contract Services pursuant to this Paragraph III including, but not limited to, not offering any incentive to the CentraCare Physician to decline employment with the Third Party Medical Practice.

*Provided, however,* that CentraCare Health shall not be required to suspend or continue to suspend its CentraCare Health Non-Compete Provisions, nor be required to allow any CentraCare Physician to leave CentraCare Health pursuant to this Order after the Second Release Period; and *provided, further, however*, that once eight (8) St. Cloud Physicians and/or CentraCare Physicians, in total, have submitted Acceptable Terminations, CentraCare Health shall not be required to suspend or continue to suspend its CentraCare Health Non-Compete Provisions, nor be required to allow any CentraCare Physician or St. Cloud Physicians to leave CentraCare Health for a Third Party Medical Practice or create a New Third Party Medical Practice, pursuant to this Order.

G. The purpose of this Paragraph III is to ensure that those St. Cloud Physicians and CentraCare Physicians who terminate their Contract Services can offer Physician Services in a Third Party Medical Practice or New Third Party Medical Practice in competition with CentraCare Health and to mitigate the lessening of competition alleged in the Commission's Complaint.

## IV.

**IT IS FURTHER ORDERED** that:

A. With respect to each St. Cloud Physician and CentraCare Physician who terminates his or her Contract Services pursuant to Paragraph II or III of this Order:

1. CentraCare Health shall not:

   a. Offer any incentive to such Physician to decline to provide Physician Services in a Third Party Medical Practice or New Third Party Medical Practice and shall retain the obligation to pay for the benefit of any St. Cloud Physician and the CentraCare Physician who accepts employment with the Third Party Medical Practice, or creates a New Third Party Medical Practice, all accrued bonuses, vested pensions, and other accrued benefits;

   b. Enforce any provision of such Physician's Employment Agreement that would prevent that Physician from informing patients treated by that Physician of his or her Third Party Medical Practice, or New Third Party Medical Practice, and providing Physician Services to those patients;

   c. Enforce any of the CentraCare Health Non-Compete Provisions for any activity Relating To terminating Contract Services;

   d. Require any St. Cloud Physician or CentraCare Physician, prior to terminating his or her Contract Services, to enter into an agreement to provide any payment to CentraCare Health;

   e. Prevent, impede, or otherwise interfere with the provision of Physician Services by such St. Cloud Physician or CentraCare Physician;

   f. For a period of two (2) years from the date such Physician terminates his or her Contract Services, directly or indirectly, solicit, induce, or attempt to solicit or induce the employment of such St. Cloud Physician or CentraCare Physician. *Provided, however*, that CentraCare Health may make general advertisements for Physicians including, but not limited to, in

newspapers, trade publications, websites, or other media not targeted specifically at the Physicians who so terminated their employment or who were released from the CentraCare Health Non-Compete Provisions. *Provided, further, however,* that CentraCare Health may employ any former St. Cloud Physician or CentraCare Health Physician who applies to Participate with CentraCare Health as long as such Physician was not solicited by CentraCare Health in violation of this Paragraph.

g. For a period of three (3) years from the end of the First Release Period, or Second Release Period, if applicable, deny, terminate or suspend medical staff privileges, or reduce or change medical staff membership status from the status existing as of the Acquisition, of St. Cloud Physicians or CentraCare Physicians who have terminated their employment with CentraCare Health pursuant to this Order, based solely on the status of that Physician's lack of employment by CentraCare Health. *Provided, however,* that CentraCare Health may deny, terminate or suspend such Physician's medical staff privileges, or reduce or change medical staff membership status, due to (a) quality or patient safety determinations; or (b) violations by such Physician of facility rules and regulations or standards of conduct that apply to all medical staff members.

2. CentraCare Health shall within thirty (30) days of such Physician's termination:

   a. Inform all patients of such Physician that such Physician has left CentraCare Health or St. Cloud Medical Group and where such Physician is practicing, including an address and phone number; and

b. Inform all patients of such Physician that they have a right to their medical records, and to have those records transferred without cost.

B. The purpose of this Paragraph IV is to ensure that those St. Cloud Physicians and CentraCare Physicians who terminate their Contract Services can offer Physician Services in a Third Party Medical Practice or New Third Party Medical Practice in competition with CentraCare Health and to mitigate the lessening of competition alleged in the Commission's Complaint.

**V.**

**IT IS FURTHER ORDERED** that for a period of three (3) years from the date this Order becomes final, CentraCare Health shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

A. Acquire any assets of or financial interest in any group consisting of three (3) or more Physicians that provides Physician Services in the St. Cloud Geographic Area; or

B. Enter into any Contract Services with any group of Physicians or individual Physicians located in the St. Cloud Geographic Area who provide Physician Services in the St. Cloud Geographic Area.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) and Item 4(d) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, Relating To the proposed transaction (hereinafter referred to as "the Notification").

*provided, however,* that (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall

be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from CentraCare Health and not from any other party to the transaction. CentraCare Health 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), CentraCare Health 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, further, 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.

## VI.

**IT IS FURTHER ORDERED** that:

A. Anytime during the First Release Period, Respondent CentraCare Health shall, in a manner consistent with local labor laws:

1. facilitate employment interviews between any St. Cloud Employee, who has been requested to join a St. Cloud Physician who has submitted an Acceptable Termination, and any Third Party Medical Practice to which a St. Cloud Physician is hired or a New Third Party Medical Practice during the First Release Period ("Designated Third Party Medical Practice");

2. with respect to each St. Cloud Employee who receives an offer of employment from a Designated Third Party Medical Practice, not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or

restrict the St. Cloud Employee from being employed by the Designated Third Party Medical Practice, and shall not offer any incentive to the St. Cloud Employee to decline employment with the Designated Third Party Medical Practice; and

3. eliminate any contractual provisions, confidentiality restrictions, or other restrictions entered into or imposed by CentraCare Health that would otherwise prevent the St. Cloud Employee from being employed by the Designated Third Party Medical Practice;

4. unless alternative arrangements are agreed upon with the Designated Third Party Medical Practice, retain the obligation for the benefit of any St. Cloud Employee who accepts employment with the Designated Third Party Medical Practice all accrued bonuses, vested pensions, and other accrued benefits.

B. CentraCare Health shall not, for a period of two (2) years following the Acquisition, directly or indirectly, solicit, induce, or attempt to solicit or induce any St. Cloud Employee who is employed by or Participating at a Designated Third Party Medical Practice to terminate his or her employment relationship with the Designated Third Party Medical Practice, unless that employment relationship has already been terminated by the Designated Third Party Medical Practice; *provided, however,* that CentraCare Health may place general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the former St. Cloud Employees; *provided further, however,* that CentraCare Health may hire former St. Cloud Employees who apply for employment with CentraCare Health as long as such employees were not solicited by CentraCare Health in violation of this Paragraph.

## VII.

**IT IS FURTHER ORDERED** that:

A. Richard Shermer of R. Shermer & Company shall be appointed Monitor to assure that CentraCare Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. No later than one (1) day after this Order issues, CentraCare Health shall, pursuant to the Monitor Agreement, attached as Appendix C and Confidential Appendix C-1 to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his 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 CentraCare Health, which consent shall not be unreasonably withheld. If CentraCare Health 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 CentraCare Health of the identity of any proposed Monitor, CentraCare Health 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, CentraCare Health 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 CentraCare Health's compliance with the terms of this Order and the Order to Suspend Enforcement and Maintain Assets in a manner consistent with the purposes of this Order.

D. CentraCare Health 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 CentraCare Health's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

   a. receiving Termination Notifications from St. Cloud Physicians and CentraCare Physicians;

   b. notifying each Physician that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;

   c. forwarding such Acceptable Terminations to CentraCare Health pursuant to this Order; and

   d. assuring that CentraCare Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

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 CentraCare Health's compliance with the Paragraphs II, III, IV.A.1.a-e, IV.A.2., and VI.A. of this Order.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to CentraCare Health'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 CentraCare Health's compliance with its obligations under this Order. CentraCare Health 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 CentraCare Health's compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of CentraCare Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of CentraCare Health, 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. CentraCare Health 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. CentraCare Health 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 CentraCare Health and any reports submitted by a current or former St. Cloud Physician or CentraCare Physician with respect to the performance of CentraCare Health's obligations under this Order.

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, until the end of the Second Release Period, if triggered, and otherwise as requested by the Commission, the Monitor shall report in writing to the Secretary of the Commission, with a copy to the Compliance Division, concerning performance by CentraCare Health of its obligations under this Order.

9. CentraCare Health 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 VII.C., above.

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. The Monitor appointed pursuant to this Order may be the same Person appointed as Monitor under the Order to Suspend Enforcement and Maintain Assets.

## VIII.

**IT IS FURTHER ORDERED** that:

A. No later than thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until CentraCare Health has fully complied, as relevant, with Paragraphs II, III, IV.A. (except IV.A.1.f. and IV.A.1.g.), and VI.A. of this Order, CentraCare Health 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 all the terms of this Order. CentraCare Health 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, CentraCare Health 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.

## IX.

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

A. Any proposed dissolution of CentraCare Health;

B. Any proposed acquisition, merger or consolidation of CentraCare Health; or

C. Any other change in the CentraCare Health, 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 with reasonable notice to CentraCare Health, CentraCare Health shall permit any duly authorized representative of the Commission:

A. Access, during office hours of CentraCare Health 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 CentraCare Health Related To compliance with this Order, which copying services shall be provided by CentraCare Health at the request of the authorized representative(s) of the Commission and at the expense of CentraCare Health; and

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

## XI.

**IT IS FURTHER ORDERED** that this Order shall terminate January 6, 2027.

By the Commission.

Decision and Order

# Appendix A

***APPENDIX A - Letter to St. Cloud Physicians***

Dear Physician:

CentraCare Health System ("CentraCare Health") has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisition of the St. Cloud Medical Group and employment of the Adult Primary Care Physicians (including Urgent Care Physicians), OB/GYNs, and Pediatricians will restrict competition in violation of Section 7 of the Clayton Act. Although CentraCare Health has not admitted liability or admitted that the facts alleged in the Commission's complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms that the Commission believes will ameliorate the competitive effects of the acquisition relating to these three practice areas.

For your convenience, CentraCare Health's obligations under the two FTC Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC's Orders and its Analysis to Aid Public Comment that are both attached to this letter. The two orders are (1) the "Order to Suspend Enforcement of CentraCare Health Non-Competes and Maintain Assets" or "Order to Suspend Non-Competes and Maintain Assets" and (2) the Decision and Order ("D&O").

**Nothing in this summary is intended to modify any of the terms of the Commission's Orders or to provide legal advice.**

**Suspension of Enforcement of CentraCare Health Non-Competes**

The first order establishes a period of time during which you, as a St. Cloud Physician (defined as an Adult Primary Care Physician, OB/GYN, or Pediatrician) currently employed by CentraCare Health, by virtue of the recent acquisition, may explore all employment and professional opportunities in the St. Cloud area, whether as an employee, a member of a medical group, or in private practice. You may enter into discussions and negotiations for new employment during this period. During this period, called the "Suspension Period," CentraCare Health cannot enforce any non-compete or non-solicitation provisions in your employment contract to interfere with your discussions with potential partners or employers.

**The Suspension Period does not apply to any physician practicing in areas other than the three practice areas of Adult Primary Care, OB/GYN, or Pediatrics.**

**Notice of Termination of Employment**

During this Suspension Period, you may submit your Termination Notice to the Monitor (identified below), but you may not actually terminate your employment before the "First Release Period" begins (described below). *If you terminate your employment with CentraCare Health **before** the First Release Period, CentraCare Health **may pursue** its non-compete or non-solicitation contract rights against you.*

If you submit a Termination Notice to the Monitor during this Suspension Period, and if the conditions below are met, your name will be included on the list of physicians terminating their employment with CentraCare Health in the event that the D&O is made final. (Until any list is provided to CentraCare Health, your Termination Notice will remain confidential with the Monitor.)

You *must* follow the procedures listed below, and the Termination Notice *must* contain certain critical information, in order to become an Acceptable Termination that allows you to leave CentraCare Health and continue practicing in the St. Cloud area without violating your employment contract:

- You must submit your Termination Notice to the Monitor.
- Your Termination Notice must contain a statement that you intend to practice in the St. Cloud area for at least two years after you leave CentraCare Health. The St. Cloud area includes the zip codes 56303, 56304, 56387, 56377, 56301, 56379, 55320, 56320, and 56329, including and surrounding St. Cloud, Minnesota.
- Your Termination Notice must contain either (a) a valid offer of employment or other affiliation with another medical practice that accepts commercial payers, *i.e.*, not a Veterans Affairs hospital, in the St. Cloud area for a period of at least one year, or (b) a detailed and verifiable business plan to begin a new medical practice in the St. Cloud area.

There is a limit to the number of Adult Primary Care Physicians, OB/GYNs, and Pediatricians who will be allowed to terminate under the FTC Orders (described below). The Monitor will keep track of the order in which doctors submit their Termination Notices. The Monitor will keep the names of the physicians who have submitted notices confidential from CentraCare Health until the notices forwarded to CentraCare Health as physicians permitted to terminate their employment with CentraCare Health pursuant to the FTC Orders.

**Termination Conditions – First Release Period**

The second order, the D&O, if made final by the Commission after a period allowing for public comment (usually around 30 days), will allow you to terminate your employment with CentraCare Health without penalty, subject to the conditions described in the D&O and the Order to Suspend Non-Competes and Maintain Assets. The Monitor will send you an email when the time starts allowing you to terminate your employment with CentraCare Health after an Acceptable Termination notice has been received. This time period is called the "First Release Period" and runs for up to ninety (90) days.

- During this ninety (90) day period, you may begin or continue discussions and negotiations for new employment. If you decide to terminate your employment, you may notify the Monitor of your intention, by following the procedures listed above.

- You must be or have been among the first fourteen (14) physicians to submit your notice to terminate employment. To protect the confidentiality of the doctors who want to leave, the Monitor will submit to CentraCare Health no more than the first fourteen (14) notices he receives.

- CentraCare Health must allow the first fourteen (14) physicians who have given notice to the Monitor and satisfied all of the conditions described above to terminate their employment without any penalty.

- You must leave employment with CentraCare Health within 60 days of CentraCare Health receiving your notice from the Monitor, but you may not leave prior to the Monitor delivering your notice to CentraCare Health.

- If at least eight (8) physicians terminate their employment with CentraCare Health by the end of the ninety (90) days, the First Release Period ends and no more employment terminations will be permitted under the Orders beyond a total of fourteen (14). After that, CentraCare Health may pursue its legal remedies against any employee who *subsequently* terminates employment with CentraCare Health in a manner that may violate that employee's contract.

- The Order to Suspend Non-Competes and Maintain Assets will continue in effect even after the Commission votes to accept (or reject) the D&O, the conclusion of this time period cannot be determined at this time. It will, however, not end until the requisite number of doctors leave CentraCare Health or ten years lapse from the date the D&O becomes final.

- If you are *not* among the first fourteen (14) physicians who submit Acceptable Termination notices, the Monitor will inform you of that fact

**Termination Conditions – Second Release Period**

If at the end of the First Release Period fewer than eight (8) doctors have notified the Monitor of their intent to terminate employment in accordance with the FTC Orders, the period in which physicians may continue to explore other employment opportunities and leave CentraCare Health's employment without penalty will remain open through a "Second Release Period." In the Second Release Period, physicians from CentraCare Health practicing in the three designated practice areas also will have the option to leave. This Second Release Period will remain open until eight (8) (rather than fourteen (14)) Adult Primary Care Physicians, OB/GYNs, or Pediatricians in total have terminated their employment with CentraCare Health in accordance with the FTC Orders, or ten years lapse from the date the D&O becomes final. *If you are not among the eight (8) physicians who submit Acceptable Termination notices during this period, the Monitor will inform you of that fact.*

**Termination Conditions – Departure Bonuses**

The D&O requires CentraCare Health to pay departure bonuses to physicians who terminate their employment with CentraCare Health pursuant to the FTC Orders and who meet certain additional conditions. A $100,000 departure bonus is available to the first five (5) St. Cloud and/or CentraCare Physicians who choose to leave CentraCare and:

- Start his or her (or their) own medical practice in the St. Cloud area, **OR**
- Choose to be a part of a St. Cloud area medical practice consisting of fewer than five (5) Adult Primary Care Physicians, OB/GYNs, and Pediatricians at the time of the Orders.

Physicians receiving a departure bonus count towards the fourteen (14) or eight (8), depending on the Release Period, total physicians that CentraCare must allow to terminate their employment pursuant to the FTC Orders.

**Asset Maintenance**

The Order to Suspend Non-Competes and Maintain Assets also contains provisions requiring CentraCare Health to limit changes to the facilities you use and your medical practice, in general, to facilitate your decision to stay or leave CentraCare Health. The goal is to keep your medical practice as similar as possible to avoid disruptions while you make your decision. If you decide to leave CentraCare Health, the FTC Orders have provisions that will facilitate the transfer of patients with you to your new practice and the ability of those patients to have their medical information transferred as well. If you find that there are changes happening that are contrary to this goal, please notify the Monitor.

**Important Reminders**

- The Orders do not *require* any doctor to terminate employment with CentraCare Health or to work for any other entity.
- The Orders do not *require* CentraCare Health to fire any doctors.
- The Orders *only apply to* Adult Primary Care Physicians, OB/GYNs, and Pediatricians.
- The Orders prohibit CentraCare Health from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either left under the terms of the Orders or who sought other employment as allowed by the Orders but decided not to leave.
- If you terminate your employment at times or under terms not described in the

D&O, the D&O does not prohibit CentraCare Health from pursuing its contract rights.

- CentraCare Health will send an email to all CentraCare physicians (including the former St. Cloud physicians) when the time has closed for any more physicians to leave under the FTC Orders.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact:

Monitor:
Dick Shermer at 214-668-0294, or dshermer@rshermer.com, and
Kevin Wilson at 303-619-6938, or kwilson@rshermer.com.

You may also call Eric D. Rohlck, an attorney at the Federal Trade Commission, at 202-326-2681, if you prefer.

# Appendix B

***APPENDIX B - Letter to CentraCare Health Physicians***

Dear Physician:

CentraCare Health System ("CentraCare Health") has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisition of the St. Cloud Medical Group and employment of the Adult Primary Care Physicians (including Urgent Care Physicians), OB/GYNs, and Pediatricians will restrict competition in violation of Section 7 of the Clayton Act. Although CentraCare Health has not admitted liability or admitted that the facts alleged in the Commission's complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms which the Commission believes will ameliorate the competitive effects of the acquisition relating to these three practice areas.

For your convenience, CentraCare Health's obligations under the two FTC Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC's Orders and its Analysis to Aid Public Comment that are both attached to this letter. The two orders are (1) the "Order to Suspend Enforcement of CentraCare Health Non-Competes and Maintain Assets" or "Order to Suspend Non-Competes and Maintain Assets" and (2) the Decision and Order ("D&O").

**Nothing in this summary is intended to modify any of the terms of the Commission's Orders or to provide legal advice.**

**Suspension of Enforcement of CentraCare Health Non-Competes**

The first order establishes a period of time during which the St. Cloud Physicians and now CentraCare Physicians (defined as an Adult Primary Care Physician, OB/GYN, or Pediatrician) currently employed by CentraCare Health are allowed to explore all employment and professional opportunities in the St. Cloud area, whether as an employee, a member of a medical group, or in private practice without CentraCare Health enforcing the non-compete provisions of your employment contracts. During this period called the "Suspension Period," CentraCare Health cannot enforce any non-compete or non-solicitation provisions in your employment contract to interfere with your discussions with potential St. Cloud partners or employers during this time period.

**The Suspension Period does not apply to any physician practicing in areas other than the three practice areas of Adult Primary Care, OB/GYN, or Pediatrics.**

**Termination Conditions**

The second order, the D&O, was made final on _____. Under the D&O, the former St. Cloud Physicians were allowed to terminate their employment with CentraCare Health without penalty subject to the conditions described in the D&O and the Order to Suspend Non-Competes and Maintain Assets. The St. Cloud Physicians had ninety (90) days during the "First Release Period" to terminate their employment. During the First Release Period, a

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maximum of fourteen (14) or a minimum of eight (8) St. Cloud Physicians practicing in the three practice areas could have terminated their employment and worked in the St. Cloud area without CentraCare Health enforcing its non-compete provisions.

CentraCare Health did not receive eight (8) Acceptable Terminations from the St. Cloud Physicians during the First Release Period. Consequently, the Second Release Period under the D&O begins [_____]. Under the Second Release Period, up to ____ (X) CentraCare Physicians practicing in the three practice areas have the opportunity to give a notice of termination, terminate their employment at CentraCare Health, and continue practicing in the St. Cloud area without violating their employment contract.

In order to take advantage of this opportunity, you *must* follow certain procedures and the Termination Notice *must* contain certain critical information in order to become an Acceptable Termination:

- You must submit your Termination Notice to the Monitor.
- Your Termination Notice must contain a statement that you intend to practice in the St. Cloud area for at least two years after you leave CentraCare Health. The St. Cloud area includes the zip codes 56303, 56304, 56387, 56377, 56301, 56379, 55320, 56320, and 56329, including and surrounding St. Cloud, Minnesota.
- Your Termination Notice must contain either (a) a valid offer of employment or other affiliation with another medical practice that accepts commercial payers, *i.e.*, not a Veterans Affairs hospital, in the St. Cloud area for a period of at least one year, or (b) a detailed and verifiable business plan to begin a new medical practice in the St. Cloud area.

As noted above, there is only a limited number of Adult Primary Care Physicians, OB/GYNs, and Pediatricians who will be allowed to terminate under the FTC Orders. The Monitor will keep track of the order in which doctors submit their Termination Notices. The Monitor will keep the names of the physicians who have submitted notices confidential from CentraCare Health until the notices are forwarded to CentraCare Health as physicians permitted to terminate their employment with CentraCare Health pursuant to the FTC Orders.

- CentraCare Health must allow the first __ (X) physicians who give notice to the Monitor and satisfy all of the conditions described above to terminate their employment without any penalty.
- You must leave employment with CentraCare Health within 60 days of CentraCare Health receiving your notice from the Monitor, but you may not leave prior to the Monitor delivering your notice to CentraCare Health.
- Once ___ (X) physicians terminate their employment with CentraCare Health, no more employment terminations will be permitted under the Orders. After that,

CentraCare Health may pursue its legal remedies against any employee who *subsequently* terminates employment with CentraCare Health in a manner that may violate that employee's contract.

- The Order to Suspend Non-Competes and Maintain Assets will continue in effect until the requisite number of doctors leave CentraCare Health or ten years lapse from the date the D&O becomes final.

**[MODIFY or DELETE AS NECESSARY]**
**Termination Conditions – Departure Bonuses**

The D&O requires CentraCare Health to pay departure bonuses to physicians who terminate their employment with CentraCare Health pursuant to the FTC Orders and who meet certain additional conditions. A $100,000 departure bonus is available to the first ____ (X) St. Cloud and/or CentraCare Physicians who choose to leave CentraCare and:

- Start his or her (or their) own medical practice in the St. Cloud area, **OR**
- Choose to be a part of a St. Cloud area medical practice consisting of fewer than five (5) Adult Primary Care Physicians, OB/GYNs, and Pediatricians at the time of the Orders.

Physicians receiving a departure bonus count towards the remaining ____ physicians who CentraCare must allow to terminate their employment pursuant to the FTC Orders.

**Important Reminders**

- The Orders do not *require* any doctor to terminate employment with CentraCare Health or to work for any other entity.
- The Orders do not *require* CentraCare Health to fire any doctors.
- The Orders *only apply to* Adult Primary Care Physicians, OB/GYNs, and Pediatricians.
- The Orders prohibit CentraCare Health from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either left under the terms of the Orders or who sought other employment as allowed by the Orders but decided not to leave.
- If you terminate your employment at times or under terms not described in the D&O, the D&O does not prohibit CentraCare Health from pursuing its contract rights.

- CentraCare Health will send an email to all CentraCare Physicians (including the former St. Cloud Physicians) when the time has closed for any more physicians to leave under the FTC Orders.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact:

Monitor:
Dick Shermer at 214-668-0294, or dshermer@rshermer.com, and
Kevin Wilson at 303-619-6938, or kwilson@rshermer.com.

You may also call Eric D. Rohlck, an attorney at the Federal Trade Commission, at 202-326-2681, if you prefer.

# Appendix C

## MONITOR AGREEMENT (DRAFT)

Monitor Agreement (the "Agreement"), dated as of September 28, 2016, between CentraCare Health, ~~Inc.~~ System ("the Respondent"), and Richard A. Shermer of R. Shermer & Company, P.O. Box 294199, Lewisville, Texas 75029 (the "Monitor").

**Preliminary Statements**

WHEREAS the Federal Trade Commission (the "**Commission**") is considering for public comment an Agreement Containing Consent Orders with Respondent or its parent company, which provides, among other things, that Respondent.....and engage a monitor to monitor Respondent's compliance with its obligations under the Order

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint the Monitor pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and the Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, until the Order to Maintain Assets has been issued and this Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

**DEFINITIONS**

A. "Respondent" means CentraCare Health, ~~Inc.~~ System, with its principal place of business at 1406 Sixth Avenue North, St. Cloud, MN 56303, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CentraCare, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Order.

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**ARTICLE I**

1.1 Powers of the Monitor. Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent's compliance with the Orders. No later than one day after the Order becomes final, Respondent hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Order to Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor's powers and authority or Respondent' obligations under the Orders.

1.2 Monitor's Duties. Monitor shall monitor Respondent's compliance with the Orders, including, but not limited to:

a. Assuring that Respondent expeditiously complies with all of the obligations, and performs all of responsibilities, of Respondent as required by the Orders in this matter;

b. Monitoring Relevant Agreements; and

c. Assuring that Confidential Business Information is not received or used by Respondent or Other Parties, except as allowed in the Orders in this matter.

1.3 Duration of Monitor's Authority. Monitor shall have all powers and duties described above and consistent with the Orders for the term set forth in the Orders.

1.4 Confidential and Proprietary Information. Monitor shall enter into a confidentiality agreement, agreeing to be bound by the terms and conditions of the Orders. Monitor must retain and maintain all Material Confidential Information it receives from either Respondent or Other Parties on a confidential basis, except as is permitted by the Orders. Monitor may disclose confidential information only to persons employed by or working with Monitor under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Other Parties with respect to information they provided Monitor. Monitor shall require any person retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which Monitor must adhere under this Agreement. Monitor shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of its duties under this Agreement and shall not disclose any confidential information relating thereto.

1.5 Restrictions. Monitor shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of the competing products of Respondent.

1.6 Reports. Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

1.7 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to

Respondent's personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent's compliance with the Orders.

**ARTICLE II**

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, (with the written prior approval of Respondent which shall not be unreasonably withheld) such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Orders.

2.2 Compensation. Monitor shall be compensated by Respondent for his services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit A for time spent in connection with the discharge of its duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent may retain an independent auditor to verify such invoices. Monitor shall provide Respondent with monthly invoices for time and expenses. Respondent shall pay such invoices within thirty (30) days of receipt. The Monitor and Respondent shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 To the extent available, Respondent will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondents' safety and security regulations, instructions and procedures while at Respondents' sites.

**ARTICLE III**

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify the Monitor and hold Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by Monitor The Monitor's maximum liability to Respondents relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort) shall

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be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent. Any claim arising from this Agreement that Respondents may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this 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. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. R. Shermer & Company disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fail to act diligently and consistent with the purpose of the Orders, Respondent shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the confidentiality provisions herein.

3.4 Termination: This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when the Respondent's last obligation under the Orders and the Relevant Agreements that pertains to the Monitors' service has been fully performed; provided, however, that the Commission may require that the Respondent extend this Agreement or enter into an additional agreement with the Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

3.5 Conflicts of Interest: If Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict.

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

**MONITOR:**

*Richard A. Shermer*

Richard A. Shermer
President, R. Shermer & Company

**RESPONDENT:**

CentraCare Health, ~~Inc.~~ System

By: _____
Sr. V.P + General Counsel

Concurring Statement

**NON-PUBLIC APPENDIX C-1**
**MONITOR COMPENSATION**

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

## Concurring Statement of Maureen K. Ohlhausen

I have reason to believe that CentraCare Health System's (CentraCare) acquisition of St. Cloud Medical Group, P.A. (SCMG), if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by substantially lessening competition for the provision of adult primary care, pediatric, and OB/GYN services in St. Cloud, Minnesota. I also believe the Consent Agreement, subject to final approval, represents the outcome most likely to minimize competitive harm and care disruption to the residents of the St. Cloud area. I write separately because, although it is a close determination, I do not believe SCMG meets the stringent failing firm criteria set forth in the Horizontal Merger Guidelines and case law.[1]

Because of SCMG's financial challenges and facts unique to the SCMG practice structure and management, physicians are leaving the group, and compelling evidence indicates that, absent the acquisition, additional physicians plan to leave the group and possibly the area. This would diminish the competitive significance of SCMG and create potential disruptions to care and possible physician shortages in the St. Cloud area. These circumstances raise serious concerns about the likelihood that the Commission will be able to preserve competition and access to care for patients if it were to prevail in its challenge.

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1 *See, e.g.,* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 11 (2010); *Citizen Publishing v. United States*, 394 U.S. 131 (1969) (establishing a three-prong test for satisfying the failing firm defense); *Fed. Trade Comm'n v. Arch Coal, Inc.,* 329 F. Supp. 2d 109, 154 (D.D.C. 2004).

Given this difficult scenario, I agree with my colleagues that the Consent Agreement presents the best opportunity to keep the SCMG physicians in the market, ensure ongoing access to care and minimal disruption for area patients, and permit the expansion of local competitive alternatives to CentraCare for the relevant physician services. Accordingly, I support the Consent Agreement on the basis that it is in the public interest.

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

### I. Overview

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from CentraCare Health that is designed to mitigate the anticompetitive effects that would result from CentraCare's acquisition of St. Cloud Medical Group, P.A. ("SCMG"), the two largest providers of adult primary care, pediatric, and obstetric/gynecological ("OB/GYN") services in the St. Cloud, Minnesota area. The Commission's willingness to accept this Consent Agreement is premised on the fact that SCMG is a financially failing physician practice group that has been unable to find an alternative purchaser for the entire practice as well as concerns regarding disruptions to patient care and possible physician shortages.

On February 29, 2016, CentraCare entered a definitive agreement to acquire all outstanding shares of stock in SCMG ("the Acquisition"). Under the terms of the Acquisition, CentraCare is to directly employ all of SCMG's physicians and advanced practice providers ("APPs"). The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by substantially lessening competition for the provision of adult

primary care, pediatric, and OB/GYN services in St. Cloud, Minnesota.

As the Complaint alleges, however, SCMG has recently lost its sole remaining line of credit and appears unlikely to be able to improve its financial condition. Physicians are leaving the group, and there is compelling evidence that others will depart the practice (and potentially the St. Cloud area) if the Acquisition is not consummated. Such physician departures would cause an immediate decline in revenues that could further destabilize the group. Although SCMG made a good-faith, but ultimately unsuccessful, multi-year effort to find an alternative buyer for the entire medical group, one local provider has recently expressed interest in employing a subset of the group, and other smaller, independent practices in the St. Cloud area have indicated that they also would consider hiring some SCMG physicians.

In light of this interest, the proposed Consent Agreement is designed to facilitate former SCMG physicians finding alternate local employment by suspending enforcement of any non-compete provisions against any adult primary care, pediatric, or OB/GYN physician from SCMG to allow up to 14 such physicians to depart for another St. Cloud area practice. It also encourages the creation of new competitors and the strengthening of smaller competitors by requiring CentraCare to provide sizeable departure payments to the first five physicians who leave CentraCare either to create a new medical practice or to join a small third-party medical practice in the St. Cloud area.

The Consent Agreement includes an Order to Suspend Enforcement of CentraCare Non-Competes and Maintain Assets, which is final immediately, and a Decision and Order, which is subject to the Commission's final approval. The Consent Agreement has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received and then decide whether it should withdraw from, modify, or make final the proposed Decision and Order.

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

## II. The Parties

CentraCare is a non-profit organization providing healthcare services through its owned hospitals, medical clinics, pharmacies, nursing homes, and home health operations throughout central Minnesota. CentraCare is the parent entity to CentraCare Clinic, a multi-specialty physician practice employing family medicine, internal medicine, pediatric, and OB/GYN physicians, among other specialists. CentraCare Clinic has 16 locations across central Minnesota, with five of those offices located within 20 miles of St. Cloud. CentraCare Clinic is the largest provider of adult primary care, pediatric, and OB/GYN services in the St. Cloud area, with approximately 102 adult primary care physicians, 28 pediatricians, and 25 OB/GYNs.

SCMG is a physician-owned multi-specialty medical clinic that operates four clinics in and around St. Cloud. SCMG's 40 physicians mainly provide family medicine, pediatrics, and OB/GYN services, but SCMG also offers surgical, occupational medicine, and rehabilitation services. SCMG also employs approximately 20 APPs.

## III. The Complaint

The Complaint alleges that the proposed Acquisition will substantially increase CentraCare's market share in the St. Cloud area for the provision of adult primary care, pediatric, and OB/GYN services to commercially insured patients. According to the Complaint, by eliminating SCMG as a potential alternative in the St. Cloud area, the Acquisition likely will increase CentraCare's bargaining power vis-à-vis commercial health plans, allowing CentraCare to increase reimbursement rates and to secure more favorable terms. In addition, the Complaint alleges

that the Acquisition likely will result in the loss of non-price competition between CentraCare and SCMG that currently results in quality and service benefits to patients. The Complaint further alleges that competition eliminated by the Acquisition is unlikely to be sufficiently replaced in a timely manner by other providers entering the market. The Complaint recognizes, however, that SCMG is unlikely to survive on its own, and that, despite a good-faith search, it has not identified an alternative buyer for the entire group.

## IV. The Consent Agreement

The goal of the Consent Agreement is to mitigate the competitive effects of the Acquisition by preserving, to the extent possible, competition for adult primary care, pediatric, and OB/GYN services in the St. Cloud area. At least one local provider may be a viable alternative purchaser to CentraCare for a portion of the practice in that they have the capacity and the desire to employ some SCMG physicians. Likewise, some SCMG physicians appear interested in these opportunities. Those parties need additional time to pursue such an arrangement, and other interested local providers looking to add physicians may be identified during this time as well.

The Commission believes that the Consent Agreement presents the best opportunity to keep the SCMG physicians in the St. Cloud market, ensuring ongoing access to care and minimal disruption for St. Cloud area patients, while allowing local competitive alternatives to CentraCare for the relevant physician services to expand. The Consent Agreement will allow current SCMG physicians to accept alternative local employment opportunities post-acquisition without the risk of violating non-compete provisions in their employment contracts.

Specifically, the Consent Agreement provides that following the issuance of a final Decision and Order and during the 90-day First Release Period, former SCMG physicians can terminate their employment with CentraCare without penalty if the physician:

(1) Submits notice of an intention to terminate employment with CentraCare to a monitor who has been appointed by the Commission to assist in implementing the Consent

Agreement in a manner that assures each physician's confidentiality;

(2) States the intention to continue to practice in the St. Cloud area for at least two years;

(3) Is among the first 14 physicians to submit a notice to terminate employment; and

(4) Leaves employment with CentraCare within 60 days of CentraCare receiving notice from the monitor.

CentraCare may request that the First Release Period be terminated as soon as the monitor has determined that 14 physicians have met the requirements to terminate.

If, at the end of the First Release Period, fewer than eight physicians have notified the monitor of their intent to terminate employment, a Second Release Period will commence. During the Second Release Period, CentraCare must also suspend the non-compete agreements of legacy CentraCare adult primary care, pediatric, and OB/GYN physicians (that is, those who did not come from SCMG) so that these physicians may explore and accept alternate employment opportunities in the St. Cloud area. The Second Release Period will end as soon as the monitor has informed CentraCare that eight physicians have met the requirements to terminate without penalty.

To encourage the creation of new competitors and strengthening of smaller competitors, CentraCare also will deposit $500,000 into an escrow account to be awarded as $100,000 departure payments to the first five physicians who leave CentraCare either to create a new medical practice or to join a third-party medical practice that has five or fewer physicians in the St. Cloud area.

Paragraphs II and III describe the basic terms under which physicians may terminate their employment with CentraCare. They prohibit CentraCare from: (1) enforcing any non-compete, non-solicitation, or non-interference provisions in their employment agreements; (2) pursuing any breach of contract action for violation of any of these provisions; or (3) taking any

retaliatory action against any physician who either leaves under the terms of the Decision and Order or who decides not to leave after exploring other employment as allowed by the Decision and Order. The Decision and Order does not, however, require CentraCare to allow physicians to terminate their employment agreements in a manner other than that specified in the Decision and Order.

Paragraph IV includes a number of provisions to ensure that CentraCare will not take any actions to discourage physicians from exploring opportunities to leave or from leaving CentraCare's employment pursuant to the Decision and Order. In addition, Paragraph IV.A.1.f prohibits CentraCare from soliciting the employment of any physician that has departed CentraCare pursuant to the Consent Orders for a period of two years.

Paragraph V requires CentraCare to give advanced notification for future acquisitions or employment contracts involving certain adult primary care, pediatrics, and OB/GYN services in the St. Cloud area for a period of three years.

Paragraph VI requires CentraCare during the First Release Period to facilitate and not interfere with the search for alternate St. Cloud area employment by former SCMG employees, such as APPs and nurses. Paragraph VI also prohibits CentraCare from attempting to re-hire those employees for a period of two years.

Paragraph VII specifies the rules governing the work of the monitor.

The remaining order provisions are standard reporting requirements to allow the Commission to monitor on-going compliance with the provisions of the Decision and Order.

In addition to the Decision and Order, the Consent Agreement includes an Order to Suspend Enforcement of CentraCare's Non-Competes and Maintain Assets that goes into effect immediately. The purposes of this Order are (1) to permit former SCMG physicians to explore alternative employment opportunities in the St. Cloud area; and (2) to maintain those assets and personnel from the SMCG to make the transition to a different practice as easy as possible.

Complaint

**IN THE MATTER OF**

# VALEANT PHARMACEUTICALS INTERNATIONAL, INC.

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

*Docket No. C-4602; File Nos.* *151 0236*
*161 0028*

*Complaint, January 25, 2017 – Decision, January 25, 2017*

This consent order addresses the $69.1 million acquisition by Valeant Pharmaceuticals International, Inc. of certain assets of Paragon Holdings I, Inc. The complaint alleges that the acquisition violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for polymer discs, or "buttons," used to make three different types of rigid gas permeable contact lenses: orthokeratology contact lenses, large-diameter scleral contact lenses, and general vision correction contact lenses. The consent order requires Valeant to divest Paragon in its entirety, including the assets of Pelican Products LLC, a manufacturer of contact lens packaging.

*Participants*

For the *Commission*: *Stuart Hirschfeld* and *Danica Noble.*

For the *Respondent*: *Joseph Ciani-Dausch* and *Stephen Sunshine, Skadden, Arps, Slate, Meagher & Flom.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that the above-named respondent Valeant Pharmaceuticals International, Inc. ("Valeant") acquired Paragon Holdings I, Inc. ("Paragon"), and that acquisition violated Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

## I. RESPONDENT VALEANT

1. Respondent Valeant is a for-profit corporation, existing and doing business under and by virtue of the laws of Canada, with its executive offices located at 2150 St. Elzéar Blvd. West, Laval, Quebec, H7L 4A8, Canada. Respondent has offices in the United States, including at 400 Somerset Corporate Blvd., Bridgewater, New Jersey 08807 and 50 Technology Drive, Irvine, California 92618.

2. Respondent engages in, among other things, developing, manufacturing, and selling plastic discs, commonly referred to as "GP buttons," used to make rigid gas permeable ("GP") contact lenses.

3. Respondent is, and at all times relevant herein has been, engaged in commerce in the United States, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## II. PARAGON

4. Paragon was a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Arizona, with its executive offices and principal place of business located at 947 East Impala Avenue, Mesa, Arizona 85204-6619.

5. Prior to the Acquisition, Paragon, and the corporate entities under its control, engaged in, among other things, developing, manufacturing, and selling GP buttons in the United States.

6. Paragon was, at times relevant herein, engaged in commerce in the United States, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and its business was in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## III. THE ACQUISITION

7. Respondent Valeant acquired Paragon in May 2015 for $69.1 million. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## IV. THE RELEVANT MARKETS

8. The relevant product markets in which to analyze the effects of the Acquisition are the manufacture and sale of FDA-approved GP buttons for:

a. Orthokeratology GP lenses, which are worn to reshape the cornea;

b. Large-diameter scleral GP lenses, which cover the white of the eye and are used post-surgery, for transplants, and to treat eye disease; and

c. General vision correction GP lenses.

9. The FDA requires that GP lenses must be made from FDA-approved GP buttons. Thus, there are no alternatives to FDA-approved GP buttons for making each of the types of GP lenses above. Further, each type of GP lens above requires a button with different parameters from buttons used for other types of GP lenses. Therefore, each type of button constitutes a distinct relevant market.

10. Because FDA approval is required for GP buttons, the United States is the relevant geographic area in which to analyze the effects of the Acquisition.

## V. MARKET STRUCTURE

11. Prior to the Acquisition, Valeant and Paragon independently produced buttons for all three types of GP lenses.

12. Prior to the Acquisition, Paragon and Valeant were the only approved producers of GP buttons for orthokeratology. As a result of the Acquisition, Valeant acquired a monopoly in GP buttons for orthokeratology.

13. Prior to the Acquisition, Paragon and Valeant were two of four producers of GP scleral buttons. As a result of the Acquisition, Valeant produced approximately 80% of GP buttons for scleral lenses.

14. Prior to the Acquisition, Valeant and Paragon were the largest manufacturers of GP buttons for general vision correction. As a result of the Acquisition, Valeant produced approximately 70% of GP buttons for general vision correction.

## VI. EFFECTS OF THE ACQUISITION

15. The Acquisition lessened competition and tended to create a monopoly in each of 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.

16. Specifically, the Acquisition of Paragon has:

a. Eliminated actual, direct, and substantial competition between Valeant and Paragon in the relevant markets for GP buttons used to produce lenses for orthokeratology, scleral, and general vision correction;

b. Allowed Valeant to exercise market power unilaterally in the relevant markets for GP buttons, including by increasing prices, reducing volume discounts, decreasing innovation, and reducing product distribution options;

c. Eliminated competition to develop new GP lens buttons and improved button materials; and

d. Eliminated competition to become the button manufacturers for new lens products by offering to fund some of the developing lab's marketing budget.

## VII. BARRIERS TO ENTRY

17. For GP orthokeratology buttons, entry into the relevant market has not been, and would not be, timely, likely, or sufficient to deter or counteract the anticompetitive effects of the

Acquisition. The FDA premarket approval process required for buttons used to produce extended-wear orthokeratology lenses takes several years.

18. For GP scleral and general vision buttons, entry into the relevant markets has not been, and would not be, timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. Scleral and general vision correction GP buttons require significant FDA premarket notification likely requiring more than one year.

## VIII. VIOLATION CHARGED

19. The Acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

**THEREFORE**, the Federal Trade Commission this twenty-fifth day of January, 2017, has issued this Complaint against Respondent.

By the Commission.

## DECISION AND ORDER
## [Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Valeant Pharmaceuticals International, Inc. ("Valeant" or "Respondent") of all of the issued and outstanding capital stock of Paragon Holdings I, Inc., which includes wholly-owned subsidiaries Paragon Vision Sciences, Inc. and CRT Technology, Inc. ("Paragon"), and Respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure 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 Valeant is a corporation organized, existing, and doing business under and by virtue of the laws of the Province of British Columbia, Canada, with its principal executive offices located at 2150 St. Elzéar Blvd. West, Laval Quebec H7L 4A8, Canada, and its United States address for service of process and the Complaint and Decision and Order as follows: Corporate Secretary/General Counsel, 400 Somerset Corporate Blvd., Bridgewater, NJ 08807.

2. Paragon Holdings I, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Arizona, with its executive offices and principal place of business located at 947 East Impala Avenue, Mesa, Arizona 85204-6619.

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

## ORDER

### I.

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

A. "Valeant" or "Respondent" mean Valeant Pharmaceuticals International, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Valeant Pharmaceuticals International, Inc. (including, without limitation, Bausch & Lomb Incorporated), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means:

1. New Paragon; or

2. Such other Person that receives the prior approval of the Commission to acquire the Paragon Divestiture Assets pursuant to this Order.

D. "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 the FDA.

E. "Application(s)" means all submissions and applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Parts 800 to 898, including all premarket notifications (Section 510(k) submissions) and premarket approvals ("PMA"), 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 holder and the FDA related thereto.

F. "Business" means the research, development, manufacture, commercialization, distribution, marketing, promotion, importation, exportation, advertisement, and/or sale of a Product.

G. "Business Records" means all books, records, files, databases, printouts, and all other documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: customer files, customer lists, customer purchasing histories, supplier and vendor files, vendor lists, correspondence, advertising and marketing materials, marketing analyses, sales materials, price lists, cost information, employee lists and contracts, salary and benefits information, personnel files, financial and accounting records and documents, financial statements, financial plans and forecasts, operating plans, studies, reports, regulatory materials, Applications, Agency filings and submissions, Agency correspondence, operating guides, technical information, manuals, policies and procedures, service and warranty records, maintenance logs, equipment logs, registrations, and permits.

H. "cGMP" means current Good Manufacturing Practices as set forth in the U.S. Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

I. "Confidential Business Information" means any non-public information in any form or format (oral, written, graphic, electronic, or other form) relating to the Paragon Business either prior to or after the Divestiture Date, including, but not limited to, Intellectual Property, discoveries, techniques, technologies, processes, trade secrets, designs, specifications, data, computer programs, manufacturing costs, marketing methods, pricing information, financial statements, forecasts, reports, records, strategic plans, studies, customer or supplier contract terms, historical information about sales to customers or purchases from suppliers, and all other information contained in Business Records or otherwise relating to the Paragon Business:

1. Obtained by the Respondent prior to the Divestiture Date; or

2. Obtained by the Respondent after the Divestiture Date, in the course of performing Respondent's obligations under the Divestiture Agreement;

*Provided, however,* that Confidential Business Information shall not include the following:

a. Information that is in the public domain when received by the Respondent;

b. Information that the Respondent develops or obtains independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and

c. Information that becomes known to the Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

J. "Contracts" means all real and personal property leases, software licenses, Intellectual Property licenses,

warranties, guaranties, insurance agreements, employment contracts, all contracts of any kind relating to construction, customer contracts, sales contracts, distribution contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, non-disclosure agreements, and other contracts or agreements of any kind.

K. "Copyrights" means rights to all original works of authorship of any kind directly related to a Product and any registrations and applications for registrations thereof, and all copyrightable works, registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith, including, but not limited to, the following: all such rights with respect to all promotional materials and all educational materials; copyrights in all preclinical, clinical, and process development data and reports relating to the research and development of any Product or of any materials used in the research, development, manufacture, marketing, or sale of any Product, including all copyrights in raw data relating to the clinical trials with respect to 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; all Product sales forecasting models, medical education materials, sales training materials, and advertising and display materials; 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 any Product; 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.

L. "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 the Respondent's employees' labor shall not exceed the average hourly wage rate for such employee; provided, however, in each instance where: (i) an agreement is specifically referenced and attached to this Order, and (ii) such agreement is part of the New Paragon Acquisition Agreement, "Direct Cost" means such cost as is provided in such agreement.

M. "Divestiture Agreement" means any agreement(s) between the Respondent and the Acquirer (or between a Divestiture Trustee and an Acquirer, if applicable), and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission to accomplish the divestiture of the Paragon Divestiture Assets and other requirements of this Order.

N. "Divestiture Date" means the date on which the divestiture required by this Order closes.

O. "Divestiture Trustee" means the Divestiture Trustee appointed pursuant to Paragraph VI. of this Order.

P. "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.

Q. "Employee Information" means the following, as and to the extent permitted by law:

1. A complete and accurate list containing the name of each Paragon Employee (including former employees who were employed by the Paragon Business within ninety (90) days of the execution date of any proposed Divestiture Agreement);

2. With respect to each such employee, the following information:

   a. direct contact information for the employee, including telephone number;

   b. the date of hire and effective service date;

   c. job title or position held;

   d. a specific description of the employee's responsibilities related to the Paragon Business; *provided, however*, in lieu of this description, the Respondent may provide the employee's most recent performance appraisal;

   e. the base salary or current wages;

   f. the most recent bonus paid, aggregate annual compensation for the last fiscal year and current target or guaranteed bonus, if any;

   g. employment status (*i.e.,* active or on leave or disability; full-time or part-time);

   h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

R. "Facility Assets" means all of Respondent's rights, title, and interests in and to the following:

1. All real property interests, including all rights, title, and interests in and to owned or leased property, together with all easements, rights of way, buildings, improvements, and appurtenances ("Facility(ies)");

2. All applicable federal, state, and local regulatory registrations, permits, and applications, and all documents related thereto, necessary for the operation and conduct of the Paragon Business at such Facility(ies) to the extent held by Respondent and with respect to which the transfer thereof is permitted by law; *provided, however*, that Respondent shall cooperate with the Acquirer in securing any federal, state, and local regulatory registrations, permits, and applications for which transfer is not permitted by law; and

3. All fixtures, equipment, machinery, tools, molds, dies, vehicles, personal property, or tangible property of any kind located at such Facility(ies) that are owned or leased by Respondent, or that Respondent has the legal right to use, or over which it has custody or control, that are related to:

   a. The research, development, production, manufacture, marketing, or sale of any Product related to the Paragon Business; or

   b. Compliance with any statute, ordinance, regulation, rule, or other legal requirement (including, but not limited to, environmental laws) of any Government Entity.

S. "FDA" means the U.S. Food and Drug Administration.

T. "General Vision Correction GP Button Product(s)" means GP Button Products used to manufacture GP Finished Contact Lens Products for general vision correction. FDA approval of General Vision Correction GP Button Products used in GP Finished Contact Lens Products for general vision correction to

be marketed in the United States (designated as Class II medical devices) requires submission of a premarket notification pursuant to 21 C.F.R. Part 807 (*i.e.,* a Section 510(k) submission).

U. "GP Button Product(s)" means semi-finished optical material blanks made of oxygen-permeable plastic polymers containing silicone and/or fluorine. FDA approval of GP Button Products used in GP Finished Contact Lens Products to be marketed in the United States for: (1) daily wear (designated as Class II medical devices) requires submission of a premarket notification pursuant to 21 C.F.R. Part 807 (*i.e.,* a Section 510(k) submission); and for (2) Ortho-K and extended wear (designated as Class III medical devices) requires submission of a premarket approval (PMA) Application pursuant to 21 C.F.R. Part 814.

V. "GP Finished Contact Lens Product(s)" means finished rigid gas permeable contact lenses manufactured from GP Button Products and prescribed by licensed eye care practitioners (*e.g.,* ophthalmologists, optometrists) for daily, extended, and overnight wear, and for therapeutic uses, to correct or address vision and corneal conditions such as myopia (nearsightedness), hyperopia (farsightedness), presbyopia (need for bifocals), keratoconus (degenerative corneal disorder), and irregular corneas.

W. "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.

X. "Intellectual Property" means all intellectual property owned or licensed (as licensor or licensee) by any Person, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all Trade Secrets; (iii) all Trademarks; (iv) all Trade Dress; (v) all Copyrights; (vi) all computer software (including source code, executable code, data, databases, and related

documentation); (vii) all Marketing Materials; and (viii) all rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, misuse, violation, or breach of any of the foregoing;

*provided, however,* that "Intellectual Property" does not include the corporate names or corporate Trade Dress of Valeant 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 (*e.g.,* Bausch + Lomb; Boston®), or general registered images or symbols by which Valeant can be identified or defined.

Y. "Inventories" means:

1. All inventories, stores, and supplies of any finished Products and work in progress; and

2. All inventories, stores, and supplies of raw materials and other materials relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of any Products.

Z. "Manufacturing Technology and Equipment" means all technology and equipment to make a Product, including, but not limited to:

1. All technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of a Product, including, but not limited to, all of the following: product specifications; processes; analytical methods; product designs; plans; trade secrets; ideas; concepts; manufacturing, engineering, and other manuals and drawings; standard operating procedures; flow diagrams; quality assurance and quality control systems;

research records; clinical data; compositions; annual product reviews; regulatory communications; control history; current and historical information associated with FDA Application(s) conformance and cGMP compliance; labeling and all other information related to the manufacturing process; and supplier lists;

2. All ingredients, materials, or components used in the manufacture of the Product; and

3. All equipment (including tooling, molds, and dies) and machinery used to manufacture, finish, and package the Product.

AA. "Marketing Materials" means all materials used in the marketing or sale of a Product as of the Divestiture Date, including, without limitation, all advertising and display materials, promotional and marketing materials, training materials, educational materials, speaker lists, 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 used for marketing and sales research), customer information, sales forecasting models, Website content, artwork for the production of packaging components, and other materials related to the marketing or sale of a Product.

BB. "Monitor" means any Person(s) appointed by the Commission pursuant to Paragraph V. of this Order.

CC. "New Paragon" means Paragon Companies LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Arizona, with its executive offices and principal place of business located at 947 East Impala Avenue, Mesa, AZ 85204-6619.

DD. "New Paragon Acquisition Agreement(s)" means:

1. The Stock Purchase Agreement by and among Paragon Companies LLC, Valeant Pharmaceuticals International and, solely for purposes of certain Sections as specified herein, Joseph E. Sicari, dated September 30, 2016; and

2. All amendments, exhibits, attachments, agreements, and schedules thereto, in each case that have received the prior approval of the Commission.

The New Paragon Acquisition Agreements are contained in Non-Public Appendix I. The New Paragon Acquisition Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Divestiture Agreements.

EE. "Order Date" means the date on which this Order is issued as final and effective by the Commission.

FF. "Ortho-K" means orthokeratology, a non-surgical process for reshaping the cornea of the eye with specially-designed therapeutic rigid gas permeable contact lenses, usually worn overnight and removed during waking hours, in order to correct or reduce myopic refractive error (nearsightedness), and for correction or reduction of other refractive errors, such as astigmatism.

GG. "Ortho-K GP Button Product(s)" means GP Button Products used to manufacture Ortho-K GP Finished Contact Lens Products. FDA approval of Ortho-K GP Button Products used in Ortho-K GP Finished Contact Lens Products to be marketed in the United States (designated as Class III medical devices) requires submission of a premarket approval (PMA) Application pursuant to 21 C.F.R. Part 814.

HH. "Paragon" means Paragon Holdings I, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Arizona, with its executive offices and principal place of business located at 947 East Impala Avenue, Mesa, AZ 85204-6619; its joint ventures, subsidiaries, divisions, groups, and affiliates, including, but not limited to, Paragon Vision Sciences, Inc. and CRT Technology, Inc.; and all assets of Paragon Holdings I, Inc. acquired by Valeant in connection with the Paragon Acquisition.

II. "Paragon Acquisition" means the acquisition of Paragon by Valeant pursuant to the Paragon Acquisition Agreement, dated May 8, 2015, and effective May 18, 2015.

JJ. "Paragon Acquisition Agreement" means the Stock Purchase Agreement by and among Valeant Pharmaceuticals International, Paragon Holdings I, Inc., All Shareholders of Paragon Holdings I, Inc. listed on Exhibit A, and Joseph E. Sicari, as the Shareholder Representative, dated May 8, 2015.

KK. "Paragon Business" means the worldwide Business conducted by Paragon with respect to the Paragon Products, all other GP Button Products, and all GP Finished Contact Lens Products, as of the date of the Paragon Acquisition, and as it has been maintained by Respondent since the Paragon Acquisition, including without limitation: all business activities relating thereto, and all tangible and intangible assets and property of any kind used for or relating thereto; all improvements and additions thereto, including, but not limited to, the Pelican Business; and the respective entities through which Paragon conducts its Business and/or pursuant to which it is organized as of the Divestiture Date.

LL. "Paragon Divestiture Assets" means all of Respondent's rights, title, and interests in and to all tangible and intangible assets and property of any kind

used for or relating to the Paragon Business, wherever located, and any improvements or additions thereto, including, but not limited to:

1. All Intellectual Property;

2. All Manufacturing Technology and Equipment;

3. All Applications and all rights to such Applications;

4. All Scientific and Regulatory Material;

5. All Product Approvals;

6. All Marketing Materials;

7. All Websites and Domain Names;

8. All Contracts;

9. All Facility Assets, including, but not limited to, the facility located at 947 East Impala Avenue, Mesa, AZ 85204-6619;

10. All Inventories; and

11. All Business Records related to the foregoing; *provided, however,* that where Respondent's Business Records contain information: (i) that relates both to the Paragon Business and to its retained Products and/or Business and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Paragon Business; or (ii) for which the Respondent has a legal obligation to retain the original copies, Respondent shall be required to provide only copies or relevant excerpts of the relevant Business Records containing this information. In instances where such copies are provided to the Acquirer, 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 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 Respondent's retained Products and/or Business. Respondent shall also be permitted to retain copies of Business Records relating to the Paragon Business to the extent necessary or required for the purposes of any ongoing legal proceedings, litigation, disputes, investigations, inquiries, subpoenas, reviews, audits or regulatory proceedings; *provided, however,* that Respondent shall comply with the requirements of Paragraph IV. of this Order with respect to any Confidential Business Information contained in such copies of Business Records.

MM. "Paragon Employee(s)" means any and all employee(s) of the Paragon Business as of the Divestiture Date, and any and all former employee(s) who were employed by the Paragon Business within ninety (90) days of the execution of any Divestiture Agreement.

NN. "Paragon Product(s)" means Paragon's Ortho-K GP Button Products, Scleral GP Button Products, and General Vision Correction GP Button Products.

OO. "Patent(s)" means all patents, patent applications (including provisional patent applications), invention disclosures, certificates of invention, applications for certificates of invention and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.

PP. "Pelican" means Pelican Products LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its executive offices and principal place of business formerly at 209 Jones Road, Spartanburg, South Carolina 29307. Valeant acquired Pelican pursuant to the Pelican Asset Purchase Agreement, dated December 15, 2015.

QQ. "Pelican Business" means the Business with respect to the Pelican Products conducted by Pelican as of the date of Valeant's acquisition of Pelican, and as it has been maintained by Respondent since the acquisition, including all business activities relating thereto, and all improvements and additions thereto.

RR. "Pelican Product(s)" means all Products manufactured and sold by Pelican, including all FDA-approved vials for wet-shipping Ortho-K GP Finished Contact Lens Products (designated as Class II medical devices), and all other contact lens storage and carrying cases, shipping vials, and related Products intended for use in cleaning, rinsing, disinfecting, lubricating, rewetting, storing, or shipping soft (hydrophilic), rigid gas permeable, and hard contact lenses.

SS. "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.

TT. "Product(s)" means any medical device regulated by the FDA as a Class II (Special Controls) or Class III (PMA) medical device pursuant to 21 C.F.R. Parts 800 to 898*, i.e.,* an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory, which is:

1. recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them;

2. intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or

3. intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.

UU. "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, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any Application related to that Product.

VV. "Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information.

WW. "Scleral GP Button Product(s)" means GP Button Products used to manufacture Scleral GP Finished Contact Lens Products, which are larger diameter GP Finished Contact Lens Products designed to cover the entire corneal surface of the eye and rest on the "white," or sclera, of the eye. Scleral GP Finished Contact Lens Products may be prescribed to address vision or corneal conditions such as keratoconus (degenerative corneal disorder), irregular corneas, or

dry eyes, and after LASIK or other corneal refractive surgery. FDA approval of Scleral GP Button Products used in Scleral GP Finished Contact Lens Products to be marketed in the United States (designated as Class II medical devices) requires submission of a premarket notification pursuant to 21 C.F.R. Part 807 (*i.e.,* a Section 510(k) submission).

XX. "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.

YY. "Trade Secret(s)" means all trade secrets, know-how, and confidential or proprietary information, including ideas, research and development, formulas, compositions, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and all other data, technology, and plans.

ZZ. "Trademark(s)" means all proprietary names or designations, registered and unregistered trademarks, service marks, trade names, brand names, commercial names, "doing business as" (d/b/a) names, logos, and slogans, together with all translations, adaptions, derivations, and combinations thereof, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), all common law rights, and all goodwill symbolized thereby and associated therewith.

AAA. "Transition Agreement(s)" means any agreement(s) between the Respondent and the Acquirer, in each case for a period not to exceed (1) one year except as otherwise approved by the Commission, entered into at the option of the Acquirer that receive the prior approval of the Commission for any services (or training for the Acquirer to provide services for itself) or for the supply of any materials or products

reasonably necessary to transfer the Paragon Divestiture Assets and the Paragon Business to the Acquirer in a manner consistent with the purposes of this Order. Services may include, but are not limited to, payroll, employee benefits, accounting, IT systems, distribution, warehousing, or other logistical and administrative support. Respondent shall provide any services to the Acquirer at no more than Respondent's Direct Costs. Any agreements for the supply of materials or products shall be at commercially reasonable prices.

BBB. "Websites and Domain Names" 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 the Respondent.

**II.**

**IT IS FURTHER ORDERED** that:

A. No later than ten (10) days after the Order Date, Respondent shall divest the Paragon Divestiture Assets, absolutely and in good faith, to New Paragon pursuant to, and in accordance with, the New Paragon Acquisition Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of New Paragon or to reduce any obligations of Respondent under such agreement), and such agreement, if it is approved by the Commission as a Divestiture Agreement related to the Paragon Divestiture Assets, is incorporated by reference into this Order and made a part hereof;

*provided, however*, that if Respondent has divested the Paragon Divestiture Assets to New Paragon prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that New Paragon is not an acceptable purchaser of the Paragon Divestiture

Assets, then Respondent shall immediately rescind the transaction with New Paragon, in whole or in part, as directed by the Commission, and shall divest the Paragon Divestiture Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further,* that if Respondent has divested the Paragon Divestiture Assets to New Paragon prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Paragon Divestiture Assets to New Paragon (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, the Respondent shall:

1. Secure, at its sole expense, all consents and waivers from all Persons that are necessary to divest the Paragon Divestiture Assets to the Acquirer, and for the Acquirer to operate such assets in a manner that will achieve the purposes of this Order (including consents for the assignment or transfer of any Contracts); *provided, however*, that the Respondent may satisfy this requirement by certifying that the Acquirer has executed agreements directly with the relevant Person(s); and

2. Take all actions necessary to ensure, or to assist in, the transfer from the Respondent to the Acquirer of any licenses, approvals, permits, registrations, certificates, or other authorizations from any

Persons that are necessary for divestiture of the Paragon Divestiture Assets to the Acquirer, and for the operation of such assets by the Acquirer.

C. Respondent shall comply with all terms of the Divestiture Agreement, and any breach by the Respondent of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Any modification of the Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Divestiture Date, without the prior approval of the Commission, or any failure by Respondent to meet any condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order.

D. Respondent shall not modify or amend any of the terms of the Divestiture 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 paragraph, section, or other provision of the Divestiture Agreement, any modification or amendment of the Divestiture 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.

E. The purpose of the divestiture of the Paragon Divestiture Assets to an Acquirer is to restore an independent, viable, and effective competitor in the relevant Ortho-K, Scleral, and General Vision Correction GP Button Product markets, and to remedy the lessening of competition resulting from the Paragon Acquisition as alleged in the Commission's Complaint.

## III.

**IT IS FURTHER ORDERED** that**:**

A. Respondent shall cooperate with and assist the Acquirer of the Paragon Divestiture Assets to evaluate independently and retain any or all of the Paragon Employees, including the following:

1. Not later than ten (10) days (i) after a request from a proposed Acquirer, or (ii) after signing a proposed Divestiture Agreement with a proposed Acquirer, whichever is earlier, Respondent shall, to the extent permitted by applicable law, provide the proposed Acquirer with a list of all Paragon Employees and the Employee Information for each Person on the list; *provided, however,* that if New Paragon is the Acquirer, Respondent shall be required to provide the list of Paragon Employees and the Employee Information for each Person on the list only if requested to do so by New Paragon;

2. Not later than ten (10) days after a request from a proposed Acquirer, Respondent shall provide an opportunity for the proposed Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any of the Paragon Employees; and (ii) to make offers of employment to any of the Paragon Employees;

3. Respondent shall:

   a. Not, directly or indirectly, interfere with the Acquirer's offer of employment to any Paragon Employee(s), offer any incentive to any Paragon Employee(s) to decline employment with the Acquirer, make a counteroffer to a Paragon Employee who receives a written offer of employment from the Acquirer, or otherwise interfere with the recruitment by the Acquirer of any Paragon Employee(s); *provided, however,* that nothing in this Order shall be

construed to require the Respondent to terminate the employment of any employee or prevent the Respondent from continuing the employment of any employee;

b. Remove and/or terminate any impediments within the control of Respondent that may deter any Paragon Employee(s) from accepting employment with the Acquirer, including, but not limited to, the removal and/or termination of any non-compete or other provisions of employment or other contracts with the Respondent that directly or indirectly relate to the Paragon Business and may affect the ability or incentive of those Persons to be employed by the Acquirer; *provided, however,* that any confidentiality agreements or provisions in contracts with the Respondent shall permit and not restrict (and shall be construed to permit and not restrict) the ability of any Paragon Employee(s) accepting employment with the Acquirer to use and to disclose confidential information to the Acquirer (but not to third parties) to the same extent such Persons were permitted to use and to disclose confidential information to or within Paragon (but not to third parties) prior to the Divestiture Date; and

c. Provide all Paragon Employees with reasonable financial incentives to continue in their positions until the Divestiture Date, including, but not limited to, a continuation of all employee benefits, including regularly scheduled or merit raises and bonuses, and the regularly scheduled vesting of all pension benefits (as permitted by law and for those Paragon Employees covered by a pension plan).

B. For a period of two (2) years following the Divestiture Date, Respondent shall not, directly or indirectly, solicit, hire, or enter into any arrangement for the

services of any Paragon Employee who has accepted an offer of employment with, or who is employed by, the Acquirer; *provided, however*, that a violation of this provision will not occur if:

1. The Paragon Employee's employment has been terminated by the Acquirer;

2. Respondent advertises for employees in newspapers, trade publications, or other media, or engages recruiters to conduct general employee search activities, in either case not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondent hires a Paragon Employee who has applied for employment with Respondent, provided that such application was not solicited or induced in violation of this Order.

**IV.**

**IT IS FURTHER ORDERED** that:

A. After the Divestiture Date, Respondent shall not use, solicit, or access, directly or indirectly, any Confidential Business Information, and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to any Person except:

1. As required or permitted by this Order;

2. For the purpose of performing its obligations under the Divestiture Agreement;

3. To prosecute or defend against any dispute or in a legal proceeding; or

4. To comply with applicable law, regulations, and other legal or governmental requirements

(including in connection with tax returns, reports required by securities laws, payroll, benefits, personnel reports, ongoing legal proceedings, litigation, disputes, investigations, inquiries, subpoenas, reviews, audits, or regulatory proceedings).

B. No later than five (5) days after the Divestiture Date, Respondent shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph IV. to all of its employees, agents, and representatives with responsibilities relating to the Paragon Business, or who had or have access to or possession, custody, or control of any Confidential Business Information, where:

1. Such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements;

2. Such notification shall be provided by U.S. mail or by e-mail, with return receipt requested acknowledging receipt of the notification or similar transmission;

3. Respondent shall maintain complete records of all such notifications at Respondent's corporate headquarters and keep a file of all receipts and acknowledgments for one (1) year after the Divestiture Date; and

4. Respondent shall provide the Acquirer with a copy of such notification and with copies of all other certifications, notifications, and reminders sent to Respondent's personnel.

C. Not later than thirty (30) days after the Divestiture Date, Respondent shall:

1. Obtain, as a condition of continued employment post-divestiture, from each of Respondent's

employees, agents, and representatives with responsibilities directly relating to the Paragon Business, or who had or have access to or possession, custody, or control of any Confidential Business Information, an executed confidentiality agreement that complies with the restrictions, prohibitions, and requirements of this Order, including the nondisclosure of such information to all other employees, executives, or other personnel of Respondent (except as necessary to comply with the requirements of this Order);

2. Institute procedures and requirements and take such actions as are necessary to ensure that Respondent's personnel comply with the restrictions, prohibitions, and requirements of this Paragraph IV., including all actions that Respondent would take to protect its own trade secrets and confidential information. These measures shall include, but not be limited to:

   a. Restrictions placed on access by Persons to any Confidential Business Information that may be available or stored on any of Respondent's computers or computer networks; and

   b. Redaction of all Confidential Business Information from copies of Respondent's Business Records that are not divested to the Acquirer; *provided, however,* that Respondent may retain one original, unredacted version of such Business Records for the purposes specified in Paragraph IV.A.

## V.

**IT IS FURTHER ORDERED** that:

A. At any time after the Respondent signs the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that the Respondent expeditiously complies with all of its obligations and

performs all of its responsibilities as required by this Order and the Divestiture Agreement.

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 on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed, Respondent shall consent to the terms and conditions herein, and shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:

1. The Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture obligations and related requirements of the Order, 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 the Order and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve for such period of time as the Commission determines may be necessary or appropriate to accomplish the purposes of the Order.

E. Subject to any demonstrated legally recognized privilege, the Respondent shall provide the Monitor with full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order and with the Divestiture Agreement. 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 the Order.

F. 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 or approve. 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.

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

H. If a Monitor is appointed, unless otherwise provided in any agreement approved by the Commission, the Respondent shall deliver a copy of any report required by this Order to the Monitor within five (5) calendar days of submitting such report to the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Divestiture Agreement. Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning the performance by Respondent of its obligations under the Order and/or the Divestiture Agreement.

I. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission or its staff, or require the Monitor to report to Respondent the substance of communications to or from the Commission, its staff, or the Acquirer.

J. 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.

K. 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.

L. 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.

M. A Monitor appointed pursuant to this Order may be the same Person appointed as the Divestiture Trustee pursuant to Paragraph VI. of this Order.

**VI.**

**IT IS FURTHER ORDERED** that:

A. If the Respondent has not fully complied with the obligations of Paragraph II. and related requirements of this Order, the Commission may appoint a Divestiture Trustee to divest the Paragon Divestiture Assets and/or perform Respondent's other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee shall divest the Paragon Divestiture Assets to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. 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 shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. The Commission may select a Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Commission may appoint a Divestiture Trustee to divest the Paragon Divestiture Assets and/or perform the

Respondent's other obligations in a manner that satisfies the requirements of this Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If the Respondent has not opposed, in writing, and stated in writing its reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to the Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement for the divestiture required by Paragraph II. of this Order 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, and satisfy the additional obligations imposed by, this Order. Any failure by the Respondent to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture required by Paragraph II. of this Order, which shall be subject to the prior approval of the

Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. of this Order, or believes that such obligation can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. 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 caused by Respondent shall extend the time under this Paragraph VI. for a time period 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 the Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers for the asset to be divested from more than one acquiring entity, and if the Commission determines to approve more

than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of any 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, 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 report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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 the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.

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 any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

H. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same Person as the Monitor appointed under this Order.

## VII.

**IT IS FURTHER ORDERED** that:

A. Within thirty (30) days after the date this Order is issued, every thirty (30) days thereafter until the Divestiture Date of the divestiture required by Paragraph II. of this Order, and every sixty (60) days thereafter until Respondent has performed fully all of its obligations under any Transition Agreement, Respondent shall submit to the Commission (and if applicable, a complete copy to any Monitor appointed under this Order) 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. For the period covered by this report, the report shall include, but not be limited to, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II. of this Order, including a description of all substantive contacts or negotiations for the divestiture, and the identity and contact information of all parties contacted. Respondent shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, a copy of the written instructions and acknowledgments concerning Confidential Business Information required by Paragraph IV. of this Order, and all reports and recommendations concerning completing the obligations.

B. One (1) year after the Order Date, annually for the next three (3) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and

form in which it intends to comply, is complying, and has complied with this Order.

## VIII.

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

A. Any proposed dissolution of Respondent;

B. Any proposed acquisition, merger, or consolidation of Respondent; or

C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

## 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 either Respondent's principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

## X.

**IT IS FURTHER ORDERED** that this Order shall terminate on January 25, 2027.

By the Commission.

## NON-PUBLIC APPENDIX I

## NEW PARAGON DIVESTITURE AGREEMENT

**[Redacted from the Public Record Version of the Order, But Incorporated by Reference]**

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted for public comment an Agreement Containing Consent Order ("Consent Order") with Valeant Pharmaceuticals International, Inc. ("Valeant") to remedy the alleged anticompetitive effects resulting from Valeant's acquisition of Paragon Holdings I, Inc., including wholly-owned subsidiaries Paragon Vision Sciences, Inc. and CRT Technology, Inc. ("Paragon").

The Complaint alleges that the 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,

by lessening competition in the markets for polymer discs, or "buttons," used to make three different types of rigid gas permeable ("GP") contact lenses: orthokeratology contact lenses, large-diameter scleral contact lenses, and general vision correction contact lenses. The Consent Order would remedy the alleged violations by restoring competition in these GP button markets.

Under the terms of the Consent Order, Valeant is required to divest Paragon in its entirety, including the assets of Pelican Products LLC ("Pelican"), a manufacturer of contact lens packaging.

The proposed Consent Order 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 Order and any comments received, and decide whether the Consent Order should be withdrawn, modified, or made final.

## 1. THE PARTIES

Valeant is a Canadian conglomerate that develops and markets prescription and non-prescription pharmaceutical products. Through its subsidiary Bausch + Lomb, Valeant is a leading producer of GP buttons used to make GP contact lenses. Prior to its acquisition by Valeant in May 2015, Paragon was a United States corporation with its principal place of business in Arizona. Paragon produces GP buttons used to make GP contact lenses and also produces finished GP lenses.

After the Paragon acquisition, Valeant also purchased Pelican, a manufacturer of contact lens packaging, and the only producer of FDA-approved vials for wet-shipping finished orthokeratology lenses. Pelican became a subsidiary of Paragon. This acquisition ensured Valeant's access to the vials, after Pelican's owner announced plans to exit the market.

## 2. THE RELEVANT MARKET

Both parties engage in developing, manufacturing, and selling GP buttons in the United States. The relevant product markets in which to analyze the effects of the acquisition are the manufacture and sale of FDA-approved GP buttons for: orthokeratology GP lenses, which are worn to reshape the cornea; large-diameter scleral GP lenses, which cover the white of the eye and are used post-surgery, for transplants, and to treat eye disease; and general vision correction GP lenses. Each type of GP lens requires a GP button with parameters unique to that lens type.

GP lenses are used, and in some cases are medically necessary, to address a variety of vision problems, including dry eyes, abnormal curvatures of the eye, corneal disease, post-eye surgery complications, and eye trauma. Optical labs use GP buttons to make GP contact lenses to fulfill prescriptions from eye care professionals. Prescriptions typically specify a particular product and brand of button, and eye care professionals invest significant capital in fitting equipment for the brands they prescribe.

The FDA requires that GP lenses must be made from FDA-approved GP buttons. Thus, there are no alternatives to FDA-approved GP buttons for making each of the types of GP lenses and the relevant geographic market is the United States.

Prior to the acquisition, Valeant and Paragon independently produced buttons for all three types of GP lenses. In the market for orthokeratology GP buttons, the combination of Valeant and Paragon was a merger to monopoly. In the market for scleral GP buttons, the combined company accounted for 70-80 percent of the market. In the market for general vision correction GP buttons, the combined company's market share was approximately 65-75 percent.

## 3. EFFECTS OF ACQUISITIONS

The acquisition likely caused significant competitive harm in the relevant markets. Specifically, the acquisition of Paragon eliminated actual, direct, and substantial competition between Valeant and Paragon in the relevant markets for GP buttons and

allowed Valeant to unilaterally exercise market power. For instance, following the acquisition, Valeant increased prices in all three GP button markets.

Prior to the acquisition, Valeant and Paragon also competed on innovation, with the incentive to develop new GP lens buttons and improve button materials by investing in research, development, and adoption. This innovation led to broader product lines, improvements to button materials, and marketing and education funding for optical labs. The acquisition also eliminated this innovation competition between Valeant and Paragon.

## 4. ENTRY AND EFFICIENCIES

Entry into the relevant market has not been, and would not be, timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition. Optical labs have limited short-term ability to switch from Valeant and Paragon, which supply the majority of their GP scleral buttons and GP general vision correction buttons, and 100 percent of their GP orthokeratology buttons. Optical labs might try to persuade eye care professionals to switch to a different material and brand, but ultimately the decision is made by the eye care professional, for whom such a change is costly and time-consuming.

Considerable entry barriers also arise from the FDA approval process. For GP orthokeratology buttons, the FDA premarket approval process takes several years because finished orthokeratology lenses worn overnight are Class III medical devices. For GP scleral and general vision buttons, the FDA premarket notification process likely requires at least one year, as the finished lenses incorporating such buttons are Class II medical devices.

We did not find any evidence of efficiencies that would outweigh the competitive concerns arising from the Paragon acquisition.

## 5. CONSENT ORDER

The proposed Consent Order requires Valeant to divest Paragon in its entirety no later than ten (10) days after the order date, to remedy the concerns raised by the acquisition and restore competition in the relevant markets by instituting Paragon as an independent, viable competitor to Valeant. The proposed Consent Order also requires Valeant to divest Pelican with Paragon to ensure continued access to FDA-approved vials for shipping its finished lenses.

The proposed Consent Order requires that Valeant must divest Paragon and Pelican to Paragon Companies LLC in an upfront transaction. Paragon Companies LLC is a newly created entity owned by Joe Sicari. Mr. Sicari was the president of Paragon prior to its acquisition by Valeant in May 2015.

The Commission may, at any time, appoint a Monitor with the power and authority to ensure that Valeant fulfills all obligations and responsibilities under the Consent Order and Divestiture Agreement.

The Consent Order will remain in effect for ten (10) years, and contains standard compliance and reporting requirements.

Complaint

**IN THE MATTER OF**

# C.H. BOEHRINGER SOHN AG & CO. KG

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

*Docket No. C-4601; File No. 161 0077*
*Complaint, December 28, 2016 – Decision, February 14, 2017*

This consent order addresses the $13.53 billion acquisition by C.H. Boehringer Sohn AG & Co. KG of certain assets of Sanofi. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act in the U.S. markets for two types of animal health products: (1) companion animal vaccines, which include various canine, feline, and rabies vaccines, and (2) cattle and sheep parasiticides. The consent order requires Boehringer Ingelheim to divest its relevant U.S. companion animal vaccine business to Eli Lily and Company, which participates in the animal health industry through its Elanco Animal Health division and its U.S. Cydectin parasiticide product to Bayer AG.

*Participants*

For the *Commission*: *Michael R. Barnett, Stephanie Bovee,* and *Yan Gao.*

For the *Respondent*: *Ryan Foley* and *William A. Henry, Baker Botts 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 believe that Respondent C.H. Boehringer Sohn AG & Co. KG ("Boehringer Ingelheim"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the Merial Animal Health business ("Merial") from Sanofi, 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, 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 Boehringer Ingelheim is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its headquarters address located at Binger Strasse 173, 55216, Ingelheim am Rhein, Germany, and the address of its United States subsidiary, Boehringer Ingelheim Vetmedica, Inc., located at 3902 Gene Field Rd., St. Joseph, Missouri 64506.

2. Respondent Boehringer Ingelheim is engaged in, among other things, the research, development, manufacture, distribution, and sale of human pharmaceutical products, as well as animal health products through its Boehringer Ingelheim Vetmedica, Inc. division.

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 company 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. Sanofi is a corporation organized, existing and doing business under and by virtue of the laws of the French Republic, with its headquarters address located at 54, rue La Boétie, 75008, Paris, France, and the address of its United States subsidiary, Sanofi US, located at 55 Corporate Drive, Bridgewater, New Jersey 08807.

5. Sanofi is engaged in, among other things, the research, development, manufacture, distribution, and sale of human pharmaceutical products, as well as animal health products through its Merial Animal Health division.

6. Sanofi is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company

whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## III. THE PROPOSED ACQUISITION

7. Pursuant to an Exclusivity Agreement dated December 15, 2015, Boehringer Ingelheim proposes to swap its consumer health care business for Sanofi's Merial animal health business (the "Acquisition"). In the proposed swap, Boehringer Ingelheim obtains Merial, valued at $13.53 billion, and Sanofi obtains Boehringer Ingelheim's Consumer Health Care business unit, valued at $7.98 billion, as well as cash compensation of $5.54 billion. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## IV. THE RELEVANT MARKETS

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the research, development, manufacture, and sale of:

a. canine vaccines for the prevention of disease caused by canine distemper virus, canine parvovirus, leptospirosis, canine adenovirus, canine parainfluenza virus, canine coronavirus, borreliosis ("Lyme disease"), and/or *Bordetella bronchiseptica* bacterium;

b. feline vaccines for the prevention of disease caused by panleukopenia, calicivirus, viral rhinotracheitis, *Chlamydia psittaci* bacterium, and/or feline leukemia;

c. companion animal vaccines for the prevention of rabies virus;

d. macrocyclic lactone cattle parasiticides; and

e. macrocyclic lactone sheep parasiticides.

9. For the purposes of this Complaint, the United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

## V. THE STRUCTURE OF THE MARKETS

10. The markets for canine vaccines in the United States are highly concentrated. Boehringer Ingelheim, Merial, Zoetis, Inc. ("Zoetis"), and Merck & Co. ("Merck") are the only four companies offering or likely to offer canine vaccines for the prevention of canine distemper virus, canine parvovirus, leptospirosis, canine adenovirus, canine parainfluenza virus, canine coronavirus, Lyme disease, and/or *Bordetella bronchiseptica* bacterium in the United States. In 2015, Boehringer Ingelheim, Merial, Zoetis, and Merck had shares representing approximately 30%, 11%, 35%, and 24%, respectively, of all canine vaccines sold in the United States and comparable shares in each relevant market, except *Bordetella bronchiseptica* bacterium, where Merial is the next likely entrant. The proposed transaction would reduce the number of current or likely competitors in each market from four to three.

11. The markets for feline vaccines in the United States are highly concentrated. Boehringer Ingelheim, Merial, Zoetis, and Merck are the only four companies offering feline vaccines for the prevention of panleukopenia, calicivirus, viral rhinotracheitis, *Chlamydia psittaci* bacterium, and/or feline leukemia in the United States. In 2015, these four companies represented approximately 28%, 33%, 16%, and 23%, respectively, of all feline vaccines sold in the United States and comparable shares in each relevant market. The proposed transaction would combine the two leading feline vaccine suppliers, reducing the number of competitors in each market from four to three.

12. The market for rabies vaccines in the United States is highly concentrated. Boehringer Ingelheim, Merial, Zoetis, and Merck are the only four significant suppliers of rabies vaccines in the United States, with market shares of 10%, 65%, 13%, and 12%, respectively.

13. The market for macrocyclic lactone cattle parasiticide in the United States is highly concentrated. Boehringer Ingelheim, Merial, and Zoetis are the three primary participants in the macrocyclic lactone cattle parasiticide market. Merial offers three brands: Ivomec, Eprinex, and LongRange that collectively accounted for 45% of the macrocyclic lactone cattle parasiticide

market in 2015. Boehringer Ingelheim's Cydectin, a parasiticide that is functionally identical to Ivomec and Eprinex for beef cattle, accounted for 22% of the macrocyclic lactone cattle parasiticide market in 2015. Zoetis offers Dectomax, a macrocyclic lactone similar to Merial's and Boehringer Ingelheim's products, which accounted for 17% of macrocyclic lactone cattle parasiticide sales in 2015. Eprinex and Cydectin are the only two macrocyclic lactone cattle parasiticides with a "zero-day milk withhold" required for dairy cattle. The Acquisition would consolidate the most significant competitors in the macrocyclic lactone cattle parasiticide market, would produce a single firm controlling more than 65% of the relevant market, and would consolidate the only two suppliers of "zero-day milk withhold" macrocyclic lactone cattle parasiticides.

14. The parties are the two primary suppliers of macrocyclic lactone sheep parasiticides. Boehringer Ingelheim offers Cydectin Oral Drench, and Merial offers Ivomec Oral Drench. In 2015, Cydectin Oral Drench and Ivomec Oral Drench approximated 57% and 22%, respectively, of total sales in the United States. Following the acquisition, the merged firm would control more than 78% of this market.

## VI. ENTRY CONDITIONS

15. Entry into the relevant markets described in Paragraph 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 require significant investment to, among other things, develop products, obtain regulatory approvals, and effectively establish recognized brands. Entry would be unlikely because the required investment would be difficult to justify given the sales opportunities in the affected markets. Entry would also not be timely because drug development times and FDA or USDA approval requirements are lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

## VII. EFFECTS OF THE ACQUISITION

16. 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, by, among other things:

a. eliminating actual or future, direct, and substantial competition between Boehringer Ingelheim and Merial in the relevant markets;

b. increasing the likelihood that the merged entity will unilaterally exercise market power in the relevant markets;

c. increasing the likelihood of coordinated interaction between or among suppliers in the relevant markets;

d. increasing the likelihood that consumers would be forced to pay higher prices or accept reduced service.

## VIII. VIOLATIONS CHARGED

17. The Exclusivity Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. 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-eighth day of December, 2016, issues its Complaint against said Respondents.

By the Commission.

# ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent C.H. Boehringer Sohn AG & Co. KG of the animal health business of Sanofi, and Respondent having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of the 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 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 C.H. Boehringer Sohn AG & Co. KG is a corporation organized, existing, and doing business under and by virtue of the laws of Germany with its headquarters address at Binger Strasse 173, Ingelheim am Rhein, Germany, 55216 and the address of its United States subsidiary, Boehringer Ingelheim Vetmedica, Inc., located at 3902 Gene Field Rd., St. Joseph, Missouri 64506.

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

## ORDER TO MAINTAIN ASSETS

### 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. "Boehringer" means C.H. Boehringer Sohn AG & Co. KG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Boehringer, including but not limited to Boehringer Ingelheim Vetmedica, Inc. ("BIVI") and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Boehringer shall include Merial.

B. "BIVI" means Boehringer Ingelheim Vetmedica, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Boehringer Ingelheim Vetmedica, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

E. "Decision and Order" means the Decision and Order incorporated into and made a part of the Agreement Containing Consent Orders.

F. "Monitor" means any monitor appointed pursuant to Paragraph V of this Order to Maintain Assets or Paragraph V of the Decision and Order.

G. "Orders" means the Decision and Order and this Order to Maintain Assets.

## II.

**IT IS FURTHER ORDERED** that:

A. Until Respondent completes the divestiture of the Companion Animal Product Assets (including fully providing Product Manufacturing Technology to the Companion Animal Acquirer) Respondent shall take all actions necessary to:

1. maintain the full economic viability and marketability of the Business associated with the Companion Animal Products;

2. minimize any risk of loss of competitive potential for that Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Companion Animal Products;

4. ensure the assets related to the Companion Animal Products are provided to the Companion Animal Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the associated Business; and

5. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology.

B. Respondent shall not sell, transfer, encumber, or otherwise impair the Companion Animal Product Assets (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 related to the Companion Animal Products, and shall continue in the same manner all current and planned capital expenditure plans and products.

C. Respondent shall:

1. on or before the Companion Animal Product Closing Date, and as a condition of continued employment, require that each employee whose responsibilities (in whole or part) includes sales or marketing and who has or may have had access to Companion Animal Confidential Information, and the direct supervisor(s) of each such employee, sign a confidentiality agreement pursuant to which the employee is required to maintain the confidentiality of the Companion Animal Confidential Information and not disclose it to other employees, executives, or other personnel of Respondent (other than as necessary to comply with the requirements of this Order). Respondent shall maintain complete records of signed confidentiality agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming that all confidentiality agreements have been signed; and

2. not later than thirty (30) days after the Companion Animal Closing Date, provide written notification of the restrictions on the use and disclosure of Companion Animal Confidential Information to all of its employees who may be in possession of or

have access to Companion Animal Confidential Information. Respondent 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 Companion Animal Closing Date. Respondent shall provide a copy of the notification to the Companion Animal Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent shall provide the Companion Animal Product Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

D. Until the Companion Animal Closing Date, Respondent shall provide all Companion Animal Product Employees with reasonable financial incentives to continue in their positions and to research, Develop, market, sell, and manufacture the Companion Animal Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Companion Animal Product(s) and to ensure successful execution of the pre-Acquisition plans for such Companion Animal Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Companion Animal Product Closing Date, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).

**III.**[Cydectin]

**IT IS FURTHER ORDERED** that:

A. Until Respondent completes the divestiture of the Cydectin Product Assets (including fully providing Product Manufacturing Technology to the Cydectin

Acquirer) Respondent shall take all actions necessary to:

1. maintain the full economic viability and marketability of the Business associated with the Cydectin Products;

2. minimize any risk of loss of competitive potential for that Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Cydectin Products;

4. ensure the assets related to the Cydectin Products are provided to the Cydectin Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the associated Business; and

5. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology.

B. Respondent shall not sell, transfer, encumber, or otherwise impair the Cydectin Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Business related to the Cydectin Products.

C. Respondent shall:

1. on or before the Cydectin Product Closing Date, and as a condition of continued employment, require that each employee whose responsibilities (in whole or part) includes sales or marketing and who has or may have had access to Cydectin Confidential Information, and the direct supervisor(s) of each such employee, sign a confidentiality agreement pursuant to which the employee is required to maintain the

confidentiality of the Cydectin Confidential Information and not disclose it to other employees, executives, or other personnel of Respondent (other than as necessary to comply with the requirements of this Order). Respondent shall maintain complete records of signed confidentiality agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming that all confidentiality agreements have been signed; and

2. not later than thirty (30) days after the Cydectin Closing Date, provide written notification of the restrictions on the use and disclosure of Cydectin Confidential Information to all of its employees who may be in possession of or have access to Cydectin Confidential Information. Respondent 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 Cydectin Closing Date. Respondent shall provide a copy of the notification to the Cydectin Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent shall provide the Cydectin Product Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

D. Until the Cydectin Closing Date, Respondent shall provide all Cydectin Products Employees with reasonable financial incentives to continue in their positions and to research, Develop, market, sell, and manufacture the Cydectin Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Cydectin Product(s) and to ensure successful execution

of the pre-Acquisition plans for such Cydectin Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Cydectin Product Closing Date, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).

## IV.

**IT IS FURTHER ORDERED** that

A. Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information solely related to the Divestiture Product Assets or the Business of the Divestiture Products, other than as necessary to comply with the requirements of this Order, Respondent's obligations to each respective Acquirer under the terms of any related Remedial Agreement, or applicable Law;

2. not disclose or convey any Confidential Business Information solely related to the Divestiture Product Assets or the Business of the Divestiture Products, directly or indirectly, to any Person except (i) the Acquirer of the relevant Divestiture Product, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of a Divestiture Product to the marketing or sales employees associated with the Business related to those Retained Products in the Geographic Territory that are the Therapeutic Equivalent of the Divestiture Product; and

4. take all reasonable steps to ensure the Companion Animal Products Acquirer:

   a. does not use, directly or indirectly, any Confidential Business Information related to the Naramune Products other than as necessary to comply with the Fort Dodge Transitional Manufacturing and Supply Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc., or any applicable Law;

   b. does not disclose or convey any Confidential Business Information related the Naramune Products directly or indirectly, to any Person except (i) the Respondent, other Persons specifically authorized by Respondent to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed); or

   c. does not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Naramune Products the marketing or sales employees associated with the Companion Animal Products Business.

B. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Companion Animal Products Business and the Cydectin Products Business within the Geographic Territory through its full transfer and delivery of the Divestiture Product Assets to the respective Acquirers, to maintain the confidentiality of the Confidential Business Information related to the Divestiture Products, and to minimize any risk of loss of competitive potential for the Companion Animal Products Business and the Cydectin Products Business within the Geographic Territory.

## V.

**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 this Order to Maintain Assets, the Decision and Order and the Remedial Agreements. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to which the Monitor and Respondent agree and that the Commission approves.

B. The Commission appoints Dr. Stephen J. Bell as a Monitor and approves the agreement between Dr. Bell and Respondent, attached as an Appendix to the Decision and Order.

C. The Monitor's duties and responsibilities shall include the following:

1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;

2. The Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of this Order to Maintain Assets 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 to Maintain Assets and in consultation with the Commission;

3. 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; and

4. The Monitor shall evaluate the reports submitted to the Commission by Respondent pursuant to this Order to Maintain Assets, the Decision and Order, and the Consent Agreement; and within thirty (30) days from the date the Monitor receives a report, report in writing to the Commission concerning the performance by Respondent of its obligations under the Orders, including without limitation the transfer of Naramune-2 manufacturing from the Fort Dodge Facility and the completion of the Fill and Packaging Improvements.

D. Respondent shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:

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

2. 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 to Maintain Assets, the Decision and Order and the Remedial Agreements;

3. Subject to any demonstrated legally recognized privilege, the Respondent shall provide the Monitor with 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 their obligations under the Orders, including, but not limited to, its obligations related to the Divestiture Assets; and

4. Respondent shall deliver to the Monitor a copy of each report submitted to the Commission pursuant to this Order to Maintain Assets, the Decision and Order or the Consent Agreement.

E. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; however, such agreement shall not limit the ability of the Monitor to provide information to the Commission without the consent of Respondent.

F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Respondent's materials and information received in connection with the performance of the Monitor's duties,

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

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the

Commission may appoint a substitute Monitor. The Commission shall select the substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor.

I. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

J. The Monitor shall serve until the later of: a) the completion of the transfer of the Divestiture Products, including the transfer and delivery of the related Product Manufacturing Technology; b) the date the Companion Animal Acquirer is able, independently of the Respondent, to manufacture the Contract Manufacture Products in final finished form, in commercial quantities and in a manner consistent with cGMP; or c) four (4) years.

## VI.

**IT IS FURTHER ORDERED** that:

A. Respondent shall submit to the Commission and to the Monitor verified written reports within thirty (30) days after the date this Order to Maintain Assets is issued and every sixty (60) days thereafter until Respondent have fully complied with Paragraphs II and III, 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 Decision and Order. Respondent shall include in its reports, among other things that are required from time to time, a full

description of the efforts being made to comply with the relevant paragraphs of the Orders, 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 Respondent 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,

*provided, however*, that, after the Decision and Order 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 Respondent pursuant to Paragraph IX of the Decision and Order.

**VII.**

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

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger, or consolidation of Respondent; or

C. any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**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 Respondent, it 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 non-privileged business records and documentary material, including without limitation electronically stored information as defined in Rule 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1), (2), books, ledgers, accounts, correspondence, memoranda and all other records and documents (in whatever form such records and documents are kept) in the possession or under the control of the 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 Respondents; and

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

## IX.

**IT IS FURTHER ORDERED** that this Order shall terminate 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 day after transfer of all Divestiture Product Assets to their respective Acquirers,

*provided, however*, that if the Commission, pursuant to Paragraph II.A or Paragraph III.A. of the Decision and Order, requires the Respondent to rescind any or all of the divestitures contemplated by any Divestiture Agreement, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant Divestiture Product Assets until the day after Respondent's (or a Divestiture Trustee's) completion

of the divestiture(s) of the relevant Divestiture Product Assets, as described in and required by the Decision and Order.

By the Commission.

## DECISION AND ORDER
## [Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent C.H. Boehringer Sohn AG & Co. KG of the animal health business of Sanofi, and Respondent having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent

Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent C.H. Boehringer Sohn AG & Co. KG is a corporation organized, existing, and doing business under and by virtue of the laws of Germany with its headquarters address at Binger Strasse 173, Ingelheim am Rhein, Germany, 55216 and the address of its United States subsidiary, Boehringer Ingelheim Vetmedica, Inc., located at 3902 Gene Field Rd., St. Joseph, Missouri 64506.

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

## ORDER
## I.

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

A. "Boehringer" means C.H. Boehringer Sohn AG & Co. KG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Boehringer, including but not limited to Boehringer Ingelheim Vetmedica, Inc. ("BIVI"), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Boehringer shall include Merial.

B. "Sanofi" means Sanofi, a corporation organized, existing and doing business under and by virtue of the laws of France and its principal executive offices are located at 54, Rue La Boetie, 75008 Paris, France. Sanofi includes its wholly-owned subsidiaries Merial,

S.A.S. and Merial Inc. and all other assets and shares comprising its animal health business.

C. "Merial" means all assets and shares comprising Sanofi's animal health business, including without limitation Merial, S.A.S. and Merial, Inc.

D. "Bayer" means Bayer AG, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its principal executive offices located at Kaiser Wilhelm-Allee, 51368 Leverkusen, Germany, and its successors, assigns, subsidiaries and divisions, including Bayer Healthcare US Funding LLC, a Delaware Limited Liability Company and Bayer HealthCareLLC, a Delaware Limited Liability Company.

E. "Elanco" means Eli Lilly and Company, a corporation organized, existing and doing business under and by virtue of the laws of the state of Indiana, with its principal executive offices located at Lilly Corporate Center, Indianapolis, Indiana, 46285, and its successors, assigns, subsidiaries and divisions, including Elanco US Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal executive offices located at 2500 Innovation Way, Greenfield, IN 46140.

F. "Commission" means the Federal Trade Commission.

G. "Acquirer" means the Companion Animal Products Acquirer or the Cydectin Products Acquirer.

H. "Acquisition" means the transaction contemplated by the agreements executed by Boehringer and Sanofi on June 2, 2016, through which Boehringer will acquire the assets and shares comprising Sanofi's animal health business and in exchange, Sanofi will acquire the assets and shares comprising Boehringer's consumer healthcare business (excluding the consumer

healthcare business in China) and receive a cash payment of approximately $5.1 billion.

I. "Acquisition Date" means the date Respondent Boehringer and Sanofi close on the Acquisition.

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 Business of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA"), and the United States Department of Agriculture ("USDA").

K. "Agency Manufacturing Standards" means:

1. for any Product regulated by the FDA, current Good Manufacturing Practice, *i.e.*, cGMP, as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and all rules and regulations promulgated by the FDA thereunder; or

2. for any Product regulated by the USDA, current manufacturing regulations contained in Title 9 of the Code of Federal Regulations pertaining to veterinary biologics and all rules and regulations promulgated by the USDA thereunder.

L. "Antigen" means any substance that when introduced to the body stimulates an immunological response. The term "Antigen" includes, without limitation, live or killed viruses, attenuated viruses, parts of viruses, toxins, bacteria, and foreign blood cells.

M. "Application(s)" means all of the following, as defined in the United States Federal Food, Drug and Cosmetic Act, as amended: "Investigational New Animal Drug Application" ("INADA"), "New Animal Drug Application" ("NADA"), "Abbreviated New Animal Drug Application" ("ANADA"), or "Conditional New Animal Drug Application" ("CNADA") for a Product

filed or to be filed with the FDA, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent and the FDA or other Agency related thereto. The term "Application" and all of the foregoing terms or abbreviations include the foreign equivalents of the above-referenced filings and activities with the foreign counterpart(s) of the FDA.

N. "Biological Manufacturing and Testing Materials" means reagents, microorganisms antibodies, sera, proteins, clinical and tissue samples, and raw materials used to perform the applicable potency, immunogenicity and/or antigen compatibility testing (including without limitation, the reference vaccine); assays (including, without limitation, potency and microorganism cell protein assays); Master Cells; Master Seeds; hybridomas; antibodies; cell culture media and similar materials; nutrient feed for cells and microorganisms; challenge material; and references that Respondent is using, are suitable for use, has used, or is planning to use in the manufacture, use, Development, or commercialization of a Companion Animal Product or a Companion Animal Pipeline Product.

O. "Business" means the following: (i) the commercialization, distribution, marketing, importation, advertisement, and sale of a Product within the Geographic Territory and (ii) the research, Development, manufacture of such Product throughout the world for the purposes of the commercialization, distribution, marketing, importation, advertisement and sale of such Product within the Geographic Territory.

P. "Clinical Trial(s)" means a controlled study in animals, including the target species with respect to a particular Product, 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 animal study used in research and Development of Divestiture Products.

Q. "Companion Animal Pipeline Products" means all Products (other than Companion Animal Products, Solo-Jec Products or Products containing the antigen produced from the Master Seeds used in the Naramune Products) that are in Development by Respondent as of the Acquisition Date or were in Development (whether or not such Development has been discontinued) by Respondent at any time within the five (5) year period immediately preceding the Acquisition Date for use in the Geographic Territory in the following Fields:

1. the following diseases, pathogens, viruses, and bacterium within canines: Adenoviruses, bordetellosis, borreliosis (Lyme disease), coronavirus, canine distemper virus (CDV), leptospirosis, parvovirus, and parainfluenza virus:

2. the following diseases, pathogens, viruses and bacterium within felines: calicivirus, chlamydia, feline immunodeficiency virus, feline leukemia, panleukopenia, feline viral rhinotracheitis; and

3. rabies.

R. "Companion Animal Products" means the following Products sold by Respondent in the Geographic Territory prior to the Acquisition for use with the following diseases, pathogens, viruses and bacterium:

1. within canines: adenoviruses, bordetellosis, borreliosis (Lyme disease), coronavirus, canine distemper virus (CDV), leptospirosis, parvovirus, and parainfluenza virus;

2. within felines: calicivirus, chlamydia, feline immunodeficiency virus, feline leukemia, panleukopenia and feline viral rhinotracheitis; and

3. rabies;

including without limitation, all dosages, strengths, formulations, routes of administration, and presentations of the Products, all Product Improvements related to the Products, and all medical and/or veterinary devices that are proprietary to Respondent and used for the administration or application of the Products:

1. Bronchi-Shield Products, meaning all Products, other than Naramune Products, that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Bordetella bronchiseptica* bacterium;

2. Calicivax Products, meaning all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the calicivirus;

3. Duramune® Products, and ULTRA-Duramune Products, meaning all Products (other than Solo-Jec Products),

    a. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine distemper virus,

    b. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine parvovirus,

    c. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the Leptospira bacterium, including without limitation, *Leptospira grippotyphosa*, *Leptospira icterohaemorrhagiae*, *Leptospira canicola*, and *Leptospira pomona*;

d. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine adenovirus Type 2 virus,

e. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine adenovirus Type 1 virus,

f. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the parainfluenza virus,

g. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine coronavirus, and

h. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the bacteria that causes borreliosis (Lyme disease), including without limitation, *Borrelia burgdorferi*, *Borrelia afzelii*, and *Borrelia gatinii*;

4. Fel-O-Guard Products, Fel-O-Vax Products, and ULTRA Fel-O-Vax® Products, meaning all Products (other than Solo-Jec Products)

a. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes panleukopenia,

b. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the calicivirus,

c. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes feline viral rhinotracheitis (FVR),

d. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Chlamydia psittaci* bacterium,

e. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes feline leukemia virus (FeLV), and

f. that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the feline immunodeficiency virus;

5. LeptoVax Products, meaning all Products (other than Solo-Jec Products) that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the Leptospira bacterium, including without limitation, *Leptospira grippotyphosa*, *Leptospira icterohaemorrhagiae*, *Leptospira canicola*, and *Leptospira pomona*; and

6. Rabvac Products, meaning all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the rabies virus marketed and sold by Respondent for use in animals prior to the Acquisition.

S. "Companion Animal Products Acquirer" means Elanco or any other Person approved by the Commission to acquire the Companion Animal Products Assets pursuant to this Order.

T. "Companion Animal Products Assets" means the Divestiture Product Assets for all Companion Animal Products and Companion Animal Pipeline Products.

U. "Companion Animal Products Business" means the Companion Animal Products Business of Respondent related to the Companion Animal Products and the Companion Animal Pipeline Products to the extent that such Business is owned, controlled, or managed by Respondent and the assets related to such Business to

the extent such assets are owned by, controlled by, managed by, or licensed to, Respondent.

V. "Companion Animal Products Closing Date" means the date on which the Respondent (or Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Companion Animal Products Assets to the Companion Animal Products Acquirer.

W. "Companion Animal Products Divestiture Agreements" means the following agreements between Respondent and Elanco to accomplish the requirements of the Order (attached hereto as Confidential Appendix B), and all amendments, exhibits, attachments, agreements, and schedules thereto:

1. Fort Dodge Asset Purchase Agreement by and among Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc. and Eli Lilly and Company (solely for the purposes of Section 12.16);

2. Fort Dodge License Agreement by and among Boehringer Ingelheim Vetmedica, Inc., Boehringer Ingelheim Vetmedica GMBH, and Elanco US Inc.;

3. Fort Dodge Services Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc.;

4. St. Joseph Transitional Packaging Services Agreement; and

5. St. Joseph Transitional Manufacturing and Supply Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc. as it relates to the Naramune Products and the canine parainfluenza antigen to be transferred to Fort Dodge.

X. "Companion Animal Products Employees" means (i) Product Marketing Employees, Product Research and Development Employees, and Product Sales Employees who directly participated in the Companion Animal Products Business (irrespective of the portion of working time involved) and (ii) employees of Respondent whose principal place of work is the Companion Animal Products Facility, or was the Companion Animal Products Facility at any time within the twelve (12) month period immediately prior to the Acquisition Date other than employees who did not, in whole or part, participate in the Companion Animal Products Business.

Y. "Companion Animal Products Facility" means all assets comprising the facilities of Respondent located at 800 Fifth Street NW, Fort Dodge, Iowa, including assets to be transferred into the facilities pursuant to the Companion Animal Products Divestiture Agreements. These assets include, without limitation, all of the following: real estate; buildings; warehouses; storage tanks; structures; manufacturing equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies associated with each particular facility; and other tangible property, owned, leased, or operated on or behalf of Respondent.

Z. "Companion Animal Products License" means a perpetual, non-exclusive, fully paid-up and royalty-free license with rights to sublicense, in the Geographic Territory, the following as of the Companion Animal Products Closing Date:

1. All Patents owned, licensed or controlled by Respondent related to a Companion Animal Product or a Companion Animal Pipeline Product that Respondent can demonstrate are also related to a Retained Product that is being marketed or sold as of the Acquisition Date;

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 Companion Animal Product or a Companion Animal Pipeline Product that Respondent can demonstrate are also related to a Retained Product that is being developed, marketed or sold as of the Acquisition Date; and

3. Product Manufacturing Technology that is general manufacturing know-how (i.e. manufacturing know-how not exclusively related to Companion Animal Products or Companion Animal Pipeline Products) that relates to the Companion Animal Products Business or the Companion Animal Products Facility,

*provided that* for any Licensed Intellectual Property that is the subject of a license from a Third Party to the Respondent, the scope of the rights granted hereunder shall only be equal to the rights granted by the Third Party to the Respondent.

AA. "Component(s)" means any active ingredient, Antigen, nucleic acids encoding an Antigen, adjuvant, and/or other component of a Product that is intended to affect the efficacy or safety of an active ingredient of such Product; *provided however*, that Respondent may retain the right, concurrently with the Acquirer's rights, to use adjuvants and excipients that are used in Divestiture Products and Retained Products.

BB. "Contract Manufacture Products" means the Companion Animal Products for which Respondent provides finish, fill, and/or packaging services pursuant to a Remedial Agreement.

CC. "Contract Manufacture" means the finish, fill, and/or packaging of a Companion Animal Divestiture Product

by Respondent on behalf of the Companion Animal Products Acquirer.

DD. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the conduct of the Business of a specified Divestiture Product. Confidential Business Information does not include the following:

1. information relating to Respondent's general business strategies or practices that does not discuss with particularity the specified Divestiture Product;

2. information contained in documents, records, or books that is provided to an Acquirer by Respondent that is unrelated to the Divestiture Product;

3. Information prepared in connection with the Acquisition that relates to the antitrust or competition Laws of any Governmental Entity and that is protected from disclosure by attorney work-product, attorney-client, joint defense, or other privilege.

EE. "Cydectin Pipeline Products" means all Products in Development by Respondent prior to the Acquisition Date and all Products (other than the Cydectin Products) that were in Development (whether or not such Development has been discontinued) by Respondent at any time within the five (5) year period immediately preceding the Acquisition Date for use in the Geographic Territory that contain the active pharmaceutical ingredient moxidectin.

FF. "Cydectin Products" means all Products manufactured, marketed, or sold by Respondent within the Geographic Territory prior to the Acquisition for use in bovines or sheep that contain the active pharmaceutical ingredient generically known as

moxidectin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof.

GG. "Cydectin Products Acquirer" means Bayer or any other Person approved by the Commission to acquire the Cydectin Product Assets pursuant to this Order.

HH. "Cydectin Product Assets" means the Divestiture Product Assets for all Cydectin Products and Cydectin Pipeline Products.

II. "Cydectin Product Business" means the Business of Respondent related to the Cydectin Products and the Cydectin Pipeline Products to the extent that such Business is owned, controlled, or managed by Respondent and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, Respondent.

JJ. "Cydectin Products Closing Date" means the date on which the Respondent (or Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Cydectin Product Assets to an Acquirer.

KK. "Cydectin Products Divestiture Agreements" means the following agreements between Respondent and Bayer to accomplish the requirements of the Order (attached hereto as Confidential Appendix B), and all amendments, exhibits, attachments, agreements, and schedules thereto:

1. Amended and Restated Cydectin Asset Purchase Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Bayer Healthcare US Funding LLC dated as of December 5, 2016;

2. Cydectin License Agreement by and among Boehringer Ingelheim Vetmedica, Inc., Boehringer

Ingelheim Vetmedica GMBH, and Bayer HealthCare LLC; and

3. Cydectin Services Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Bayer HealthCare LLC.

LL. "Cydectin Products Employees" means Product Research and Development Employees who directly participated in the Cydectin Products Business (irrespective of the portion of working time involved).

MM. "Cydectin Product License" means a perpetual, non-exclusive, fully paid-up and royalty-free license with rights to sublicense the following as of the Cydectin Closing Date:

1. All Patents owned, licensed or controlled by Respondent related to a Cydectin Product or a Cydectin Pipeline Product that Respondent can demonstrate are also related to a Retained Product that is being marketed and sold as of the Acquisition Date;

2. trade secrets, know how, techniques, data, inventions, practices, methods, and other confidential or proprietary information related to the Cydectin Products Business, and all rights in the Geographic Territory to limit the use or disclosure thereof, that Respondent can demonstrate are also related to a Retained Product that is being marketed and sold as of the Acquisition Date; and

3. Product Manufacturing Technology that is general manufacturing know-how (i.e. manufacturing know-how not exclusively related to Cydectin Products Business) and relates to the Cydectin Products Business,

*provided that* for any Licensed Intellectual Property that is the subject of a license from a Third Party to the

Respondent, the scope of the rights granted hereunder shall only be required to be equal to the rights granted by the Third Party to the Respondent.

NN. "Designee" means any Person other than Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

OO. "Development" means all preclinical and clinical drug and biological research and development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

PP. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

*provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

QQ. "Divestiture Agreements" means the Cydectin Divestiture Agreements and Companion Animal Divestiture Agreements.

RR. "Divestiture Closing Date" means, as applicable, the Companion Animal Products Closing Date or the Cydectin Products Closing Date.

SS. "Divestiture Product Assets" means Respondent's rights, title and interest in all Respondent's assets related to the Business of a Divestiture Product, to the extent legally transferable, including without limitation the following:

1. rights to all Applications;

2. all Product Intellectual Property;

3. all Product Improvements;

4. all Product Approvals;

5. all Product Manufacturing Technology;

6. all Product Marketing Materials;

7. all Website(s) related exclusively to the Divestiture Products divested to the same Acquirer and all content related exclusively to such Divestiture Products displayed on any other Website;

8. a list of all of the Product Code Numbers, and rights, to the extent permitted by Law:

    a. to require Respondent to discontinue the use of those Product Code Numbers other than with respect to returns, rebates, allowances, and adjustments for Divestiture Products sold prior to the Acquisition Date,

    b. to prohibit Respondent from seeking from any customer any type of cross- referencing of

those Product Code Numbers with any Retained Products,

c. to seek to change any cross-referencing by a customer of those Product Code Numbers with any Retained Products (including the right to receive notification from Respondent of any such cross-referencing that is discovered by Respondent),

d. to seek cross-referencing from a customer of those Product Code Numbers with the relevant Acquirer's Product Code Numbers,

e. to approve the timing of Respondent's discontinued use of those Product Code Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Companion Animal Products sold prior to the Acquisition Date, and

f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such Product Code Numbers by Respondent prior to such notification(s) being disseminated to the customer(s);

9. all rights to all Applications or Veterinary Biological Product Authorization(s), as applicable, and the related Master Files, including without limitation, the pharmacology and toxicology data contained in all Application(s) or Veterinary Biological Product Authorization(s);

10. all Product Development Reports and research data and test results;

11. at the Acquirer's option, all Product Assumed Contracts (copies to be provided to the Acquirer on or before the relevant Divestiture Closing Date);

12. all strategic safety programs submitted to the FDA or USDA, as applicable, that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;

13. all pharmaco and vaccino vigilance data and records, post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA or USDA, as applicable, to facilitate the investigation of adverse effects;

14. a list identifying each customer and targeted customer (other than High Volume Accounts) and providing the net sales (in either units or dollars) of the Divestiture Product on an annual basis for 2014 and 2015 and on a monthly basis for 2016;

15. a list identifying each High Volume Account and providing the following information regarding the High Volume Account:

    a. the name and business contact information for the employee(s) that is or has been responsible for the purchase of the specified Divestiture Product,

    b. providing the net sales (in either units or dollars) of the Divestiture Product on an annual basis for 2014 and 2015 and on a monthly basis for 2016,

    c. inventory levels (weeks of supply) as of the Companion Animal Closing Date or Cydectin Product Closing Date, as applicable, and

    d. the anticipated reorder date of the Divestiture Product;

16. at the relevant Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as

of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods;

17. copies of all unfilled customer purchase orders for such Divestiture Product as of the Closing Date, to be provided to the relevant Acquirer not later than five (5) days after the Closing Date; and

18. all of the Respondent's books, records, and files directly related to the foregoing or to such Divested Product;

*provided, however*, that Divestiture Product Assets shall not include (1) information relating to the Respondent's general business strategies or practices relating to marketing or sales of Products that does not discuss with particularity a Divested Product, (2) administrative, financial, and accounting records; (3) assets licensed to the Acquirer pursuant to the Companion Animal Products License and the Cydectin Product License (Respondent shall, however, be required to transfer the information and assets as provided for in by the Companion Animal Products License), and (4) any other asset specifically identified in a Remedial Agreement as being retained by Respondent.

*provided, further,* Respondent shall only be required to provide copies of documents and materials for which (1) the information to be divested cannot be separated from the information to be retained in a manner that preserves its meaning and usefulness; or (2) Respondent has a legal obligation to retain the original documents or materials. If Respondent provides such copies to an Acquirer, Respondent shall also provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent provides the Acquirer with the above-described information without requiring Respondent

completely to divest itself of information that, in content, also relates to the Retained Products.

TT. "Divestiture Pipeline Products" means the Cydectin Pipeline Products and the Companion Animal Pipeline Products.

UU. "Divestiture Product(s)" means the Cydectin Products, the Cydectin Pipeline Products, the Companion Animal Products and the Companion Animal Pipeline Products, individually and collectively.

VV. "Divestiture Product Releasee(s)" means the Acquirer for the assets related to a particular Divestiture Product or any Person controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated entities.

WW. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

XX. "Domain Name" means the domain name(s), universal resource locators ("URL"), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

YY. "Field" means the prevention, treatment, diagnosis, or control of a particular disease within a particular family, genus, and/or species of non-human animals.

ZZ. "Geographic Territory" shall mean the United States of America, including all its territories and possessions.

AAA. "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.

BBB. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States of America from the Respondent was, or is projected to be among the top twenty (20) highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Acquisition Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (4) the end of the last quarter following the Acquisition and/or the Closing Date.

CCC. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

DDD. "Master Cell(s)" means the master cell, working cell, and production cell existing as of the Companion Animal Closing Date required or used in the production of a Product.

EEE. "Master Files" means submissions made to the FDA in order to provide confidential, detailed information about facilities, processes, or articles used in the manufacturing, processing, packaging, and storing of one or more veterinary drugs, and includes both master files maintained by the FDA Center for Drug Evaluation and Research (generally referred to as drug master files) and those maintained by the FDA Center for Veterinary Medicine (generally referred to as veterinary master files).

FFF. "Master Seed(s)" means the master seed, working seed and production seed existing as of the Companion

Animal Closing Date required or used in the production of a Product.

GGG. "Monitor" means any monitor appointed pursuant to Paragraph V of this Order or Paragraph V of the Order to Maintain Assets.

HHH. "Naramune Products" means Products marketed by Respondent in the Geographic Territory at the time of the Acquisition under the trade name Naramune (or private label analogs).

III. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

JJJ. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned or licensed by Respondent as of the Closing Date (*except* where this Order specifies a different time).

KKK. "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.

LLL. "Process and Analytical Documents" means the following documents, whether in paper, electronic or other format, related to the processes and Product Manufacturing Technology used by Respondent to manufacture, or have manufactured, the Divestiture

Products and the applicable analytical methods used by Respondent:

1. Master Cell and Master Seed bank documentation, which includes but is not limited to, the following:

    a. Master Cell Line and Master Seed Generation Technical Report (including: description of the host cell history, cell line generation procedures, vector construction, selection/cloning, if any, and stability data,

    b. Preliminary Master Cell and Master Seed Bank Preparation Technical Report (including: description of banking procedures including storage conditions, vial thaw results, and in-house and contract lab test reports (sterility, mycoplasma, and any other contaminants)),

    c. Master Cell and Master Seed Stability Technical Report (including: description of methodology, evaluation of cell growth and Master Seed titers (at increasing cell age), and any results of genetic mutation studies),

    d. Master Cell and Master Seed Banking Process Description (including: list of raw materials and suppliers, list of consumables, list of equipment, media and solution recipes, culture working volumes and conditions, criteria for transfer, seed ratios and process set points),

    e. Master Cell and Master Seed Bank Specification (including: quality assurance approved Master Cell and Master Seed bank specification),

    f. Master Cell and Master Seed Bank Raw Materials Documentation (including: list of raw materials, source and lot numbers used for Master Cell and Master Seed banking and verification of origin),

g. Master Cell and Master Seed Bank Batch Record (including: executed and released batch records for Master Cell and Master Seed bank preparation and methodology and certificate of analysis), and

h. Master Cell and Master Seed Bank Test Reports (including: copy of test reports for safety and quality assurance testing of Master Cell and Master Seed bank by in-house and contract lab);

2. Drug and Biological Substance Process Information Documentation, which includes the following:

a. Cell Culture Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, media and solution recipes, culture working volumes, criteria for transfer, seed ratios, process set points, sampling requirements, criteria for feeding, and feed schedule),

b. Harvest Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, sampling requirements, and criteria for initiating harvest),

c. Purification Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, analytic and quality assurance data obtained at the beginning, during and ending of the Run, and sampling requirements),

d. Drug Substance Formulation Process Description for Specified Engineering Run

(including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, and sampling requirements),

e. Cell Culture Process Development Reports (i.e., summary of experiments performed during development of the cell culturing process),

f. Harvest Process Development Reports (i.e., summary of experiments performed during development of the harvesting process),

g. Purification Process Development Reports (i.e., summary of experiments performed during development of the purification process),

h. Formulation Process Development Reports (i.e., summary of experiments performed during development of the formulation process),

i. Viral Clearance Study In-House and Contract Lab Reports (i.e., summary of viral clearance/inactivation study results and conclusions (i.e., total logs clearance)),

j. Drug and Biological Substance Specification (i.e., the quality assurance approved drug substance specification and biological quality standards for all Components),

k. Drug and Biological Substance Process Raw Materials Documentation (including: list of raw materials used for drug and biological substance manufacturing and verification of origin, including specifications and risk assessment),

l. Batch Records for Agency Manufacturing Standards - Purification (i.e., executed and

released batch records, including in-process controls and testing results),

m. Batch Records for Agency Manufacturing Standards - Formulation (i.e., executed and released batch records, including in-process controls and testing results),

n. Drug Substance Stability Reports (including: summary of drug substance stability), and

o. Test Results for Agency Manufacturing Standards (including: antibody concentration, endotoxin, sterility, mycoplasma, in vitro viral, and bioburden);

3. Process for Technical Transfer Documentation including: technical transfer plan detailing responsibilities, deliverables and targeted time line; transfer protocols, detailing responsibilities, procedures, sampling plan and criteria for transfer success for each of the following: cell culture process, harvest process, purification process, formulation process; transfer reports summarizing the results of the following transfers: cell culture process, harvest process, purification process, formulation process; and

4. Analytical Methods for Technical Transfer: potency, identity, and safety assay development report detailing the development and qualification of the assay; potency and safety assay transfer protocol, detailing responsibilities, procedures, and criteria for transfer success; and potency assay transfer report summarizing the results of the transfer.

MMM. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound that is referenced as the composition's pharmaceutically, biologically, or genetically active ingredient.

NNN. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application or Veterinary Biological Product Authorization.

OOO. "Product Assumed Contracts" means contracts or agreements related to a Divestiture Product (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. pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Divestiture Product from the Respondent;

2. pursuant to which Respondent purchases or had planned to purchase the active pharmaceutical ingredient, Biological Manufacturing and Testing Materials, Components, or other necessary ingredient from any Third Party for use in connection with the manufacture of the Divestiture Product;

3. relating to any Clinical Trials involving the Divestiture Product;

4. with universities or other research institutions for the use of the Divestiture Product in scientific research;

5. relating to the particularized marketing of the Divestiture Product or educational matters relating solely to one or more Divestiture Products;

6. pursuant to which a Third Party manufactures or packages the Divestiture Product on behalf of Respondent;

7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Divestiture Product to Respondent;

8. pursuant to which a Third Party is licensed by Respondent to use the Product Manufacturing Technology;

9. constituting confidentiality agreements involving the Divestiture Product;

10. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the Divestiture Product;

11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Products to Respondent including, but not limited to, consultation arrangements; and/or

12. pursuant to which any Third Party collaborates with Respondent in the performance of research, Development, marketing, distribution or selling of the Divestiture Product or the Divestiture Product business;

*provided, however*, that where any such contract or agreement also relates to a Retained Product or other assets not being divested to an Acquirer, Respondent shall provide to the Acquirer all rights under the contract or agreement that are related to Divestiture Products, but concurrently may retain similar rights with respect to the Retained Products or other assets.

PPP. "Product Code Numbers means:

1. for the Cydectin Products, the National Drug Code ("NDC") 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; or

2. for the Companion Animal Products, any labeler code assigned by the USDA and any additional number assigned by the holder of the Product Approvals related to the Product that appear on the packaging or labeling of a specific Product.

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 animal owners and/or breeders, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of the Divestiture Product or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Product, including all copyrights in raw data relating to Clinical Trials of the Divestiture 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, the Divestiture Product sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding

any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Divestiture Product(s) or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; all correspondence with the FDA; and all correspondence with the USDA.

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 to the Respondent from the FDA or USDA, as applicable to the specified Product, and from the Respondent to the FDA or USDA, as applicable to the specified Product, relating to the Application(s) or Veterinary Biological Product Authorization(s) submitted by, on behalf of, or acquired by, the Respondent related to the Divestiture Product;

5. annual and periodic reports related to the above-described Application(s) or Veterinary Biological

Product Authorization(s), including any safety update reports;

6. FDA or USDA, as applicable to the specified Product, approved Product labeling related to the Divestiture Product;

7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);

8. FDA or USDA, as applicable to the specified Product, approved circulars for animal owners and/or breeders and information related to the Divestiture Product;

9. adverse event/serious adverse event summaries related to the Divestiture Product;

10. summary of Product complaints from physicians or veterinarians related to the Divestiture Product;

11. summary of Product complaints from customers related to the Divestiture Product; and

12. Product recall reports including those filed with the FDA or USDA, as applicable to the specified Product, related to the Divestiture Product.

SSS. "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 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 Respondent or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent or the related logos thereof.

TTT. "Product Improvements" means all of the following that are in existence as of the Divestiture Closing Date for the relevant Divestiture Product:

1. for Companion Animal Products and Companion Animal Pipeline Products, any new, improved or modified composition, formulation or line extension of, or derived from, a Companion Animal Product or Companion Animal Pipeline Product (including, without limitation, the addition, subtraction, substitution and/or modification of one or more Components in an Companion Animal Products or Companion Animal Pipeline Product), including, without limitation, the following:

   a. the combination of one or more such Components with other Components,

   b. the substitution of a Component in a Companion Animal Product or Companion Animal Pipeline Product with a different Component (*e.g.*, without limitation, substitution with an Antigen from the same or a different virus, bacterin, substitution of one strain of virus/bacterium for another, substitution of an Antigen with a nucleic acid encoding an Antigen, substitution of an Antigen by a recombinant Antigen with a

nucleic acid encoding an Antigen, and/or substitution of an Antigen by a recombinant Antigen in a viral vector such as baculo-virus vector), and/or

c. modification of a Component in a Companion Animal Product or Companion Animal Pipeline Product (*e.g.*, without limitation, modifying the Antigen/virus used in a Product by mutation, chimerization, etc.); and

2. for Cydectin Products and Cydectin Pipeline Products, any new, improved or modified composition (*e.g.*, without limitation, structural modifications to the active pharmaceutical ingredients, and/or different salt forms, hydrates or polymorphs of such active pharmaceutical ingredients), combination, formulation or line extension of, or derived from, a Cydectin Product or Cydectin Pipeline Product (including, without limitation, the addition, subtraction, substitution and/or modification of one or more Components in a Cydectin Product or Cydectin Pipeline Product).

UUU. "Product Manufacturing Technology" means:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of a Divestiture Product, including, but not limited to, the following: compositions; product specifications; processes; product designs and plans; trade secrets, ideas and concepts; manufacturing, engineering, and other manuals and drawings; standard operating procedures and flow diagrams; chemical and research records; cell culture processes (including all cell culture processes developed or being developed for use in such manufacture, and results of all experiments used to evaluate such processes); product preparation (including vial thaw and inoculum preparation), synthesis, culture (including fed-

batch bioreactor culture), recovery and purification (including chromatography and filtration steps); product formulation (including concentration, buffer exchange, and excipient addition); safety, quality assurance and quality control processes, techniques and specifications; analytical methods for process controls and drug substance release; clinical data; annual product reviews; regulatory communications; control history; current and historical information associated with the FDA Application(s) conformance, Veterinary Biologic Product Authorization(s), and cGMP compliance, as applicable; Agency Manufacturing Standards compliance; labeling and all other information related to the manufacturing process; and supplier lists;

2. all Biological Manufacturing and Testing Materials related to the Divestiture Products;

3. all ingredients, materials, or components used in the manufacture of the Divestiture Product including the active pharmaceutical ingredient, excipients and packaging materials;

4. all Process and Analytical Documents; and

5. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture the Divestiture Product(s).

VVV. "Product Marketing Materials" means all marketing or promotional materials to the extent used specifically in the marketing or sale of a Divestiture Product in the Geographic Territory as of the relevant Divestiture 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, advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, Product labels, and packaging, television masters and other similar materials related to the Divestiture Product(s).

WWW. "Product Marketing Employees" means management level employees of Respondent who participate in the marketing, contracting, or promotion of Products in the Geographic Territory or have so participated during the eighteen (18) month period immediately prior to the Acquisition Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, veterinary market and other specialty markets, and exclude administrative assistants.

XXX. "Product Research and Development Employees" means salaried employees of Respondent who directly participate in the research, Development, or regulatory approval process, or clinical studies of Products or so participated during the eighteen (18) month period immediately prior to the Closing Date, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance.

YYY. "Product Sales Employees" means employees of Respondent who directly participate in detailing, marketing or promotion of Products in the Geographic Territory directly to veterinarians, animal breeders, and/or professional distributors, or have so participated during the twelve (12) month period immediately prior to the Acquisition Date.

ZZZ. "Product Trade Dress" means the current trade dress of the Divestiture Product, including without limitation, Product packaging, and the lettering of the Product trade name or brand name.

AAAA. "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 the Divestiture Product(s). The term "Product Trademarks" includes, without limitation, all trademarks specifically identified in the definition of Companion Animal Products and Cydectin Products, and any variations of such trademarks.

BBBB. "Proposed Acquirer" means a Person proposed by Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondent pursuant to this Order.

CCCC. "Remedial Agreement(s)" means the following:

1. any agreement between Respondent 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, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final;

2. any agreement between Respondent and a Third Party to affect the assignment of assets or rights of

Respondent 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;

3. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a 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.

DDDD. "Retained Product" means any Product of Respondent, including a pipeline Product, that is not a Divestiture Product.

EEEE. "Solo Jec Products" means Products referred to on Schedule 1.01(f) of the Fort Dodge Asset Purchase Agreement by and among Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc. and Eli Lilly and Company (solely for the purposes of Section 12.16).

FFFF. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars of manufacturing the 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: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) 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.

GGGG. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

1. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer and/or its Designee, and the Monitor, 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(s) 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 Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Designee to:

   a. manufacture the specified Divestiture Product(s) in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such Divestiture Product;

   b. obtain any Product Approvals necessary for the Acquirer or its Designee, to manufacture, distribute, market, and sell the specified Divestiture Product(s) in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product(s); and

   c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product(s).

HHHH. "Third Party(ies)" means any non-governmental Person other than the following: Respondent, Sanofi, the Cydectin Acquirer and the Companion Animal Acquirer.

IIII. "Veterinary Biological Product Authorization(s)" means all of the following, as defined in Title 9 of the Code of Federal Regulations: a U.S. Veterinary Biological Product License or Permit, and a U.S. Veterinary Biological Establishment License, for a Product filed or to be filed with the USDA, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, all outlines of production, protocols, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent and the USDA or other Agency related thereto. The term "Veterinary Biological Product Authorization(s)" and all of the foregoing terms or abbreviations include the foreign equivalents of the above-referenced filings and activities with the foreign counterpart(s) of the USDA.

JJJJ. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondent; *provided, however,* "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Product(s).

## II.

**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) days after the Acquisition Date, Respondent shall divest the Companion Animal Products Assets and grant the Companion Animal Products License, absolutely and in good faith, to Elanco pursuant to, and in accordance with, the Companion Animal Divestiture Agreements,

*provided, however*, that if Respondent has divested the Companion Animal Products Assets and granted the Companion Animal Products License to Elanco prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Elanco is not an acceptable purchaser of the Companion Animal Products Assets or licensee of the Companion Animal Products License, then Respondent shall immediately rescind the transaction with Elanco, in whole or in part, as directed by the Commission, and shall divest the Companion Animal Products Assets and grant the Companion Animal Products License (as applicable) within one hundred eighty (180) days after this Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondent has divested the Companion Animal Products Assets and granted the Companion Animal Products License to Elanco prior to this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture or license grant was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Companion Animal Products Assets or grant of the Companion Animal Products License, as applicable, to Elanco (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 Companion Animal Products Closing Date, Respondent shall:

1. provide the Companion Animal Products Acquirer with the opportunity to review all Product Contracts related to the Companion Animal Products and the Companion Animal Pipeline Products for the purpose of determining whether to assume such contracts or agreements, and

2. secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Companion Animal Products Assets and grant the Companion Animal Products Licenses to the Companion Animal Products Acquirer and permit the Acquirer to continue the Companion Animal Products Business,

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

C. Within five (5) days after the Companion Animal Products Closing Date, Respondent shall provide to the Companion Animal Products Acquirer,

1. Copies of all unfilled customer purchase orders for the Companion Animal Products as of the Companion Animal Closing Date; and

2. The information identified in Paragraphs I.SS(8), (14) and (15) regarding each Companion Animal Product and Companion Animal Pipeline Product.

D. Respondent shall provide, or cause to be provided, to the Companion Animal Products Acquirer all Product Manufacturing Technology related to the Companion Animal Products in a manner consistent with the Technology Transfer Standards and pursuant to an agreement approved by the Commission as a Remedial Agreement. The duration of such Remedial Agreement shall be no less than two (2) years, except as to any service for which a longer time period is identified in a Remedial Agreement. Further, at the request of the Acquirer, the term of any service offered under the agreement shall be extended for up to two (2) additional six (6) month periods if the monitor, in consultation with Commission staff, determines that such extensions are reasonably necessary to fulfill the requirements of this Paragraph.

E. Respondent shall:

1. not enforce any agreement that limits or otherwise impairs the ability of the Companion Animal Acquirer to use or to acquire the Companion Animal Products Assets or the Companion Animal Products License (including but not limited to, all Product Manufacturing Technology, and Confidential Business Information related to the Companion Animal Products) in the Companion Animal Products Business, or to operate the Companion Animal Products Facility; and

2. no later than ten (10) days after the Companion Animal Closing Date, grant to each Third Party subject to an agreement that limits or otherwise impairs the ability of the Companion Animal Acquirer to use or to acquire, pursuant to and in accordance with this Order, the Companion Animal Products Assets or Companion Animal Products License (including but not limited to Product Manufacturing Technology and related intellectual property and Companion Animal Confidential Business Information) or operate the Companion Animal Products Facility, a release that allows the Third Party to provide the relevant information to the Companion Animal Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer and the Monitor (if one has been appointed).

F. Respondent shall:

1. submit to the Companion Animal Acquirer, at Respondent's expense, all Confidential Business Information related to the Companion Animal Products, the Companion Animal Pipeline Product, the Companion Animal Facility or the Companion Animal Products Business ("Companion Animal Confidential Information");

2. deliver the Companion Animal Confidential Information to the Companion Animal Products Acquirer in good faith, in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all Companion Animal Confidential Information, provide the Companion Animal Products Acquirer and the Monitor with access to the Companion Animal Confidential Information and employees who

possess or are able to locate such information for the purposes of identifying the books, records, and files that contain Companion Animal Confidential Information, and facilitating the delivery of the Companion Animal Confidential Information in a manner consistent with this Order;

4. on or before the Companion Animal Products Closing Date, and as a condition of continued employment, require that each employee whose responsibilities (in whole or part) include sales or marketing and who has or may have had access to Companion Animal Confidential Information, and the direct supervisor(s) of each such employee, sign a confidentiality agreement pursuant to which the employee is required to maintain the confidentiality of the Companion Animal Confidential Information and not disclose it to other employees, executives, or other personnel of the Respondent (other than as necessary to comply with the requirements of this Order). Respondent shall maintain complete records of signed confidentiality agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming that all confidentiality agreements have been signed; and

5. not later than thirty (30) days after the Companion Animal Closing Date, provide written notification of the restrictions on the use and disclosure of Companion Animal Confidential Information to all of its employees who may be in possession of or have access to Companion Animal Confidential Information. Respondent 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 Companion Animal Closing Date. Respondent shall provide a copy of the notification to the Companion Animal Acquirer. Respondent shall maintain complete records of all such notifications

at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent shall provide the Companion Animal Products Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

G. Respondent shall deliver to the Companion Animal Products Acquirer the following information regarding each Companion Animal Products Employee no later than ten (10) days after such information is requested by either the Acquirer or staff of the Commission:

1. direct contact information for the employee, including telephone number;

2. the date of hire and effective service date;

3. job title or position held;

4. a specific description of the employee's responsibilities related to the Companion Animal Products; provided, however, in lieu of this description, the Respondent may provide the employee's most recent performance appraisal;

5. the base salary or current wages;

6. the most recent bonus paid, aggregate annual compensation for the Respondent's last fiscal year, and current target or guaranteed bonus, if any;

7. employment status (i.e., active or on leave or disability; full-time or part-time);

8. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

9. at the Acquirer's option, a copy of all applicable employee benefit plans and summary plan descriptions (if any),

*provided that,* Respondent may condition providing this information for an employee whose principal place of work is not the Companion Animal Products Facility on the Acquirer's written confirmation that it will treat the information as confidential, use the information solely in connection with hiring or considering whether to hire the employees and restrict access to the information to only those employees or representatives who need such access in connection with the specified and permitted uses of the information.

H. For a period ending twelve (12) months after the Companion Animal Closing Date, Respondent shall:

1. provide the Companion Animal Acquirer with the opportunity to enter into employment contracts with the Companion Animal Products Employees. This period is hereinafter referred to as the "Companion Animal Products Employee Access Period;"

2. not interfere with the hiring or employing by the Companion Animal Acquirer of the Companion Animal Products Employees, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Acquirer, including without limitation, any non-compete or nondisclosure provision of employment with respect to a Companion Animal Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Companion Animal Acquirer;

3. not make any counteroffer to any Companion Animal Products Employee who has received a

written offer of employment from the Companion Animal Acquirer; and

4. not directly or indirectly, hire, solicit or otherwise attempt to induce any employee of the Acquirer to terminate his or her employment relationship with the Acquirer;

*provided, however*, Respondent may hire any former employee of Respondent whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the terms of the Order, and

*provided further*, that Respondent may advertise for employees in newspapers, trade publications, or other media not targeted specifically at employees of the Acquirer; and may hire an employee of the Acquirer who contacts Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent;

Failure by Respondent to provide any information requested in Paragraph II.G above within the time provided therein shall extend the time period in this Paragraph II.H in an amount equal to the delay.

I. Until the Companion Animal Closing Date, Respondent shall provide all Companion Animal Products Employees with reasonable financial incentives to continue in their positions and to research, Develop, market, sell, and manufacture the Companion Animal Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Companion Animal Product(s) and to ensure successful execution of the pre-Acquisition plans for such Companion Animal Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Companion Animal Products Closing Date,

including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).

J. Respondent shall:

1. upon reasonable written notice and request from the Companion Animal Acquirer to Respondent, Contract Manufacture and deliver, or cause to be manufactured and delivered, in a timely manner and under reasonable terms and conditions, a supply of any requested Contract Manufacture Product at the Supply Cost, for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondent;

2. make representations and warranties to the Companion Animal Products Acquirer that each Contract Manufacture Product supplied by the Respondent meets the relevant Agency-approved specifications. Respondent shall agree to indemnify, defend, and hold the Companion Animal Products Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of Respondent to meet cGMP in the Contract Manufacture of a Product supplied to the Companion Animal Products Acquirer pursuant to a Remedial Agreement. This obligation may be made contingent upon the Companion Animal Products Acquirer giving the Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

*provided, however*, that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain

limits on Respondent's aggregate liability to the Acquirer for such a breach;

3. give priority to supplying a Contract Manufacture Product to the Companion Animal Products Acquirer over manufacturing and supplying Products for Respondent's own use or sale;

4. make representations and warranties to the Companion Animal Products Acquirer that Respondent shall hold harmless and indemnify the Companion Animal Products 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 Respondent can demonstrate that the failure was beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent,

*provided, however*, that where (i) an agreement to divest the Companion Animal Products Assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, the agreement may contain limits on the Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of the Companion Animal Products Acquirer or the Monitor, make available to the Companion Animal Products Acquirer and the Monitor all records generated or created after the Closing Date that relate to the manufacture of the Contract Manufacture Products;

6. during the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Products; and

7. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Contract Manufacture.

The foregoing provisions shall remain in effect with respect to each Contract Manufacturer Product until the date the Companion Animal Products Acquirer is able to finish, fill, and package the Product in commercial quantities, in a manner consistent with Agency and Manufacturing Standards, independently of Respondent.

K. Respondent shall cease having the Naramune Products manufactured at the Companion Animal Products Facility as soon as practicable after the Companion Animal Closing Date, and in no event later than one year after the Companion Animal Closing Date.

L. Until Respondent completes the divestiture of the Companion Animal Products Assets (including fully providing Product Manufacturing Technology to the Companion Animal Acquirer) Respondent shall take all actions necessary to:

1. maintain the full economic viability and marketability of the Business associated with the Companion Animal Products;

2. minimize any risk of loss of competitive potential for that Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Companion Animal Products;

4. ensure the assets related to the Companion Animal Products are provided to the Companion Animal Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the associated Business; and

5. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology.

M. Respondent shall not sell, transfer, encumber, or otherwise impair the Companion Animal Products Assets (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 related to the Companion Animal Products, and shall continue in the same manner all current and planned capital expenditure plans and products.

## III.

**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) days after the Acquisition Date, Respondent shall divest the Cydectin Product Assets and grant the Cydectin Product License, absolutely and in good faith, to Bayer pursuant to, and in accordance with, the Cydectin Divestiture Agreements,

*provided, however*, that if Respondent has divested the Cydectin Product Assets and granted the Cydectin Product License to Bayer prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Bayer is not an acceptable purchaser of the Cydectin Product Assets or licensee of the Cydectin Product License, then Respondent shall immediately rescind the transaction with Bayer, in whole or in part, as directed by the Commission, and shall divest the Cydectin Product Assets and grant the Cydectin Product License (as applicable) within one hundred eighty (180) days after this Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondent has divested the Cydectin Product Assets and granted the Cydectin Product License to Bayer prior to this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture or license grant was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Cydectin Product Assets or grant of the Cydectin Product License, as applicable, to Bayer (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 Cydectin Product Closing Date, Respondent shall:

1. provide the Cydectin Product Acquirer with the opportunity to review all Product Contracts related to the Cydectin Products and the Cydectin Pipeline Products for the purpose of determining whether to assume such contracts or agreements: and

2. secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Cydectin Product Assets and grant the Cydectin Product Licenses to the Cydectin Products Acquirer and permit the Acquirer to continue the Cydectin Products Business,

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

C. Within five (5) days after the Cydectin Products Closing Date, Respondent shall provide to the Cydectin Products Acquirer,

1. copies of all unfilled customer purchase orders for the Cydectin Products as of the Cydectin Closing Date; and

2. the customer information identified in Paragraphs I.SS(8), (14) and (15) regarding each Cydectin Product and Cydectin Pipeline Product.

D. Respondent shall provide, or cause to be provided, to the Cydectin Product Acquirer all Product Manufacturing Technology related to the Cydectin Products in a manner consistent with the Technology Transfer Standards and pursuant to an agreement approved by the Commission as a Remedial Agreement. The duration of such Remedial Agreement shall be no less than one (1) year and, at the request of the Acquirer, shall be extended for up to one (1) additional six (6) month period if the monitor, in consultation with Commission staff, determines that such extensions are reasonably necessary to fulfill the requirements of this Paragraph.

E. Respondent shall:

1. not enforce any agreement that limits or otherwise impairs the ability of the Cydectin Acquirer to use or to acquire the Cydectin Products Assets or the Cydectin Products License (including but not limited to, all Product Manufacturing Technology, and Confidential Business Information related to the Cydectin Products) in the Cydectin Products Business, and

2. no later than ten (10) days after the Cydectin Closing Date, grant to each Third Party subject to an agreement that limits or otherwise impairs the ability of the Cydectin Acquirer to use or to acquire, in accordance with and pursuant to this Order, the Cydectin Product Assets or Cydectin Product License (including without limitation Product Manufacturing Technology and related intellectual property and Cydectin Confidential

Business Information), a release that allows the Third Party to provide the relevant information to the Cydectin Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer and the Monitor.

F. Respondent shall:

1. submit to the Cydectin Acquirer, at Respondent's expense, all Confidential Business Information related to the Cydectin Products and the Cydectin Pipeline Products and the Cydectin Products Business ("Cydectin Confidential Information");

2. deliver the Cydectin Confidential Information to the Cydectin Product Acquirer in good faith, in a timely manner *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of the Cydectin Confidential Information to the Cydectin Product Acquirer, provide the Acquirer and the Monitor with access to the Cydectin Confidential Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain Cydectin Confidential Information, and facilitating the delivery of the Cydectin Confidential Information in a manner consistent with this Order;

4. on or before the Cydectin Product Closing Date, and as a condition of continued employment, require that each employee whose responsibilities (in whole or part) include sales or marketing and who has or may have had access to Cydectin Confidential Information, and the direct supervisor(s) of each such employee, sign a

confidentiality agreement pursuant to which the employee is required to maintain the confidentiality of the Cydectin Confidential Information and not disclose it to other employees, executives, or other personnel of the Respondent (other than as necessary to comply with the requirements of this Order). Respondent shall maintain complete records of signed confidentiality agreement at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming that all confidentiality agreements have been signed; and

5. not later than thirty (30) days after the Cydectin Closing Date, provide written notification of the restrictions on the use and disclosure of Cydectin Confidential Information to all of its employees who may be in possession of or have access to Cydectin Confidential Information. Respondent 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 Cydectin Closing Date. Respondent shall provide a copy of the notification to the Cydectin Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent shall provide the Cydectin Product Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

G. Respondent shall deliver to the Cydectin Products Acquirer the following information regarding each Cydectin Products Employee no later than ten (10) days after such information is requested by either the Acquirer or staff of the Commission:

1. direct contact information for the employee, including telephone number;

2. the date of hire and effective service date;

3. job title or position held;

4. a specific description of the employee's responsibilities related to the Cydectin Products; provided, however, in lieu of this description, the Respondent may provide the employee's most recent performance appraisal;

5. the base salary or current wages;

6. the most recent bonus paid, aggregate annual compensation for the Respondent's last fiscal year, and current target or guaranteed bonus, if any;

7. employment status (i.e., active or on leave or disability; full-time or part-time);

8. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

9. at the Acquirer's option, a copy of all applicable employee benefit plans and summary plan descriptions (if any),

*provided that*, Respondent may condition providing this information on the Acquirer's written confirmation that it will treat the information as confidential, use the information solely in connection with hiring or considering whether to hire the employees and restrict access to the information to only those employees or representatives who need such access in connection with the specified and permitted uses of the information.

H. For a period ending twelve (12) months after the Cydectin Closing Date, Respondent shall:

1. provide the Cydectin Acquirer with the opportunity to enter into employment contracts with the Cydectin Product Employees. This period is hereinafter referred to as the "Cydectin Product Employee Access Period;"

2. not interfere with the hiring or employing by the Cydectin Acquirer of the Cydectin Product Employees, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Acquirer, including without limitation, any non-compete or nondisclosure provision of employment with respect to a Cydectin Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Cydectin Acquirer;

3. not make any counteroffer to any Cydectin Product Employee who has received a written offer of employment from the Cydectin Acquirer; and

4. not directly or indirectly, hire, solicit or otherwise attempt to induce any employee of the Acquirer to terminate his or her employment relationship with the Acquirer;

*provided, however*, Respondent may hire any former employee of Respondent whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the terms of the Order, and

*provided further*, that Respondent may advertise for employees in newspapers, trade publications, or other media not targeted specifically at employees of the Acquirer; and may hire an employee of the Acquirer who contacts Respondent on his or her own initiative

without any direct or indirect solicitation or encouragement from Respondent;

Failure by Respondent to provide any information requested in Paragraph III.G above within the time provided therein shall extend the time period in this Paragraph III.H in an amount equal to the delay.

I. Until the Cydectin Closing Date, provide all Cydectin Products Employees with reasonable financial incentives to continue in their positions and to research, Develop, market, sell, and manufacture the Cydectin Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Cydectin Product(s) and to ensure successful execution of the pre-Acquisition plans for such Cydectin Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Cydectin Product Closing Date, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).

J. Until Respondent completes the divestiture of the Cydectin Product Assets (including fully providing Product Manufacturing Technology to the Cydectin Acquirer) Respondent shall take all actions necessary to:

1. maintain the full economic viability and marketability of the Business associated with the Cydectin Products;

2. minimize any risk of loss of competitive potential for that Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Cydectin Products;

4. ensure the assets related to the Cydectin Products are provided to the Cydectin Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the associated Business; and

5. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology.

K. Respondent shall not sell, transfer, encumber, or otherwise impair the Cydectin Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Business related to the Cydectin Products.

## IV.

**IT IS FURTHER ORDERED** that

A. Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information solely related to the Divestiture Product Assets or the Business of the Divestiture Products, other than as necessary to comply with the requirements of this Order, Respondent's obligations to each respective Acquirer under the terms of any related Remedial Agreement, or applicable Law;

2. not disclose or convey any Confidential Business Information solely related to the Divestiture Product Assets or the Business of the Divestiture Products, directly or indirectly, to any Person except (i) the Acquirer of the relevant Divestiture Product, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of a Divestiture Product to the marketing or sales employees associated with the Business related to those Retained Products in the Geographic Territory that are the Therapeutic Equivalent of the Divestiture Product; and

4. take all reasonable steps to ensure the Acquirer:

   a. does not use, directly or indirectly, any Confidential Business Information related to the Naramune Products other than as necessary to comply with the Fort Dodge Transitional Manufacturing and Supply Agreement by and between Boehringer Ingelheim Vetmedica, Inc. and Elanco US Inc., or any applicable Law

   b. does not disclose or convey any Confidential Business Information related the Naramune Products directly or indirectly, to any Person except (i) the Respondent, other Persons specifically authorized by Respondent to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed); and

   c. does not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Naramune Products the marketing or sales employees associated with the Companion Animal Products Business.

B. Respondent shall not join, file, prosecute, or maintain any suit, in law or equity, against an Acquirer, any Person controlled by or under common control with an Acquirer, the Manufacturing Designee of an Acquirer, or any Person that has an agreement with an Acquirer

to commercialize, distribute, market or import a Divestiture Product:

1. under any Patent owned by or licensed to the 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; or

2. under any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to the 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 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, or the supply, distribution, sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from the 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 , or the supply, distribution, 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 the Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

C. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation 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: (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, or the supply, distribution, sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.

D. For any patent infringement suit filed prior to the relevant Divestiture Closing Date in which Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that Respondent has prepared or is preparing to defend against as of such Divestiture 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 Product(s); or (ii) the use within, import into, or the supply, distribution, sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer, Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from the 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 the Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work product in the possession of the Respondent's outside counsel related to that Divestiture Product.

E. The purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on the Respondent 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;

2. to create a viable and effective competitor that is independent of the Respondent 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.

F. Respondent shall not, in the Geographic Territory:

1. use the Product Trademarks related to the Divestiture Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark, except to manufacture Retained Products for export from the Geographic Territory;

2. attempt to register such Product Trademarks;

3. attempt to register any mark confusingly similar to such Product Trademarks;

4. challenge or interfere with the relevant Acquirer's use and registration of such Product Trademarks; or

5. challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

*provided, however*, that this paragraph shall not preclude Respondent from continuing to use all trademarks, trade names, or service marks that have been in use in commerce on a Retained Product at any time prior to the Acquisition Date.

## V.

**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 this Order, the Order to Maintain Assets and the Remedial Agreements. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to which the Monitor

and Respondent agree and that the Commission approves.

B. The Commission appoints Dr. Stephen J. Bell as a Monitor and approves the agreement between Dr. Bell and Respondent, attached as Public Appendix A and Non-Public Appendix A-1 to this Order.

C. The Monitor's duties and responsibilities shall include the following:

1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;

2. The Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related 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 purposes of this Order and in consultation with the Commission;

3. 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; and

4. The Monitor shall evaluate the reports submitted to the Commission by any Respondent pursuant to this Order, the Order to Maintain Assets, and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, report in writing to the Commission concerning the performance by Respondent of its obligations under the Orders, including without limitation the transfer of Naramune-2 manufacturing from the Companion Animal Products Facility and the completion of the Fill and Packaging Improvements.

D. Respondent shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:

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

2. 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, the Order to Maintain Assets and the Remedial Agreements;

3. Subject to any demonstrated legally recognized privilege, the Respondent shall provide the Monitor with 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 the Orders, including, but not limited to, its obligations related to the relevant assets; and

4. Respondent shall deliver to the Monitor a copy of each report submitted to the Commission pursuant to this Order, the Order to Maintain Assets or the Consent Agreement.

E. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; however such agreement shall not limit the ability of the Monitor to provide information to the Commission without the consent of Respondent.

F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Respondent's materials and information received in connection with the performance of the Monitor's duties,

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

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor.

I. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

J. The Monitor shall serve until the later of: a) the completion of the transfer of the Divestiture Products, including the transfer and delivery of the related Product Manufacturing Technology; b) the date the Companion Animal Acquirer is able, independently of the Respondent, to manufacture the Contract Manufacture Products in final finished form, in commercial quantities and in a manner consistent with cGMP; or c) four (4) years.

## VI.

**IT IS FURTHER ORDERED** that:

A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the 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 Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

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, 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 Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

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

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* 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.

## VII.

**IT IS FURTHER ORDERED** that

A. It shall not be violation of this Order for Respondent's counsel (including in house counsel under appropriate confidentiality arrangements) to retain documents or other materials provided to an Acquirer, or access original documents provided to an Acquirer to:

1. assure Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

2. 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,

*so long as* copies of such documents are insufficient or otherwise unavailable, Respondent requires those who view such un-redacted 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 Respondent uses best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

## VIII.

**IT IS FURTHER ORDERED** that:

A. Any Remedial Agreement shall be incorporated by reference into this Order and made a part hereof, and

Respondent shall comply with all terms of the Remedial Agreement. A breach by Respondent of any term of a Remedial Agreement shall constitute a violation of this Order.

B. A Remedial Agreement 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 rights or benefits of the Acquirer or to reduce any obligations of Respondent under any Remedial Agreement. To the extent that any term of a 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.

C. Respondent shall not modify, replace or extend the terms of a Remedial Agreement without the prior approval of the Commission, except as otherwise provided under Rule §2.41(f), 16 C.F.R. §2.41(f).

D. Respondent 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 Respondent's obligation to the Acquirer pursuant to this Order.

E. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

## IX.

**IT IS FURTHER ORDERED** that:

A. Within five (5) days of the Acquisition, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Respondent shall submit to the Commission and to the Monitor verified written reports within thirty (30) days after the date this Order is issued and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II and III, setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its 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 Respondent to the relevant Acquirer, and (iii) any agreement to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

C. One (1) year after the Order is issued, and annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

## X.

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

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger, or consolidation of Respondent; or

C. any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

## XI.

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, it 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 non-privileged business records and documentary material, including without limitation electronically stored information as defined in Rule 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1), (2), books, ledgers, accounts, correspondence, memoranda and all other records and documents (in whatever form such records and documents are kept) in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

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

## XII.

**IT IS FURTHER ORDERED** that this Order shall terminate on February 14, 2027.

By the Commission.

**In re C.H. Boehringer Sohn AG & Co. KG**
**Docket No. C-4601**

**Appendix A**

**Monitor Agreement**

**In re C.H. Boehringer Sohn AG & Co. KG**
**Docket No. C-4601**

**CONFIDENTIAL Appendix A-1**

**Exhibit to the Monitor Agreement**

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

Analysis to Aid Public Comment

**In re C.H. Boehringer Sohn AG & Co. KG**
**Docket No. C-4601**

**CONFIDENTIAL Appendix B**

**Companion Animal Divestiture Agreements**

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

**In re C.H. Boehringer Sohn AG & Co. KG**
**Docket No. C-4601**

**CONFIDENTIAL Appendix C**

**Cydectin Products Divestiture Agreements**

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

## 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 C.H. Boehringer Sohn AG & Co. KG ("Boehringer Ingelheim"), which is designed to remedy the anticompetitive effects of Boehringer Ingelheim's acquisition of the Merial Animal Health business ("Merial") from Sanofi. Under the terms of the proposed Decision and Order ("Order")

contained in the Consent Agreement, Boehringer Ingelheim is required to divest its relevant U.S. companion animal vaccine business to Eli Lily and Company, which participates in the animal health industry through its Elanco Animal Health ("Elanco") division. Boehringer Ingelheim is also required to divest its U.S. Cydectin parasiticide product to Bayer AG ("Bayer").

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, modify it, or make it final.

## THE TRANSACTION

Pursuant to an Exclusivity Agreement dated December 15, 2015, Boehringer Ingelheim proposes to swap its consumer health care business for Sanofi's Merial animal health business (the "Proposed Acquisition"). In the proposed swap, Boehringer Ingelheim obtains Merial, valued at $13.53 billion, and Sanofi obtains Boehringer Ingelheim's Consumer Health Care business unit, valued at $7.98 billion, as well as cash compensation of $5.54 billion. The Commission alleges in its Complaint 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, in the U.S. markets for two types of animal health products: (1) companion animal vaccines—which include various canine, feline, and rabies vaccines—and (2) cattle and sheep parasiticides. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

## THE PARTIES

Headquartered in Germany, Boehringer Ingelheim is one of the world's leading pharmaceutical companies. It manufacturers, researches, develops and markets an array of human and animal

health products. The company's animal health division, Boehringer Ingelheim Vetmedica, Inc., is the sixth-largest animal health supplier in the world.

Sanofi is a multinational pharmaceutical company headquartered in Gentilly, France. The company develops and markets a diverse portfolio of products, including pharmaceuticals, human vaccines, and, through its subsidiary Merial, animal health products. Merial is the fourth-largest animal health supplier in the world.

## THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

### Companion Animal Vaccines

There are three classes of companion animal vaccines in which to analyze the effects of the Proposed Acquisition: canine vaccines, feline vaccines, and rabies vaccines. A vaccine is a version of an antigen that triggers an immune response to the antigen but not the disease, causing the animal to develop an immunity that prevents the disease. Only vaccines containing an antigen of a specific virus can provide the desired immunity response to that virus and the corresponding disease. No substitute product immunizes against a disease. Nor is treatment following infection a substitute for the vaccinations at issue. For these reasons, each vaccine containing an antigen to immunize against a particular disease constitutes a relevant market in which to analyze the effects of the acquisition.

Canine vaccines prevent specific illnesses in dogs. The Proposed Acquisition raises competitive concerns in the markets for seven canine vaccines: canine distemper virus, canine parvovirus, leptospirosis, canine adenovirus, canine parainfluenza virus, canine coronavirus, and borreliosis ("Lyme disease"). In addition, the proposed transaction raises future competition concerns in the canine vaccine market for *Bordetella bronchiseptica* bacterium, in which Boehringer Ingelheim currently competes and Merial is the most likely entrant in the near future. The canine vaccine markets are highly concentrated. Boehringer Ingelheim, Merial, Zoetis, Inc. ("Zoetis"), and Merck & Co. ("Merck") are the only four suppliers offering or likely to

offer canine vaccines in the United States. In 2015, Boehringer Ingelheim, Merial, Zoetis and Merck had market shares of approximately 30%, 11%, 35%, and 24%, respectively, of all revenues from canine vaccines sold in the United States and comparable shares in each relevant market, except *Bordetella bronchiseptica* bacterium, where Merial is the next likely entrant. The Proposed Acquisition would reduce the number of current or likely competitors in each market from four to three.

Feline vaccines prevent diseases common to cats. The transaction raises competitive concerns in the feline vaccine markets for five diseases: panleukopenia, calicivirus, viral rhinotracheitis, *Chlamydia psittaci* bacterium, and feline leukemia. The feline vaccine industry in the United States is highly concentrated with the same four market participants—Boehringer Ingelheim, Merial, Zoetis, and Merck—as the canine vaccine industry. In 2015, these four companies had market shares of approximately 28%, 33%, 16%, and 23%, respectively, of all revenues from feline vaccines sold in the United States and comparable shares in each relevant market. The proposed transaction would combine the two leading feline vaccine suppliers, reducing the number of competitors in each market from four to three.

The rabies virus, transmitted through bites from infected animals, triggers a fatal neurological condition culminating in paralysis, respiratory failure, and eventual death. Because this fatal disease is transmittable to humans, most U.S. states have mandatory rabies vaccination requirements. Regular vaccination for all animals is the only means of protection, and there are no substitutes for rabies vaccines. All rabies vaccines are approved for use in both dogs and cats, although some are approved for use in additional species as well. The market for the sale of rabies vaccines in the United States is highly concentrated. Boehringer Ingelheim, Merial, Zoetis, and Merck are the only four significant suppliers of rabies vaccines in the United States, with market shares of 10%, 65%, 13%, and 12% of revenues, respectively.

## Cattle and Sheep Parasiticides

Parasiticides prevent and control outbreaks of parasites such as worms, flies, lice, and ticks.

Analysis to Aid Public Comment

***Cattle Parasiticides***

Parasiticides are a key part of cattle health care regimens. If left unchecked, parasites reduce milk production in dairy cattle and prevent weight gain in beef cattle. There are two primary types of cattle parasiticides: macrocyclic lactones, which prevent both internal and external parasites, and benzimidazoles, which prevent only internal parasites. Because macrocyclic lactones reach a much broader spectrum of parasites, other parasiticides, including benzimidazoles, are not viable substitutes.

Boehringer Ingelheim, Merial, and Zoetis are the three primary participants in the macrocyclic lactone cattle parasiticide market, and the Proposed Acquisition would combine the two most significant competitors. Merial, the market leader, offers three brands: Ivomec, Eprinex, and LongRange. After Merial, Boehringer Ingelheim is the next largest supplier of macrocyclic lactone cattle parasiticides. Boehringer Ingelheim's sole product is Cydectin, a parasiticide that is functionally identical to Ivomec and Eprinex for beef cattle. Zoetis also offers a macrocyclic lactone product, Dectomax, that is similar to the products of Merial and Boehringer Ingelheim. Merial, Boehringer Ingelheim and Zoetis accounted for 45%, 22%, and 17% of revenues, respectively, of U.S. sales in 2015. Beyond these three companies, multiple manufacturers produce generic versions of Merial's Ivomec. Although these generic products are significantly cheaper than the branded products, they have limited competitive significance. Many customers prefer the branded products because the branded product manufacturers offer valuable technical support, field support, and education. In addition, many customers also perceive the generic products to be inferior and unreliable, preferring to pay a higher price for the guaranteed success of branded products.

Merial and Boehringer Ingelheim are the only two macrocyclic lactone cattle parasiticide suppliers that offer "zero-day milk withhold" products—Cydectin and Eprinex, respectively. The Proposed Acquisition would eliminate the competition between them, effectively leaving dairy cattle customers with a sole supplier.

***Sheep Parasiticides***

Sheep parasiticides are critical for optimizing wool and meat production. Sheep parasiticides utilize the same compounds as cattle parasiticides, but use a different route of administration. Because a sheep's wool and skin prevent the absorption of topical products and the thickness of a sheep's wool makes injections difficult, customers view oral administration as the only viable option for sheep parasiticides. Both macrocyclic lactones and benzimidazoles can be used as sheep parasiticides, but benzimidazoles are not economic substitutes for macrocyclic lactones in most cases because they do not treat external parasites and are less efficacious.

Merial and Boehringer Ingelheim are the two primary suppliers of macrocyclic lactone sheep parasiticides. Boehringer Ingelheim offers Cydectin Oral Drench and Merial offers Ivomec Oral Drench. Following the Proposed Acquisition, the merged firm would control more than 78% of this market. The other macrocyclic lactone sheep parasiticides are generic versions of the Merial product, which are of limited competitive significance.

## Relevant Geographic Market

The United States is the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition. The USDA must approve companion animal vaccines before they are sold in the United States. Cattle and sheep parasiticides must be approved by the FDA before being sold in the United States. Thus, products sold outside the United States, but not approved for sale in the United States, are not alternatives for U.S. consumers.

## ENTRY

Entry into the U.S. markets for companion animal vaccines and cattle and sheep parasiticides would not be timely, likely or sufficient in magnitude, character and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Three major obstacles stand in the way of a prospective entrant into the relevant markets: lengthy development periods, FDA and USDA approval requirements, and difficulty of establishing a brand name

and reputation and convincing veterinarians to prescribe new products.

## EFFECTS OF THE ACQUISITION

The Proposed Acquisition would cause significant competitive harm to consumers in the relevant U.S. markets for companion animal vaccines and cattle and sheep parasiticides by eliminating actual or future, direct, and substantial competition between Boehringer Ingelheim and Merial. The transaction would increase the likelihood that Boehringer Ingelheim will be able to unilaterally exercise market power, increase the likelihood of coordinated interaction between or among suppliers, and increase the likelihood that consumers will pay higher prices.

## THE CONSENT AGREEMENT

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects by requiring Boehringer Ingelheim to divest its relevant companion animal vaccine business and certain of its cattle and sheep parasiticides assets to Elanco and Bayer, respectively.

Under the proposed Order, Boehringer Ingelheim will divest its relevant U.S. rights and interests in its companion animal vaccine business to Elanco no later than ten days after the consummation of the Proposed Acquisition or on the date on which the proposed Order becomes final, whichever is earlier. Similarly, the proposed Order requires Boehringer Ingelheim to divest all of its respective U.S. rights and interests in its parasiticide product, Cydectin, to Bayer. These divestitures include all regulatory approvals, brand names, marketing materials, confidential business information, customer information, and other assets associated with marketing and selling both products. To ensure the divestitures are successful, the proposed Order requires Boehringer Ingelheim to secure all third-party consents and waivers required to permit both buyers to conduct business with the divested assets. Additionally, Elanco and Bayer also will have the right to interview and offer employment to employees associated with the divested businesses.

Elanco is an experienced supplier in the global animal health industry and has the resources and expertise to replicate Boehringer Ingelheim's role in the companion animal vaccine markets. In 2015, Elanco generated approximately $1 billion in revenue. Elanco currently offers a limited portfolio of companion animal pharmaceutical products such as parasiticides, pain relievers, and dermatological products. Elanco, however, is not a meaningful participant in any of the companion animal vaccines subject to divestiture, and its proposed acquisition of those assets will complement and expand its existing companion animal portfolio. Elanco is well positioned to replicate immediately Boehringer Ingelheim's competitive position in all companion animal vaccine markets.

Bayer is similarly well qualified to replicate Boehringer Ingelheim's competitive position in the United States with respect to the Cydectin product line. Bayer is currently the fifth-largest animal health company both worldwide and in the United States. Bayer had 2015 worldwide sales of $1.6 billion, of which $595 million derived from its animal health business. Bayer does not currently offer a parasiticide that controls external and internal parasites to cattle and sheep farmers. However, Bayer offers a variety of other products to cattle and sheep farmers, such as ear tags and external parasite control products.

The Commission has agreed to appoint a Monitor to ensure that Boehringer Ingelheim complies with all of its obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Elanco and Bayer.

The Commission's goal in evaluating possible purchasers of divested rights and assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that either buyer is not an acceptable acquirer, or that the manner of the divestiture is not acceptable, the proposed Order requires the parties to unwind the sale and then divest the products to another Commission-approved acquirer within six months of the date that the proposed Order becomes final. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products.

Analysis to Aid Public Comment

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

Complaint

**IN THE MATTER OF**

# ABBOTT LABORATORIES
**AND**
# ST. JUDE MEDICAL, INC.

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

*Docket No. C-4600; File No. 161 0126*
*Complaint, December 7, 2016 – Decision, February 14, 2017*

This consent order addresses the $25 billion acquisition by Abbott Laboratories of certain assets of St. Jude Medical, Inc. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the U.S. markets for vascular closure devices, steerable sheaths, and lesion-assessing ablation catheters. The consent order requires the parties are required to divest St. Jude's vascular closure device business and Abbott's steerable sheath business to Terumo Corporation.

*Participants*

For the *Commission*: *Jordan S. Andrew* and *Sarah E. Wohl.*

For the *Respondents*: *George S. Cary* and *Tara Tavernia, Cleary Gottlieb Steen & Hamilton LLP; Bob Nichols* and *Joshua H. Soven, Gibson, Dunn & Crutcher 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 believe that Respondent Abbott Laboratories ("Abbott"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent St. Jude Medical, Inc. ("St. Jude"), 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, 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 Abbott is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its offices and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064-6400.

2. Respondent St. Jude is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its offices and principal place of business located at One St. Jude Medical Drive, St. Paul, Minnesota 55117.

3. 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 company 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

4. Pursuant to an Agreement and Plan of Merger dated April 27, 2016, Abbott proposes to acquire St. Jude in exchange for cash and stock valued at approximately $25 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## III.THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, licensing, manufacturing, marketing, distribution, and sale of the following medical devices:

a. vascular closure devices;

b. steerable sheaths; and

c. lesion-assessing ablation catheters.

6. For the purposes of this Complaint, the United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

## IV.THE STRUCTURE OF THE MARKETS

7. Vascular closure devices are used to close arterial holes created by catheterization procedures, which are minimally-invasive processes during which a physician uses a specialized catheter to either diagnose or treat a cardiovascular condition. The U.S. market for vascular closure devices is highly concentrated with Abbott and St. Jude holding a combined 70 percent market share. Only two other suppliers, Cardinal Health, Inc. and Cardiva Medical, Inc., currently sell vascular closure devices in the United States.

8. Steerable sheaths are used to access difficult to reach areas of the heart to treat arrhythmias such as atrial fibrillation. Steerable sheaths allow physicians to more easily puncture the transseptal wall of the heart and guide an ablation catheter into the left atrium or ventricle of the heart. Currently, St. Jude accounts for the vast majority of steerable sheath sales in the United States. Abbott recently entered the U.S. market for steerable sheaths and appears well positioned to compete with St. Jude. Other suppliers in this market, though not recent entrants, have very small market shares.

9. Lesion-assessing ablation catheters are used to treat heart arrhythmias and provide feedback to the physician regarding the force being applied by the catheter or the temperature of the ablation target. St. Jude and Biosense Webster Inc. ("Biosense") are currently the only suppliers of lesion-assessing ablation catheters in the U.S. market. Advanced Cardiac Therapeutics, Inc. ("ACT") is developing lesion-assessing ablation catheter products that would compete directly with the lesion-assessing ablation catheters offered by St. Jude and Biosense in the United States. Abbott and ACT entered into a strategic partnership to develop lesion-assessing ablation catheters.

## V.EFFECTS OF THE ACQUISITION

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

a. by eliminating actual competition between Abbott and St. Jude in the U.S. market for vascular closure devices;

b. by eliminating actual competition between Abbott and St. Jude in the U.S. market for steerable sheaths;

c. by eliminating potential competition between Abbott/ACT and St. Jude in the U.S. market for lesion-assessing ablation catheters if Abbott acquires ACT's lesion-assessing ablation catheter assets, thereby reducing additional competition that would have resulted from an additional U.S. supplier of lesion-assessing ablation catheters; and

d. by increasing the ability of the merged entity to raise prices unilaterally in the relevant markets.

## VI.ENTRY CONDITIONS

11. Entry into the relevant markets described in Paragraph 5 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 product development times and FDA approval requirements are lengthy. Although a limited number of firms other than Respondents may begin competing in some relevant markets in the future, such entry would not be timely or sufficient to prevent the competitive harm likely to result from the Acquisition.

## VII. VIOLATIONS CHARGED

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

13. 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 twenty-seventh day of December, 2016 issues its Complaint against said Respondents.

By the Commission.

## ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Respondent Abbott Laboratories ("Abbott") and Respondent St. Jude Medical, Inc. ("St. Jude"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of the 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 the 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 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, this Order the Maintain Assets and makes the following jurisdictional findings:

1. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its offices and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064-6400.

2. Respondent St. Jude is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its offices and principal place of business located at One St. Jude Medical Drive, St. Paul, Minnesota 55117.

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.

## 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. "Abbott" means Abbott Laboratories, its directors, officers, employees, agents, and representatives; its

successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Abbott, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, Abbott will include St. Jude.

B. "St. Jude" means St. Jude Medical, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by St. Jude, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "Respondent(s)" means Abbott and St. Jude, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "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

2. Final Decision and Order following the issuance and service of a final Decision and Order by the Commission in this matter.

F. "Divestiture Product Business(es)" means the worldwide Businesses of Respondents related to each of the Assets To Be Divested to the extent that each such Business is owned, controlled, or managed by the Respondents and the assets related to such Businesses to the extent such assets are owned by, controlled by, managed by or licensed to, the Respondents.

G. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

H. "Transition Period" means, for each Divestiture Product Business, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the relevant Acquirer directs Respondents to cease the marketing, distribution, and sale of Products related to the relevant Divestiture Product Business; (ii) the date on which the relevant Acquirer commences the marketing, distribution, and sale of all of the Products related to the relevant Divestiture Product Business in a manner that is fully independent of the Respondents; or four (4) months after the Closing Date for such Divestiture Product Business.

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 Assets To Be Divested to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal or wasting, deterioration, or impairment of the Assets To Be Divested except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Assets To Be Divested (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Product Businesses.

B. Until Respondents fully transfer and deliver each of the respective Assets To Be Divested 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 full economic viability, marketability, 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; customers, Agencies; employees; and others having business relationships with each of the respective Divestiture Product Businesses, in the ordinary course of business and in accordance with past practice. Respondents shall use their best efforts to keep the organization and properties of the Divestiture Product Businesses intact, including current business operations, physical facilities and working conditions, and a work force of equivalent size, training, and expertise associated with the 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 the 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 Product Businesses and/or to prevent any diminution in sales of each of the Divestiture

Product Businesses during and after the Acquisition process and prior to the complete transfer and delivery of the related Assets To Be Divested to an Acquirer;

4. 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 Divestiture Product Business; and

5. Providing such support services to each of the respective Divestiture Product Businesses as were being provided to such Divestiture Product Business(es) by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until Respondents fully transfer and deliver each of the respective Assets To Be Divested to an Acquirer, Respondents shall maintain a work force that is (i) at least as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Product Businesses for the relevant Assets To Be Divested's last fiscal year.

D. During the Transition Period, Respondents, in consultation with the relevant Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of the Products related to each of the Divestiture Product Businesses by the Acquirer(s) is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the marketing, distribution, and sale of the Products related to each of the

Divestiture Product Businesses who will be responsible for communicating directly with the Acquirer(s), and the Monitor (if one has been appointed), for the purposes of assisting in the transfer of the Assets To Be Divested to the Acquirer(s);

3. Maintain and manage inventory levels of the Products of the Divestiture Product Businesses in consideration of the marketing and distribution transition to the Acquirer;

4. Continue to market, distribute, and sell the Products of the Divestiture Product Businesses;

5. Allow the Acquirer access at reasonable business hours to all Confidential Business Information related to the Divestiture Product Businesses 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 Divestiture Product Businesses that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;

6. Provide the Acquirer with a listing of inventory levels (weeks of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler, or distributor) on a regular basis and in a timely manner;

7. Provide the Acquirer with anticipated reorder dates for each customer on a regular basis and in a timely manner; and

8. Establish projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.

E. Until Respondents fully transfer and deliver each of the respective Assets To Be Divested to an Acquirer, Respondents shall:

1. Not use, directly or indirectly, any Confidential Business Information related to the Assets To Be Divested other than as necessary to comply with the following:

   a. The requirements of this Order;

   b. Respondents' obligations to the Acquirer(s) under the terms of any related Remedial Agreement; or

   c. Applicable Law;

2. Not disclose or convey any such Confidential Business Information, directly or indirectly to any Person except (i) the Acquirer(s), (ii) other Persons specifically authorized by such Acquirer(s) to receive such information (*e.g.*, employees of the Respondents responsible for the manufacture and/or supply of any Products or components related to the Assets to Be Divested on behalf of an Acquirer), (iii) the Commission, or (iv) the Monitor (if one 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 Products related to the Assets To Be Divested to the employees associated with Respondents' Retained Business(es) who are related to the marketing or sales of Respondents' Products identified in the Commission's Complaint as competing 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.

F. 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 shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Assets To Be Divested by Respondents' 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.

G. Respondents 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. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' registered offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgment program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to Respondents' personnel.

H. Respondents shall monitor the implementation by their employees and other personnel of all applicable restrictions with respect to Confidential Business Information, 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.

I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through their full transfer and delivery to an Acquirer(s); to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

## III.

**IT IS FURTHER ORDERED** that:

F. Edward J. Buthusiem shall serve as 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 Agreement, including any Transition Services Agreement and Transitional Manufacturing and Supply Agreement, approved by the Commission.

G. No later than one (1) day after the Acquisition Date, Respondents shall enter into the Monitor Agreement that is attached as Appendix II and Confidential Appendix II-1 to this Order to Maintain Assets. The Monitor Agreement shall become effective on the date this Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:

1. The Monitor shall have the responsibility and the power and authority to monitor Respondents' compliance with the terms of the Orders and the

Remedial Agreement, including any Transition Services Agreement and Transitional Manufacturing and Supply 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 the Orders, in consultation with the Commission or its staff, including any directive from the Commission to the Respondents to effect such modifications to the manner of divestiture of the Assets to be Divested as are necessary to satisfy the requirements of this Order;

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 Respondents' compliance with the provisions of the Orders and the Remedial Agreement, including for as long as Respondents are providing Transition Services to the Acquirer pursuant to the Transition Services Agreement or supplying VCD Products or VCD Components to the Acquirer pursuant to the Transitional Manufacturing and Supply Agreement; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders;

4. Subject to any demonstrated legally recognized privilege, the 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 Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders and the Remedial Agreement. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor

Respondents' compliance with the Orders and the Remedial Agreement;

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

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

7. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

H. 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.

I. 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.

J. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows: (a) If Respondents have 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 Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor; and (b) not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders and the Remedial Agreement.

K. 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 Orders or the Remedial Agreement.

L. The 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 this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.C. 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 at the same time submit to the Monitor, if any Monitor has been appointed, a copy of their report concerning compliance with the Orders. 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, and (ii) transitional services being provided by the Respondent to the relevant Acquirer; and

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 Respondents; or

C. Any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

## VI.

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

A. Access, during 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 Respondents relating to compliance with this Order, which copying services shall be provided by Respondents at their expense; 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 Assets To Be Divested, as required by and described in the Decision and Order, has been completed; or

C. The day after Respondents, with the concurrence of the Acquirer(s), certify in writing to the Commission as to the completion of all Transition Services provided by Respondents to the Acquirer(s) pursuant to any Transition Services Agreement, and of the manufacture and supply of any Products or components by the Respondents to the Acquirer(s) pursuant to any Transitional Manufacturing and Supply Agreement, in each instance pursuant to the Remedial Agreement approved by the Commission; or

D. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

## DECISION AND ORDER
## [Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Abbott Laboratories ("Abbott") of Respondent St. Jude Medical, Inc. ("St. Jude"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of the 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 the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its offices and principal place of business located at 100 Abbott Park Road, Abbott Park, Illinois 60064-6400.

2. Respondent St. Jude Medical, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its offices and principal place of business located at One St. Jude Medical Drive, St. Paul, Minnesota 55117.

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

## I.

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

A. "Abbott" means Abbott Laboratories, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Abbott, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, Abbott will include St. Jude.

B. "St. Jude" means St. Jude Medical, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by St. Jude, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. St. Jude does not include Abbott.

C. "Respondent(s)" means Abbott and St. Jude, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means the following:

1. Terumo, if approved by the Commission; or

2. Any other Person approved by the Commission to acquire the Assets to Be Divested pursuant to this Order.

*Provided, however*, that, if Terumo is not approved by the Commission as the Acquirer, the VCD Assets To Be Divested and the Steerable Sheath Assets To Be Divested may, in the Commission's sole discretion, be divested to two different Acquirers that receive the prior approval of the Commission.

F. "Acquisition" means Abbott's acquisition of St. Jude through a series of transactions as contemplated by and pursuant to the Agreement and Plan of Merger dated April 27, 2016, among Abbott Laboratories, St. Jude Medical, Inc., Vault Merger Sub, Inc., and Vault Merger Sub LLC that was submitted by the Respondents to the Commission.

G. "Acquisition Date" means the date on which the Acquisition is consummated.

H. "ACT" means Advanced Cardiac Therapeutics, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 22880 Lakeside Drive, Suite 250, Santa Clara, CA 95054.

I. "Agency(ies)" means any governmental 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 Vascular Closure Devices or Steerable Sheaths. The term "Agency" includes, but is not limited to, the United States Food and Drug Administration ("FDA").

J. "Application(s)" means all submissions and applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Parts 800 to 898, including all premarket notifications (Section 510(k) submissions) and premarket approvals ("PMA"), 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 holder and the FDA related thereto.

K. "Assets To Be Divested" means the VCD Assets To Be Divested and the Steerable Sheath Assets To Be Divested.

L. "Business" means the research, development, manufacture, commercialization, distribution, marketing, promotion, importation, exportation, advertisement, and/or sale of a Product.

M. "Business Records" means all books, records, files, databases, printouts, and all other documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: customer files, customer lists, customer purchasing histories, supplier and vendor files, vendor lists, correspondence, advertising and marketing materials, marketing analyses, sales materials, price lists, cost information, employee lists and contracts, salary and benefits information, personnel files, financial and accounting records and documents, financial statements, financial plans and forecasts, operating plans, studies, reports, regulatory materials, Applications, Agency filings and submissions, Agency correspondence, operating guides, technical information, manuals, policies and procedures, service and warranty records, maintenance logs, equipment logs, registrations, and permits.

N. "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.

O. "Closing Date(s)" means the date(s) on which Respondents (or a Divestiture Trustee) consummate a transaction to divest any of the Assets To Be Divested to an Acquirer(s) pursuant to this Order.

P. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is directly related to the conduct of the VCD Business or the Steerable Sheath Business. The

term "Confidential Business Information" excludes the following:

a. Information relating to the Respondents' general business strategies or practices that does not discuss the VCD Products or the Steerable Sheath Products with particularity;

b. Information that is contained in documents, records, or books of the Respondents that are provided to an Acquirer by the Respondents that is unrelated to the VCD Products or the Steerable Sheath Products or that is exclusively related to the Retained Product(s); and

c. 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.

Q. "Contracts" means all real and personal property leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, all contracts of any kind relating to construction, customer contracts, sales contracts, distribution contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, non-disclosure agreements, and other contracts or agreements of any kind.

R. "Copyrights" means rights to all original works of authorship of any kind directly related to a Product and any registrations and applications for registrations thereof, and all copyrightable works, registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith, including, but not limited to, the following: all such rights with respect to all promotional materials and all educational materials; copyrights in all preclinical, clinical, and process development data and reports relating to the

research and development of any Product or of any materials used in the research, development, manufacture, marketing, or sale of any Product, including all copyrights in raw data relating to the clinical trials with respect to 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; all Product sales forecasting models, medical education materials, sales training materials, and advertising and display materials; 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 any Product; 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.

S. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent such costs are directly incurred to provide the relevant Product(s), inputs, components, goods, assistance or services. "Direct Cost" to the Acquirer(s) for its use of any of Respondents' 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) an

agreement becomes a Remedial Agreement for the Assets to be Divested, "Direct Cost" means such cost as is provided in such Remedial Agreement.

T. "Divestiture Trustee" means any Person appointed by the Commission pursuant to Paragraph IV of this Order.

U. "Employee(s)" means:

1. If Terumo is approved by the Commission to be the Acquirer, the employees identified in the Terumo Purchase Agreement; or

2. If the Acquirer(s) is not Terumo, any individual employed on a full-time, part-time, or contract basis as of, and at any time after, April 28, 2016, the date of the announcement of the Acquisition, by:

   a. St. Jude, where such employee's job responsibilities relate or related primarily to the VCD Business; and

   b. Abbott (or Kalila), where such employee's job responsibilities relate or related primarily to the Steerable Sheath Business.

V. "Facility Assets" means all of Respondents' rights, title, and interests in and to the following:

1. All real property interests, including all rights, title, and interests in and to owned or leased property, together with all easements, rights of way, buildings, improvements, and appurtenances ("Facility(ies)");

2. All applicable federal, state, and local regulatory registrations, permits, and applications, and all documents related thereto, necessary for the operation and conduct of the Relevant Business at such Facility(ies) to the extent held by

Respondents and with respect to which the transfer thereof is permitted by law; *provided, however*, that Respondents shall cooperate with the Acquirer in securing any federal, state, and local regulatory registrations, permits, and applications for which transfer is not permitted by law; and

3. All fixtures, equipment, machinery, tools, molds, dies, vehicles, personal property, or tangible property of any kind located at such Facility(ies) that are owned or leased by Respondents, or that Respondents have the legal right to use, or over which they have custody or control, that are related to:

   a. The research, development, production, manufacture, marketing, or sale of any Product related to the Relevant Business; or

   b. Compliance with any statute, ordinance, regulation, rule, or other legal requirement (including, but not limited to, environmental laws) of any Government Entity.

W. "Governmental Entity" means any federal, state, local or non-U.S. government or any court, legislature, governmental Agency or governmental commission or any judicial or regulatory authority of any government.

X. "Intellectual Property" means all intellectual property related to the Product(s) that is owned, licensed, or controlled by the Respondents as of the Closing Date, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all Trade Secrets; (iii) all Know-How; (iv) all Trademarks; (v) all Trade Dress; (vi) all Copyrights; (vii) all computer software (including source code, executable code, data, databases, and related documentation); (viii) all Marketing Materials; and (ix) all rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to sue and recover damages or obtain injunctive

relief for infringement, dilution, misappropriation, misuse, violation, or breach of any of the foregoing.

Y. "Inventories" means:

a. All inventories, stores, and supplies of any semi-finished and finished Product(s) and work in progress; and

b. All inventories, stores, and supplies of raw materials and other materials relating to the research, development, manufacture, finishing, packaging, labeling, distribution, marketing, or sale of any Product(s).

Z. "Kalila" means Kalila Medical, Inc., a Delaware corporation engaged in the Business of Steerable Sheath Products. Abbott acquired Kalila pursuant to the Kalila Acquisition.

AA. "Kalila Acquisition" means the acquisition of Kalila by Abbott pursuant to the Agreement and Plan of Merger, dated January 29, 2016, by and among Abbott Laboratories, Topera, Inc., Kalila Medical, Inc., Kentucky Merger Sub, Inc., Shifamed, LLC and Shareholder Representative Services LLC; and the Paying Agent Agreement, dated January 29, 2016.

BB. "Know-How" means 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, and process descriptions).

CC. "Law" means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law by any Governmental Entity.

DD. "Manufacturing Technology and Equipment" means all technology and equipment to make a Product, including, but not limited to:

1. All technology, Trade Secrets, Know-How, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of a Product, including, but not limited to, all of the following: product specifications; processes; analytical methods; product designs; plans; ideas; concepts; manufacturing, engineering, and other manuals and drawings; standard operating procedures; flow diagrams; quality assurance and quality control systems; research records; clinical data; compositions; annual product reviews; regulatory communications; control history; current and historical information associated with FDA Application(s) conformance and cGMP compliance; labeling and all other information related to the manufacturing process; and supplier lists;

2. All ingredients, materials, or components used in the manufacture of a Product; and

3. All machinery, equipment, mechanical and spare parts, supplies, tools, tooling, jigs, molds, dies, production supplies, samples, media, and fixtures used to manufacture, finish, and package a Product ("Manufacturing Equipment").

EE. "Marketing Materials" means all materials used in the marketing or sale of a Product as of the Closing Date, including, without limitation, all advertising and display materials, promotional and marketing materials, training materials, educational materials, speaker lists, 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 used for marketing and sales

research), customer information, sales forecasting models, website content, domain names (universal resource locators) and registrations thereof, artwork for the production of packaging components, and other materials related to the marketing or sale of a Product).

FF. "Minnesota Facility" means Respondents' Product manufacturing facility located at 14900 Minnetonka Industrial Road, Minnetonka, MN 55345, as specified in the Manufacturing and Supply Agreement between St. Jude and Terumo, which will be executed and become effective on the Closing Date, submitted as part of the Terumo Purchase Agreement.

GG. "Monitor" means any Person appointed by the Commission pursuant to Paragraph III of this Order.

HH. "Orders" means this Order and the Order to Maintain Assets.

II. "Patents" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention, applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date, and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.

JJ. "Person" means any individual, partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association or organization, or other business entity.

KK. "Product(s)" means any medical device or system regulated by the FDA as a Class II (Special Controls)

or Class III (PMA) medical device pursuant to 21 C.F.R. Parts 800 to 898, *i.e.,* an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory, which is:

a. recognized in the official National Foundry, or the United States Pharmacopoeia, or any supplement to them;

b. intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or

c. intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.

LL. "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, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any Application related to that Product.

MM. "Proposed Acquirer" means any proposed acquirer of the Assets to Be Divested that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order. "Proposed Acquirer" includes Terumo.

NN. "Puerto Rico Facility" means Building B of the premises located at Zona Industrial Oeste Lot 20, Calle B, Caguas, Puerto Rico.

OO. "Relevant Business" means the VCD Business or the Steerable Sheath Business.

PP. "Remedial Agreement" means the following:

1. the Terumo Purchase Agreement, if approved by the Commission; and

2. any other agreement between Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has received the prior approval of the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

QQ. "Retained Business" means:

1. All assets, tangible or intangible, businesses, and goodwill related to all of the Retained Products of Respondents, including, but not limited to, all rights, title, and interest in and to all Intellectual Property, including the name "St. Jude Medical" or "Abbott Laboratories" together with all variations thereof and all Trademarks and Trade Dress containing, incorporating, or associated with any of the foregoing, and any Trademark and Trade Dress related thereto; and

2. Cash and cash equivalents except cash and cash equivalents of Kalila; accounts receivable arising prior to the Closing Date; compensation or benefit plans except plans sponsored by Kalila; and tax assets.

RR. "Retained Product(s)" means any product researched, developed, manufactured, marketed, promoted, sold, or distributed by Respondents prior to the Acquisition other than the VCD Products and the Steerable Sheath Products.

SS. "Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information.

TT. "Specified VCD Manufacturing Equipment" means all machinery, equipment, mechanical and spare parts, supplies, tools, tooling, jigs, molds, dies, production supplies, samples, media, and fixtures located at the Minnesota Facility that are exclusively related to the manufacture of the VCD Products produced at the Minnesota Facility.

UU. "Steerable Sheath" means a medical device used to deliver tools, primarily diagnostic and therapeutic catheters, to the heart.

VV. "Steerable Sheath Assets To Be Divested" means all of Abbott's rights, title, and interests in and to all tangible and intangible assets and property of any kind used for or relating to the Steerable Sheath Business, wherever located, and all improvements or additions thereto, and as maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date, including, without limitation, all of the issued and outstanding shares of capital stock acquired in the Kalila Acquisition, and the following:

1. All Intellectual Property;

2. All Manufacturing Technology and Equipment;

3. All Scientific and Regulatory Material;

4. All Applications and rights to Applications;

5. All Product Approvals;

6. All Marketing Materials;

7. All Contracts;

8. All Facility Assets;

9. All Inventories; and

10. All Business Records relating to the foregoing;

*Provided, however,* that:

a. "Steerable Sheath Assets To Be Divested" do not include (1) the Retained Products or the Retained Business(es); and (2) any part of the Steerable Sheath Assets To Be Divested if not needed by an Acquirer and the Commission approves the divestiture without such assets;

b. "Intellectual Property" does not include: (i) the corporate names or corporate Trade Dress of Respondents 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 Respondents or the related corporate logos thereof, or general registered images or symbols by which Respondents can be identified or defined; or (ii) the business marks specified on Schedule 5.07(a) of the Terumo Purchase Agreement; and

c. Where Respondents' Business Records contain information: (i) that relates both to the Assets To Be Divested and to Retained Products or the Retained Business(es) and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Assets To Be Divested; or (ii) for which the Respondents have a legal obligation to retain

the original copies, Respondents shall be required to provide access or copies or relevant excerpts of the relevant Business Records containing this information. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer with 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 Respondents provide the Acquirer with the above-described information without requiring the Respondents completely to divest information that, in content, also relates to Respondents' Retained Products or Retained Business(es). Respondents shall also be permitted to retain copies of Business Records relating to the Assets To Be Divested to the extent necessary or required for the purposes of any ongoing legal proceedings, litigation, disputes, investigations, inquiries, subpoenas, reviews, audits or regulatory proceedings; *provided, however,* that Respondents shall comply with the requirements of Paragraph II.E. of this Order with respect to any Confidential Business Information contained in such copies of Business Records.

WW. "Steerable Sheath Business" means the Business of Abbott relating to the Steerable Sheath Products acquired in the Kalila Acquisition, as conducted and maintained by Abbott since the Kalila Acquisition, including without limitation all improvements and activities relating thereto as of the Closing Date.

XX. "Steerable Sheath Products" means the Steerable Sheaths and any related Products acquired by Abbott in the Kalila Acquisition, including all Products marketed or sold under the following Trademarks: Vado® 1.0, Vado® 1.1, and Vado® 2.1.

YY. "Terumo" means Terumo Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Japan with its offices and principal place of business located at Tokyo Opera City Tower 50F; 3-20-2 Nishi-Shinjuku, Shinjuku-ku, Tokyo, 163-1450 Japan.

ZZ. "Terumo Purchase Agreement" means the Purchase Agreement by and between Respondents and Terumo dated December 6, 2016, and the letter agreement with modifications dated January 5, 2017, and all amendments, exhibits, attachments, agreements, and schedules thereto, including, but not limited to: Transition Services Agreement by and between Respondent Abbott and Terumo, the Manufacturing and Supply Agreement between Respondent St. Jude and Terumo, and Quality Agreement between Respondent St. Jude and Terumo, each of which will be executed and become effective on the Closing Date, that have been approved by the Commission to accomplish the requirements of this Order. The Terumo Purchase Agreement is attached to this Order as Confidential Appendix I. The January 5, 2017, letter agreement with modifications is attached to this Order as Confidential Appendix I-I.

AAA. "Third Party(ies)" means any Person other than the following: (1) the Respondents, or (2) the Acquirer.

BBB. "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.

CCC. "Trade Secret(s)" means all trade secrets, Know-How, and confidential or proprietary information, including ideas, research and development, formulas, compositions, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and

marketing plans and proposals, and all other data, technology, and plans.

DDD. "Trademark(s)" means all proprietary names or designations, registered and unregistered trademarks, service marks, trade names, brand names, commercial names, "doing business as" (d/b/a) names, logos, and slogans, together with all translations, adaptions, derivations, and combinations thereof, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), all common law rights, and all goodwill symbolized thereby and associated therewith.

EEE. "Transition Services" means technical services, personnel, assistance, training, and other logistical, administrative and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Assets To Be Divested from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, manufacturing, purchasing, quality control, R&D support, technology transfer, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

FFF. "Transition Services Agreement(s)" means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for the Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.

GGG. "Transitional Manufacturing and Supply Agreement(s)" means any agreement(s) that receives

the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, sufficient quantities of VCD Products and VCD Components for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture the VCD Products and VCD Components in commercial quantities, and in a manner consistent with cGMP, independently of Respondents, and to secure relevant Manufacturing Equipment and sources of supply of VCD Components from Persons other than the Respondents.

HHH. "Vascular Closure Device" means a medical device used to seal arterial holes generally following catheterization procedures accessed through the femoral artery.

III. "VCD Products" means Vascular Closure Devices composed of an absorbable collagen sponge and absorbable polymer anchor, each connected by a self-tightening suture, and any related Products or devices, researched, developed, manufactured, marketed, promoted, or sold by St. Jude prior to the Acquisition, including all VCD Products marketed or sold under the Trademark Angio-Seal™.

JJJ. "VCD Assets To Be Divested" means all of St. Jude's rights, title, and interests in and to all tangible and intangible assets and property of any kind used for or relating to the VCD Business, wherever located, and all improvements or additions thereto, and as maintained by Respondents in accordance with the Order to Maintain Assets until the Closing Date, including, without limitation, the following:

1. All Intellectual Property;

2. All Manufacturing Technology and Equipment, including, at the Acquirer's option, the Specified VCD Manufacturing Equipment; *provided, however,* that the Specified VCD Manufacturing

Equipment may be divested to the Acquirer only after completion by Respondents of any Transitional Manufacturing and Supply Agreements using such equipment.

3. All Scientific and Regulatory Material;

4. All Applications and rights to Applications;

5. All Product Approvals;

6. All Marketing Materials;

7. The Puerto Rico Facility and all Facility Assets related thereto; *provided, however*, that this includes only the portion of the lease agreement between Respondents and the Puerto Rico Industrial Development Company applicable to the Puerto Rico Facility;

8. All Contracts related to the Puerto Rico Facility;

9. All Contracts related to the research, development, manufacture, marketing, sale, and distribution of VCD Products and VCD Components at the Minnesota Facility, in each case only to the extent they are related to, and only upon completion of Respondents' obligations under, any Transitional Manufacturing and Supply Agreement for the supply of VCD Products and VCD Components to the Acquirer;

10. All Inventories related to the Puerto Rico Facility; and

11. All Business Records;

*Provided*, *however*, that:

a. "VCD Assets To Be Divested" do not include (1) the Retained Products or the Retained Business(es); and (2) any part of the VCD

Assets to Be Divested if not needed by an Acquirer and the Commission approves the divestiture without such assets;

b. "Intellectual Property" does not include: (i) the corporate names or corporate Trade Dress of Respondents 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 Respondents or the related corporate logos thereof, or general registered images or symbols by which Respondents can be identified or defined; or (ii) the business marks specified on Schedule 5.07(a) of the Terumo Purchase Agreement; and

c. Where Respondents' Business Records contain information: (i) that relates both to the Assets to be Divested and to Retained Products or Retained Business(es) and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Assets to be Divested; or (ii) for which the Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of, or access to, the relevant Business Records containing this information. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer with 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 Respondents provide the Acquirer with the above-described information without requiring the Respondents completely to divest information that, in content, also relates to Respondents' Retained Products or Retained Business(es). Respondents shall also be permitted to retain

copies of Business Records relating to the Assets to be Divested to the extent necessary or required for the purposes of any ongoing legal proceedings, litigation, disputes, investigations, inquiries, subpoenas, reviews, audits or regulatory proceedings; *provided, however,* that Respondents shall comply with the requirements of Paragraph II.E. of this Order with respect to any Confidential Business Information contained in such copies of Business Records.

KKK. "VCD Business" means the Business conducted by St. Jude as of the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the VCD Products.

LLL. "VCD Component(s)" means the components specified and described in the Manufacturing and Supply Agreement between St. Jude and Terumo at the Terumo Purchase Agreement, Exhibit C.

## II.

**IT IS FURTHER ORDERED** that:

A. No later than forty five (45) days after the Acquisition Date, Respondents shall divest the VCD Assets To Be Divested and the Steerable Sheath Assets To Be Divested to Terumo, absolutely and in good faith, at no minimum price, pursuant to and in accordance with the Terumo Purchase Agreement (which agreement 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 Terumo or to reduce any obligations of Respondents under such agreement);

*Provided, however*, that if Respondents have divested the Assets To Be Divested to Terumo prior to the date this Order is issued and served as final, and if, at the time the Commission determines to issue and serve

this Order as final, the Commission notifies Respondents that Terumo is not an acceptable purchaser of one or both of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Terumo, in whole or in part, as directed by the Commission, and shall divest the Assets To Be Divested within ninety (90) days from the date this Order is issued, absolutely and in good faith, at no minimum price to an Acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

*Provided further* that if Respondents have divested the Assets To Be Divested to Terumo prior to the date this Order is issued and served as final, and if, at the time the Commission determines to issue and serve this Order as final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Assets to Be Divested to Terumo (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall:

1. Secure, at their sole expense, all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Assets To Be Divested to the Acquirer(s), and to permit the Acquirer(s) to continue to operate the Businesses related to the Assets To Be Divested in a manner that will achieve the purposes of this Order; *provided, however,* that the Respondents may satisfy this requirement by certifying that the Acquirer(s) has executed agreements or entered into equivalent arrangements directly with the relevant Third Party(ies); and

2. Secure the transfer from the Respondents to the Acquirer(s) of any licenses, approvals, permits, registrations, certificates, rights, or other authorizations from any Persons or Governmental Entity(ies) that are necessary to accomplish the divestiture and transfer of the Assets To Be Divested to the Acquirer(s), and for the continued operation of such assets by the Acquirer(s), in a manner that will achieve the purposes of this Order;

*Provided, however,* that in the event Respondents are unable to secure the transfer to the Acquirer(s) of, or the Acquirer is unable to obtain, any license(s), approval(s), permits(s), registration(s), certificate(s), right(s), or authorization(s) with respect to the VCD Assets To Be Divested in any of the "Specified Jurisdictions" identified in the Terumo Purchase Agreement prior to the Closing Date, then Respondents shall:

a. Continue to use best efforts and provide such assistance as the Acquirer(s) may reasonably request in connection with obtaining such license, approval, permit, registration, certificate, right, or other authorization until notification from such Specified Jurisdiction that the Acquirer(s) has been approved and/or is acceptable; but

b. If within one hundred twenty (120) days after the Acquisition Date, a Specified Jurisdiction notifies Respondents and/or the Acquirer(s) that the Acquirer(s) has not been approved and/or is not acceptable to such Specified Jurisdiction, then, with the agreement of the Acquirer(s), and subject to the prior approval of the Commission, Respondents shall substitute an alternative arrangement; or

c. If, after one hundred twenty (120) days after the Acquisition Date, the Specified Jurisdiction

has not determined that the Acquirer(s) is approved or acceptable then Respondents shall: (i) report to the Commission on the circumstances surrounding such Specified Jurisdiction's review of the Acquirer(s); and (ii) if and as directed by the Commission, submit a proposal for an alternative arrangement, with the agreement of the Acquirer(s), for the prior approval of the Commission.

C. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for a period of (2) years from the Closing Date; *provided, however,* that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of a Transition Services Agreement as provided in this Paragraph. The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Direct Costs for such personnel, technical support, assistance, training, and other services as are necessary to transfer the Assets To Be Divested to the Acquirer and enable the Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.

D. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, enter into a Transitional Manufacturing and Supply Agreement to supply the Acquirer with VCD Products and VCD Components for a period of (2) years from the Closing Date; *provided, however,* that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's

request, Respondents shall file with the Commission any request for prior approval to extend the term of a Transitional Manufacturing and Supply Agreement as provided in this Paragraph for such period of time as will be sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture the VCD Products and VCD Components in commercial quantities, and in a manner consistent with cGMP, independently of Respondents, and to secure relevant Manufacturing Equipment and sources of supply of VCD Components from Persons other than the Respondents. The VCD Products and VCD Components supplied by Respondents to the Acquirer pursuant to such Transitional Manufacturing and Supply Agreement shall be at no greater than Respondents' Direct Costs.

E. Respondents shall:

1. Provide to the Acquirer(s) originals or copies of, or access to all Confidential Business Information;

2. Deliver or provide access to such Confidential Business Information as follows: (i) in good faith; (ii) in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and (iii) in a manner that ensures it completeness and accuracy and that fully preserves its usefulness;

3. Pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor (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 related to the Assets To Be Divested;

4. Not use, directly or indirectly, any Confidential Business Information, other than as necessary to comply with the following: (i) the requirements of

this Order; (ii) the Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Assets to be Divested; or (iii) applicable Law, including mandatory regulatory filings;

5. Not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, and (iv) the Monitor, if any, and the Divestiture Trustee, if any; and

6. No later than thirty (30) days after the Closing Date, provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacture, distribution, sale, or marketing of the Assets to be Divested or who may have or have access to Confidential Business Information ("Designated Employees"); Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for at least one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records at its principal place of business regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Designated Employees.

*Provided, however*, that this Paragraph II.E. shall not apply to Confidential Business Information:

a. That Respondents can demonstrate to the Commission that Respondents obtained other than in connection with the Acquisition;

b. To the extent related to Retained Products or the Retained Business;

c. That subsequently falls within the public domain through no violation of the Order or breach of confidentiality and non-disclosure agreement with respect to such information by Respondents;

d. That is necessary to be exchanged in the course of consummating the Acquisition or the transactions under the Remedial Agreement; and

e. The disclosure of which is consented to by the Acquirer.

F. Respondents shall:

1. No later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:

a. Name, job title or position, date of hire by the relevant Respondent, and effective service date;

b. Specific description of the employee's responsibilities and primary work location;

c. The base salary or current wages;

d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;

e. Employment and leave status (*i.e.,* active or on leave or disability; full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days);

f. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and

g. At the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.

2. No later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;

3. Not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere

with the recruitment or employment of an Employee by the Proposed Acquirer;

4. Remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;

5. Not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:

   a. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or

   b. Hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.F.

*Provided, however*, that this Paragraph II.F. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

G. Pending divestiture of the Assets To Be Divested, Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, deterioration, or impairment of any of the Assets To Be Divested.

H. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the assets in the same Businesses in which the Assets To Be Divested were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

## III.

**IT IS FURTHER ORDERED** that:

A. Edward J. Buthusiem shall serve as 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 Agreement, including any Transition Services Agreement and Transitional Manufacturing and Supply Agreement, approved by the Commission.

B. No later than one (1) day after the Acquisition Date, Respondents shall enter into the Monitor Agreement that is attached as Appendix II and Confidential Appendix II-1 to the Order to Maintain Assets. The Monitor Agreement shall become effective on the date the Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his/her duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:

1. The Monitor shall have the responsibility and the power and authority to monitor Respondents'

compliance with the terms of the Orders and the Remedial Agreement, including any Transition Services Agreement and Transitional Manufacturing and Supply 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 the Orders, in consultation with the Commission or its staff, including any directive from the Commission to the Respondents to effect such modifications to the manner of divestiture of the Assets to be Divested as are necessary to satisfy the requirements of this Order;

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 Respondents' compliance with the provisions of the Orders and the Remedial Agreement, including for as long as Respondents are providing Transition Services to the Acquirer pursuant to a Transition Services Agreement or supplying VCD Products or VCD Components to the Acquirer pursuant to a Transitional Manufacturing and Supply Agreement; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders;

4. Subject to any demonstrated legally recognized privilege, the 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 Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders and the Remedial Agreement. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with

or impede the Monitor's ability to monitor Respondents' compliance with the Orders and the Remedial Agreement;

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

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

7. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

C. 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.

D. 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.

E. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows: (a) If Respondents have 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 Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor; and (b) not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders and the Remedial Agreement.

F. 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 Orders or the Remedial Agreement.

G. The Monitor appointed pursuant to the Orders may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

## IV.

**IT IS FURTHER ORDERED** that:

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

B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. No later than ten (10) Days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture(s) required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets or rights that are required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order;

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture(s), 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 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; *provided, however*, the Commission may extend the divestiture period only two (2) times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by the

Order, or 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(s). Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in the contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) 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 any of the Assets to be Divested, 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* that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers,

appraiser, 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(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, 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 assigned, granted, licensed, divested, transferred delivered or otherwise conveyed by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of the Orders;

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(s); and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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(s) required by this Order.

## V.

**IT IS FURTHER ORDERED** that, for a period of ten (10) years from the date this Order is issued, Respondents shall not, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in ACT or the assets of the ACT, without providing advance written notice to the Commission.

The prior notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the "Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification; Notification shall be filed with the Secretary of the Commission; Notification need not be made to the Department of Justice; and Notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereafter 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. § 802.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested by Respondents and, where appropriate, granted by a letter from the Commission's 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.

## VI.

**IT IS FURTHER ORDERED** that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by Respondents 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 a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the

full scope and breadth of each Respondent's obligations to the Acquirer(s) pursuant to this Order.

D. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Assets to be Divested, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. Respondents shall not 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 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, Respondents shall submit a letter certifying the date on which the Acquisition occurred (the "Acquisition Date").

B. Within ten (10) days after the date this Order is issued, Respondents shall provide a copy of this Order to each of Respondents' officers, employees, or agents having managerial responsibility for any of Respondents' obligations under Paragraphs II through V of this Order.

C. Within thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.B. of this Order, and every sixty (60) days

thereafter until Respondents have fully complied with Paragraphs II.C., II.D., II.E.1., II.E.2., II.E.3., II.E.6., II.F.1., II.F.2., II.F.3., II.F.4., II.G., III., VII.A., and VII.B. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their reports, among other things that are required from time to time: (1) a full description of the efforts being made to comply with this Order; (2) a detailed description of the plans and actions taken to divest and transfer the relevant assets and rights; (3) a detailed description of the plans and actions taken to deliver all Confidential Business Information to the Acquirer; and (4) a description of Respondents' provision of Transition Services and Products pursuant to the Remedial Agreement, including any Transition Services Agreement and Transitional Manufacturing and Supply Agreement.

D. Respondents shall submit to the Monitor, if one has been appointed, a copy of each report at the same time such report is submitted to the Commission.

E. One (1) year after the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order. Respondents shall submit at the same time a copy of these reports to the Monitor.

## 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 Respondents; or

C. Any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

## IX.

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

A. Access, during 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 Respondents relating to compliance with this Order, which copying services shall be provided by Respondents at their expense; 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 February 14, 2027.

By the Commission.

## Confidential Appendix I

## Terumo Purchase Agreement

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

## Confidential Appendix I-1

## Letter Agreement

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

## Appendix II

## Monitor Agreement

## Confidential Appendix II-1

## Appendix to Monitor Agreement

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

# 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 Abbott Laboratories ("Abbott") and St. Jude Medical, Inc. ("St. Jude") that is designed to remedy the anticompetitive effects that otherwise would have resulted from Abbott's proposed acquisition of St. Jude. Under the terms of the proposed Consent Agreement, the parties are required to divest St. Jude's vascular closure device business and Abbott's steerable sheath business to Terumo Corporation ("Terumo"). Abbott is also required to provide notice if it intends to acquire the assets of Advanced Cardiac Therapeutics, Inc. ("ACT").

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

Pursuant to an Agreement and Plan of Merger dated April 27, 2016, Abbott proposes to acquire St. Jude in exchange for cash and stock valued at approximately $25 billion (the "Proposed Acquisition"). The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for vascular closure devices, steerable sheaths, and lesion-assessing ablation catheters. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

Analysis to Aid Public Comment

## THE PARTIES

Headquartered in Abbott Park, Illinois, Abbott is a global health care company that offers a large portfolio of vascular products, including coronary, endovascular, vascular closure, electrophysiology, and structural heart devices.

St. Jude, headquartered in St. Paul, Minnesota, is a leading manufacturer of vascular products and medical devices. St. Jude's vascular products include vascular closure devices, pressure measurement guidewires, percutaneous catheter introducers, heart failure monitoring devices, cardiac mapping and navigation systems, diagnostic catheters, ablation catheters, and introducer sheaths.

## THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

Vascular closure devices are used to close arterial holes resulting from vascular catheterization procedures. Physicians perform these catheterization procedures to diagnose or treat a cardiovascular condition. Typically, physicians access the femoral artery and direct a specialized catheter to the heart or peripheral arteries to deploy a balloon, diagnose an arrhythmia, or insert a stent or other device. The procedures leave a hole in the artery that must be closed quickly after the catheter is removed. Vascular closure devices provide a fast and effective way for physicians to close these holes while minimizing complications and the time patients must spend recovering from the procedure. Abbott and St. Jude are the two largest suppliers of vascular closure devices in the United States, with a combined market share of over 70%. The only other firms that supply vascular closure devices in the U.S. market are Cardinal Health, Inc. and Cardiva Medical, Inc.

Steerable sheaths are used in electrophysiology procedures to treat complex heart arrhythmias, such as atrial fibrillation. Unlike a fixed sheath, the tip of a steerable sheath is deflectable, which provides better maneuverability and stability for an ablation catheter. Steerable sheaths allow physicians to more easily puncture the transseptal wall of the heart and guide the sheath and catheter into the left atrium or ventricle of the heart. St. Jude is,

by far, the largest supplier of steerable sheaths in the U.S. market. Abbott recently entered this market through its acquisition of Kalila Medical, Inc. ("Kalila") in early 2016. Other suppliers in this market, though not recent entrants, have low single-digit market shares.

Lesion-assessing ablation catheters are used during ablation procedures to treat heart arrhythmias. They also provide feedback to physicians regarding the force being applied by the catheter or the temperature of the ablation target. These products are becoming more important, and more frequently used, as physicians treat more cases of complex atrial fibrillation. Currently, only St. Jude and Biosense Webster Inc. ("Biosense") provide lesion-assessing ablation catheters in the United States. Abbott and ACT entered into a strategic partnership to develop lesion-assessing ablation catheters.

The United States is the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition. Vascular closure devices, steerable sheaths, and lesion-assessing ablation catheters are all medical devices that are regulated by the FDA. Products that are sold outside the United States, but not approved for sale in the United States, are not alternatives for U.S. consumers.

## EFFECTS OF THE ACQUISITION

The Proposed Acquisition would cause significant competitive harm in the U.S. markets for vascular closure devices, steerable sheaths, and lesion-assessing ablation catheters. For vascular closure devices, the merger would combine the largest and second-largest suppliers in the United States. The merger would eliminate the substantial price competition that currently exists between these competitors.

In the market for steerable sheaths, St. Jude is currently the largest supplier in the United States and has held a near-monopoly position in this market for over a decade. Abbott entered this market recently and its product is well positioned to compete head-to-head with St. Jude. The Proposed Acquisition would eliminate the competition that would have occurred between Abbott and St. Jude in this market.

Finally, if Abbott acquires ACT's lesion-assessing ablation catheter assets, it could eliminate potential competition in the U.S. market for lesion-assessing ablation catheters. ACT's lesion-assessing ablation catheter currently in development would compete directly with offerings from St. Jude and Biosense. It would thus be the third competitor in the highly-concentrated U.S. market for lesion-assessing ablation catheters. Abbott's acquisition of the ACT assets would reduce the additional competition that would have resulted from an additional U.S. supplier of lesion-assessing ablation catheters.

## ENTRY

Entry into the U.S. markets for vascular closure devices, steerable sheaths, and lesion-assessing ablation catheters would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The development process for each of these devices is difficult, time-consuming, and expensive. It can take tens of millions of dollars of research and development, significant further funding for clinical trials, and an extensive amount of time to even reach the stage of applying to the FDA for approval. The regulatory approval process itself can also be time-consuming as the FDA reviews the volume of material and data a company submits in support of its application.

## THE CONSENT AGREEMENT

The Consent Agreement remedies the competitive concerns raised by Abbott's proposed acquisition of St. Jude by requiring that the parties divest to Terumo all of the assets and resources needed for it to become an independent, viable, and effective competitor in the U.S. markets for vascular closure devices and steerable sheaths. It also requires Abbott to provide notice if it intends to acquire ACT's lesion-assessing ablation catheter assets.

Terumo possesses the industry experience and reputation necessary to replace competition that would be lost in the U.S. markets for vascular closure devices and steerable sheaths. Terumo is headquartered in Tokyo, Japan. It has been active in the U.S. medical device market for over thirty years and has a U.S. subsidiary based in Somerset, New Jersey. Terumo offers a

portfolio of products that are highly complementary to the vascular closure and steerable sheath products being acquired but does not sell any competing products. Through its Interventional Systems business unit, Terumo manufactures and sells guidewires, catheters, and sheaths, as well as other vascular access devices. As a result, it currently sells its products to many of the same customers as Abbott and St. Jude. Terumo is thus well positioned to restore the benefits of competition that would be lost through the Proposed Acquisition.

Pursuant to the Order, Terumo will receive all rights and assets related to St. Jude's vascular closure device business and Abbott's steerable sheath business, including all of the intellectual property used in those businesses. In addition, Terumo will take over part of the facility in Caguas, Puerto Rico where St. Jude currently manufactures most of its vascular closure device products. In order to ensure continuity of supply for certain vascular closure devices and components that are not currently manufactured in the Puerto Rico facility, the Order requires that St. Jude supply Terumo with finished vascular closure devices and components for up to two years while Terumo transitions to independent manufacturing.

To ensure that the divestiture is successful, the Order requires the parties to enter into a transitional services agreement with Terumo to assist the company in establishing its manufacturing capabilities. Further, the Order requires that the parties transfer all confidential business information to Terumo, as well as provide access to employees who possess or are able to identify such information. Terumo also will have the right to interview and offer employment to employees associated with St. Jude's vascular closure device business and Abbott's steerable sheath business.

The parties must accomplish the divestiture no later than forty-five days after the consummation of the Proposed Acquisition. If the Commission determines that Terumo is not an acceptable acquirer, or that the manner of the divestiture is not acceptable, the Order requires the parties to unwind the sale and accomplish the divestiture within 180 days of the date the Order becomes final to another Commission-approved acquirer.

Analysis to Aid Public Comment

To ensure compliance with the Order, the Commission has agreed to appoint an Interim Monitor to ensure that Abbott and St. Jude comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Terumo. Further, the Order allows the Commission to appoint a Divestiture Trustee to accomplish the divestiture should the parties fail to comply with their divestiture obligations. Lastly, the Order terminates after ten years.

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

Complaint

**IN THE MATTER OF**

# COOPERATIVA DE MÉDICOS OFTALMÓLOGOS DE PUERTO RICO

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

*Docket No. C-4603; File No. 141 0194*
*Complaint, February 27, 2017 – Decision, February 27, 2017*

This consent order addresses Cooperativa de Médicos Oftalmólogos de Puerto Rico's agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc., a payor, and Eye Management of Puerto Rico, MCS's network administrator. The complaint alleges that Cooperativa de Médicos Oftalmólogos de Puerto Rico violated Section 5 of the Federal Trade Commission Act by orchestrating a concerted refusal to deal by ophthalmologists in Puerto Rico to preclude a third-party payor and its network administrator from implementing a cost-savings program to manage ophthalmology services and reduce reimbursement rates. The consent order prohibits Cooperativa de Médicos Oftalmólogos de Puerto Rico from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payor over contract terms, as well as agreements not to deal individually with payors, or to deal only through Cooperativa de Médicos Oftalmólogos de Puerto Rico.

*Participants*

For the *Commission*: *Robert S. Canterman, Synda Mark, Gary H. Schorr,* and *Steve Vieux.*

For the *Respondent*: *Omar Martinez, Martinez & Martinez; Luis Martinez; Veronica Ferraiuoli, Estudio Legal Ferraiuoli; David Balto* and *Bradley A Wasser, Law Offices of David A.·Balto.*

## 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 Cooperativa de Médicos Oftalmólogos de Puerto Rico ("OFTACOOP"), hereinafter referred to as "Respondent," has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it

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

## NATURE OF THE CASE

1. This matter concerns an agreement among competing ophthalmologists to refuse to deal with a health plan that tried to establish a lower-cost provider network for its members who sought medical treatment for eye problems in the Commonwealth of Puerto Rico.

2. Respondent OFTACOOP is a healthcare cooperative in Puerto Rico composed of about 100 member ophthalmologists. Respondent orchestrated an agreement among competing ophthalmologists not to deal with a health plan, MCS Advantage, Inc. ("MCS"), and its network administrator Eye Management of Puerto Rico ("Eye Management"). Respondent's concerted refusal to deal succeeded. MCS had to abandon its plans to have Eye Management create a lower-cost network of ophthalmologists.

3. OFTACOOP has not undertaken any efficiency-enhancing integration among its members sufficient to justify the challenged conduct.

4. The Respondent's illegal conduct unreasonably restrained prices and other forms of competition among otherwise-independent ophthalmologists in Puerto Rico.

## RESPONDENT

5. OFTACOOP is a not-for-profit corporation organized, existing, and doing business as a cooperative under and by virtue of the laws of the Commonwealth of Puerto Rico with its principal address at 1250 Ponce de Leon Avenue, Suite #906, San Juan, Puerto Rico 00907. OFTACOOP is a healthcare cooperative of composed of more than 50% of the physicians practicing ophthalmology throughout Puerto Rico.

## JURISDICTION

6. OFTACOOP is organized for the purpose of serving the interests of its members. OFTACOOP exists and operates, and at all times relevant to this Complaint, has existed and operated, for the pecuniary benefits of its members.

7. At all times relevant herein, OFTACOOP's members have provided ophthalmology services to people for a fee. Except to the extent that Respondent has restrained competition as alleged herein, OFTACOOP's members have competed with one another to provide ophthalmology services to patients for a fee.

8. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

9. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as "Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, defines "commerce".

## OVERVIEW OF CONTRACTING AMONG PHYSICIANS, PAYORS, AND NETWORK ADMINISTRATORS

10. Individual physicians and physician group practices, including ophthalmologists and ophthalmologist group practices, often contract with payors of healthcare services and benefits, including health insurers, managed care organizations, and others to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to the payors' enrollees.

11. Physicians entering into a payor contract often agree to discount or lower their reimbursement rates in exchange for access to additional patients made available by that payor's relationship with its subscribers. The contract with physicians may reduce the payor's costs and enable it to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

12. Absent anticompetitive agreements among them, otherwise-competing physicians unilaterally decide whether to contract with a payor to provide services to individuals covered by that payor's health plan(s), and what prices and other terms they will accept as payment for their services pursuant to such contracts.

13. In some instances, physicians and payors contract with network administrators. Network administrators provide various services to payors, including assembling provider panels, assuming financial risk, and offering administrative services such as credentialing, utilization management, and claims processing services. While many payors conduct these functions in-house, they may also contract with a network administrator to perform some or all of these services in exchange for a fee. These contracts with a network administrator may reduce payors' costs and may enable payors to lower the price of health insurance and reduce patients' out-of-pocket medical care expenses.

14. Physicians contracting with a network administrator often agree to discount or lower their reimbursement rates in exchange for access to additional patients made available by that network administrator's relationship with health-plan subscribers. These contracts with physicians may reduce a network administrator's costs and enable it to provide services to individuals covered by a payor's health plan at a lower cost than the health plan is able to provide on its own.

## ANTICOMPETITIVE CONDUCT

### Payor MCS Retained Network Administrator Eye Management to Help Lower Costs of Ophthalmology Services

15. MCS, a payor, provides healthcare services to enrollees of its Medicare Advantage plans pursuant to a contract with Medicare. Medicare pays MCS a premium; in exchange, MCS arranges and pays for healthcare services for its enrollees.

16. To participate in the Medicare Advantage program, MCS must offer a network with a sufficient number of physicians because the network must comply with the program's requirement of providing adequate access to healthcare services for its

Medicare Advantage enrollees. In 2014, MCS therefore needed a certain number of ophthalmologists in its network to meet the program's requirement of adequate access.

17. As of April 2014, MCS contracted directly with approximately 200 ophthalmologists in Puerto Rico to provide ophthalmology services to its Medicare Advantage enrollees.

18. MCS sought to lower its costs after Medicare reduced the premiums it was paying to MCS. In April 2014, MCS asked Eye Management, a network administrator, to create and manage a network of ophthalmologists in Puerto Rico to help lower costs and better manage ophthalmology services provided to its Medicare Advantage enrollees. Eye Management is part of a group of privately owned, affiliated companies that create provider networks and offer credentialing, utilization management, and claims processing services in Puerto Rico, Florida, Georgia, and New Jersey to help improve the efficiency and reduce the costs of providing healthcare services to health-plan enrollees.

19. Under its arrangement with Eye Management, MCS would pay Eye Management a capitated rate (i.e., a set dollar amount per MCS enrollee per month) in exchange for Eye Management assuming financial and operational responsibility for managing ophthalmology services and benefits for MCS Medicare Advantage enrollees. Specifically, Eye Management would enter into new contracts directly with ophthalmologists to replace MCS's existing contracts with each ophthalmologist. In addition, Eye Management would administer ophthalmology services and benefits provided to MCS enrollees, including credentialing, utilization review, claims processing, and other management services.

20. On or about June 4, 2014, MCS sent a letter to OFTACOOP members and other ophthalmologists in its network explaining its arrangement with Eye Management. On or about June 8, 2014, Eye Management sent a proposed contract to each ophthalmologist under which Eye Management offered to pay the ophthalmologist at rates that were about 10% lower, on average, than the rates under the existing contracts between MCS and each ophthalmologist.

**Collective Refusal to Deal Defeated the Eye Management Network and Forced MCS to Maintain Higher Rates**

21. In response to the letters from MCS and Eye Management, OFTACOOP convened a meeting on June 14, 2014. Under the leadership of OFTACOOP's president, a number of OFTACOOP member and non-member ophthalmologists, including a former secretary of the Board of Directors, attended the meeting. At the meeting, the ophthalmologists discussed their dissatisfaction with Eye Management and MCS, and their refusal to accept Eye Management's proposed contract.

22. The ophthalmologists who attended the meeting agreed not to sign new contracts with Eye Management in order to prevent Eye Management from creating the new network.

23. Within hours after the meeting, the former secretary of the Board, with the assistance of OFTACOOP's president, drafted and sent an email to more than 100 OFTACOOP member and non-member ophthalmologists with the subject line "**DO NOT SIGN THE MCS/EYE MANAGEMENT CONTRACT**." The email was signed "**Board of Directors OFTACOOP"** and sent from the email account "oftacoop@gmail.com." The email informed the recipients that the ophthalmologists reached an agreement "**of NOT SIGNING the contract**" at the June 14, 2014 meeting and that they "**ALL NEEDED TO BE UNITED TO STOP THE TRAMPLING FROM THE MEDICAL PLANS.**" The email also urged the ophthalmologists not to sign the contract with Eye Management so they could collectively negotiate with payors through OFTACOOP.

24. Eye Management's medical director was one of the recipients of the email. Eye Management believed that OFTACOOP was directly interfering with Eye Management's plans to develop an ophthalmology network in Puerto Rico. In response, on June 19, 2014, Eye Management's counsel sent OFTACOOP a cease-and-desist letter urging OFTACOOP to stop interfering with negotiations between Eye Management and individual ophthalmologists. The letter also notified OFTACOOP that any agreement among competing ophthalmologists to jointly refuse to contract with Eye Management was illegal under the antitrust laws.

25. OFTACOOP next met on June 22, 2014. The stated purpose of that meeting, according to the June 14, 2014 email, was "to turn this around and for us to trample over MCS." At the meeting, OFTACOOP's president told the attendees they should make their own decisions. But he did not tell them that a collective refusal to deal with Eye Management violated the antitrust laws. Indeed, despite the cease-and-desist letter from Eye Management, the former secretary of the Board told the attendees that they had to be united against Eye Management.

26. Respondent's efforts to unite the ophthalmologists against Eye Management had the desired effect. While some ophthalmologists initially told Eye Management they would sign a contract with Eye Management, the positive response quickly came to a halt after the June 14, 2014 OFTACOOP meeting and email. Some ophthalmologists told Eye Management that they would not accept the proposed contract until they received further instructions from OFTACOOP. Another ophthalmologist told Eye Management he would not sign the Eye Management contract because that was the agreement reached among OFTACOOP members and others. In the end, only a few ophthalmologists joined the Eye Management network. The final number of contracting ophthalmologists was well below what MCS needed in its network to meet network adequacy requirements under the Medicare Advantage program.

27. This was the first time Eye Management and its affiliates had encountered a widespread unwillingness by providers to join their networks. In fact, Eye Management and its affiliates have successfully created provider networks for at least six different medical specialties in several states, even when offering providers lower reimbursement than they had previously received under their contracts with health plans. In fact, the same year Eye Management was unable to contract with ophthalmologists because of Respondent's conduct, it successfully assembled a network of 350 optometrists in Puerto Rico.

28. The collective refusal to deal thwarted Eye Management's efforts to create a lower-cost network of ophthalmologists on behalf of MCS. In early August 2014, Eye Management informed MCS that it had been unable to form a viable network of

ophthalmologists. MCS directed Eye Management to suspend further efforts to do so.

29. Having no choice but to abandon its cost-savings arrangement with Eye Management, MCS tried another approach to lower costs and better manage care. In early August 2014, MCS sent a letter to each ophthalmologist agreeing to continue contracting directly with the ophthalmologist. MCS informed the ophthalmologists that it would delegate only certain administrative functions to Eye Management. Faced with declining premium payments from the Medicare program to provide services to Medicare Advantage enrollees, MCS offered rates about 10% below the rates under its existing contracts with the ophthalmologists.

30. Just as they had rejected Eye Management's proposed contracts, many ophthalmologists refused to accept MCS's offer and cancelled, or threatened to cancel, their contracts with MCS. Out of approximately 200 contracted ophthalmologists, more than half cancelled their contracts with MCS between July 2014 and August 2014. Almost all of the ophthalmologists who sent cancellation letters were OFTACOOP members.

31. The contract cancellations jeopardized MCS's ability to include a sufficient number of ophthalmologists in its network needed to meet adequate access requirements for its Medicare Advantage enrollees. It also threatened to imperil patient care: MCS received hundreds of phone calls from its enrollees complaining that some ophthalmologists were either not offering appointments or cancelling previously scheduled surgeries.

32. With the ophthalmologists standing firm in their agreement not to participate in any lower-cost arrangement with MCS, MCS met with OFTACOOP's president, the former secretary of the Board, and other ophthalmologists to try to resolve the impasse. During a meeting in September 2014, the ophthalmologists made clear that OFTACOOP remained united in opposing MCS's efforts to contract at lower rates. MCS therefore had no choice but to abandon its plan to reduce rates and instead continued paying the higher rates to the ophthalmologists to retain its provider network for its Medicare Advantage members. Had MCS been able to lower the rates it paid to ophthalmologists, it

may have been able to benefit consumers in two ways: (i) pass savings along to its members in the form of lower out-of-pocket medical expenditures, or (ii) refrain from potentially decreasing benefits or increasing out-of-pocket expenditures.

33. Through its concerted conduct, Respondent restrained competition by collectively refusing to deal with Eye Management and MCS. The purpose and effect of the concerted refusal to deal was to prevent Eye Management from creating a network of ophthalmologists on behalf of MCS and to defeat MCS's attempt to lower the costs of ophthalmology services provided to Medicare Advantage enrollees.

## RESPONDENT'S CONDUCT IS NOT LEGALLY JUSTIFIED

34. Respondent's conduct described above has not been, and is not, reasonably related to achieving any efficiency-enhancing integration. Respondent has not undertaken any activities to create any integration among OFTACOOP members in their delivery of ophthalmology services and thus cannot justify the conduct described above.

## ANTICOMPETITIVE EFFECTS

35. Respondent's actions described in paragraphs 23 through 34 have had the purpose and effect of unreasonably restraining trade and hindering competition in the provision of ophthalmology services in the Commonwealth of Puerto Rico in the following ways, among others:

a. unreasonably restraining price and other forms of competition among ophthalmologists;

b. increasing costs for ophthalmology services;

c. depriving payors and individual consumers access to a lower-cost network of ophthalmologists; and

d. depriving consumers of the benefits of competition among ophthalmologists.

## VIOLATION CHARGED

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-seventh day of February, 2017, issues its Complaint against the Cooperativa de Médicos Oftalmólogos de Puerto Rico.

By the Commission.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Cooperativa de Médicos Oftalmólogos de Puerto Rico, hereafter referred to as "Respondent OFTACOOP," and Respondent OFTACOOP 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 OFTACOOP with violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent OFTACOOP, its attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent OFTACOOP 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 OFTACOOP 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 OFTACOOP has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 OFTACOOP is a not-for-profit cooperative association organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at 1250 Ponce de León Ave., Suite #906, San Juan, Puerto Rico 00907.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent OFTACOOP, 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 OFTACOOP" means Cooperativa de Médicos Oftalmólogos de Puerto Rico, its directors, officers, employees, agents, attorneys, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Respondent OFTACOOP, and the respective directors, officers, employees, agents, attorneys, representatives, successors and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Committee" means the Committee for the Supervision and Inspection of the Proceedings of Collective Negotiation established pursuant to Act 228, and includes additional or successor entities established pursuant to Act 228.

D. "Communicate" means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word "communicate," including, but not limited to, "communicating," "communicated" and "communication."

E. "COSSEC" means the Public Corporation for the Supervision and Insurance of Cooperatives in Puerto Rico.

F. "Ophthalmologist" means a Physician who performs surgery and provides medical and surgical treatment and care of the eyes and visual system.

G. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services to a Payor through such entity. This definition applies to all tenses and forms of the word "Participate," including, but not limited to, "Participating," "Participated" and "Participation."

H. "Payor" means any Person that pays, or arranges for the payment, for all or any part of any Physician services or hospital services for itself or for any other Person. Payor includes any Person that develops, leases, or sells access to networks of Physicians or hospitals.

I. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities and governments.

J. "Physician" means a doctor of allopathic medicine ("M.D."), a doctor of osteopathic medicine ("D.O."), a doctor of chiropractic medicine ("D.C."), or a doctor of podiatric medicine ("D.P.M.")

K. "Act 228" means Puerto Rico Act 228 of December 15, 2015 and includes any implementing regulations subsequently promulgated.

## II.

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

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Ophthalmologists:

1. To refuse to deal or threaten to refuse to deal with any Payor regarding any term, condition, or requirement upon which any Ophthalmologist deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or

2. Not to deal individually with any Payor or not to deal with any Payor other than through Respondent OFTACOOP;

B. Submitting for approval to COSSEC, the Committee, including any Committee member, or any other entity established pursuant to Act 228, any agreement with any Payor if Respondent OFTACOOP, or any of its

members, engaged in any acts of coercion, intimidation, or boycott of, or concerted refusal to deal with any Payor seeking to contract with Respondent OFTACOOP.

C. Exchanging or facilitating in any manner the exchange or transfer of information to facilitate any action prohibited by Paragraph II.A. of this Order;

D. Attempting to engage in any action prohibited by Paragraphs II.A. and II.B. of this Order; and

E. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A. through II.C of this Order.

*Provided, however*, that it shall not of itself constitute a violation of Paragraph II. of this Order for Respondent OFTACOOP, when negotiating with any Payor in compliance with Act 228, to:

1. reject any offer or counter-offer or refuse to contract; or

2. exchange such information as is reasonably necessary to contract pursuant to negotiating or contracting with any Payor.

## III.

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

A. Within thirty (30) days after the date this Order issues, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation, a copy of this Order, the Complaint and the Analysis of the Proposed Order to Aid Public Comment to each:

1. Ophthalmologist who Participates, or has Participated, in Respondent OFTACOOP; and

2. Officer, director, manager and employee of Respondent OFTACOOP.

B. For five (5) years after the date on which this Order is issued, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation a copy of this order and the Complaint to each:

1. Ophthalmologist who begins Participating in Respondent as a provider of ophthalmological services, and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that such Participation begins;

2. Person who becomes an officer, director, manager, or employee of Respondent OFTACOOP, and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that he or she assumes such status with Respondent.

3. Post and maintain on Respondent OFTACOOP's website, if any, and annually publish in any official annual report or newsletter sent to all ophthalmologists who Participate in Respondent OFTACOOP, this Order and the Complaint, in English and in Spanish, with such prominence as is given to regularly featured articles.

## IV.

**IT IS FURTHER ORDERED** that Respondent OFTACOOP shall file a verified written report within sixty (60) days after the date this Order is issued, annually thereafter for five (5) years on the anniversary of the date this Order is issued, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. A detailed description of the manner and form in which Respondent OFTACOOP has complied and is complying with the Order;

B. A copy of each confirmation required by Paragraphs III.A. and B. of this Order.

**V.**

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

A. Any proposed dissolution of Respondent OFTACOOP;

B. Any proposed acquisition, merger or consolidation of Respondent OFTACOOP; or

C. Any other change in Respondent OFTACOOP, including but not limited to assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**VI.**

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

A. Access, during office hours of Respondent OFTACOOP 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 OFTACOOP related to compliance with this Order, which copying services shall be provided by Respondent OFTACOOP at the request of the authorized representative(s) of the

Commission and at the expense of Respondent OFTACOOP; and

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

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on February 27, 2037.

By the Commission.

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

### I. Overview

The Federal Trade Commission (Commission), has accepted, subject to final approval, an agreement containing a proposed consent order with the Cooperativa de Médicos Oftalmólogos de Puerto Rico (Respondent or OftaCoop). The agreement settles charges that OftaCoop violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by orchestrating a concerted refusal to deal by ophthalmologists in Puerto Rico to preclude a third-party payor and its network administrator from implementing a cost-savings program to manage ophthalmology services and reduce reimbursement rates.

The proposed consent order 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 order along with the comments received,

and decide whether it should withdraw from the consent agreement, modify it, or make final the proposed consent order.

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

## II. The Complaint

OftaCoop is a healthcare cooperative with about 100 ophthalmologists organized under the laws of the Commonwealth of Puerto Rico. The proposed complaint charges that OftaCoop facilitated an agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc. (MCS), a payor, and Eye Management of Puerto Rico (Eye Management), MCS's network administrator. The allegations of the proposed complaint are summarized below.

MCS provides healthcare coverage to enrollees of its Medicare Advantage plans pursuant to a contract with Medicare. Medicare pays MCS a premium; in exchange, MCS arranges and pays for healthcare services for its enrollees. To participate in the Medicare Advantage program, MCS must offer a provider network with a sufficient number of physicians to comply with the program's network adequacy requirement designed to ensure enrollees have adequate access to healthcare services. MCS sought to lower its costs after Medicare reduced the premiums it was paying to MCS.

In April 2014, MCS asked Eye Management to create and manage a network of ophthalmologists in Puerto Rico to help lower costs and better manage ophthalmology services provided to its Medicare Advantage enrollees. Eye Management would administer ophthalmology services and benefits provided to MCS enrollees, including credentialing, utilization review, claims processing, and other management services. Under the arrangement, Eye Management would enter into contracts directly

with each ophthalmologist to replace MCS's existing contracts with each ophthalmologist. In early June 2014, Eye Management sent a proposed contract to every ophthalmologist contracted with MCS at the time. These contracts offered payments at rates that were about 10% lower, on average, than the rates under the existing contracts between MCS and each ophthalmologist.

OftaCoop convened a meeting on June 14, 2014 with OftaCoop members and non-member ophthalmologists to discuss their dissatisfaction with Eye Management. The attendees agreed not to sign a new contract with Eye Management in order to prevent Eye Management from creating a network on behalf of MCS. After the meeting, OftaCoop's former Secretary of the Board of Directors, with help from OftaCoop's president, sent an email to OftaCoop member and non-member ophthalmologists with the subject line "DO NOT SIGN THE MCS/EYE MANAGEMENT AGREEMENT." The email was signed "Board of Directors OFTACOOP" and sent from OftaCoop's official email account. The email urged the ophthalmologists not to sign the contract with Eye Management so they could collectively negotiate with payors through OftaCoop.

Eye Management's medical director was one of the recipients of the email. In response to the email, Eye Management's counsel sent OftaCoop a cease-and-desist letter on June 19, 2014, asking OftaCoop to stop interfering with negotiations between Eye Management and individual ophthalmologists. The letter also notified OftaCoop that any agreement among competing ophthalmologists to jointly refuse to contract with Eye Management was illegal under the antitrust laws.

OftaCoop next met on June 22, 2014. The stated purpose of that meeting, according to the June 14, 2014 email, was "to turn this around and for us to trample over MCS." At the meeting, OftaCoop's president told the attendees they should make their own decision about payor contracting. Notwithstanding Eye Management's cease-and-desist letter, the former Secretary of the Board told the meeting attendees that they had to be united against Eye Management.

The collective refusal to deal among the ophthalmologists prevented Eye Management from creating a lower-cost network.

Few ophthalmologists joined the Eye Management network. In early August 2014, Eye Management informed MCS of its inability to form a viable network of ophthalmologists. MCS directed Eye Management to suspend further efforts to develop a network.

MCS next tried to lower costs through its direct contracts with the ophthalmologists. In early August 2014, MCS offered to continue contracting directly with the ophthalmologists at rates about 10% below rates under its existing contracts with the ophthalmologists. Just as they had rejected Eye Management's proposed contracts, many ophthalmologists refused to accept MCS's offer and cancelled, or threatened to cancel, their existing contracts with MCS. The contract cancellations jeopardized MCS's ability to meet network adequacy requirements for its Medicare Advantage enrollees. It also threatened to imperil patient care: MCS received hundreds of phone calls from its enrollees complaining that ophthalmologists were not offering appointments or cancelling previously scheduled surgeries. MCS had no choice but to abandon its plan to lower rates and instead continued paying ophthalmologists the higher rates to retain its network.

Finally, the complaint alleges that OftaCoop has not undertaken any activities to create any integration among OftaCoop members in their delivery of ophthalmology services and thus cannot justify the alleged conduct.

## III. The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal conduct alleged in the complaint. The key provisions are aimed at preventing OftaCoop from using concerted refusals to deal or other coercive tactics to extract favorable contract terms from payors. The proposed consent order also takes into account a change in Puerto Rico law that authorizes healthcare cooperatives to jointly negotiate with payors. Therefore, the proposed consent order does not prohibit OftaCoop from jointly contracting with payors.

### A. Proposed consent order provisions

Paragraph II.A bars OftaCoop from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payor over contract terms, as well as agreements not to deal individually with payors, or to deal only through OftaCoop. Paragraph II.B prohibits OftaCoop from submitting for state approval any payor contract that it negotiated using acts of coercion, intimidation, boycott, or concerted refusal to deal.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A. Paragraph II.C bars information exchanges to further conduct that violates the core prohibitions of Paragraph II. Paragraphs II.D and II.E. ban attempts and encouragement of such violations.

Paragraph III.A requires OftaCoop to send a copy of the complaint and consent order to its members, officers, directors, managers, and employees. Paragraph III.B contains notification provisions relating to future contact with its members, officers, directors, managers and employees. For five years after the date on which the consent order is issued, OftaCoop is required to distribute a copy of the consent order and complaint to each member who begins participating in OftaCoop and each person who becomes an officer director, manager, or employee. Paragraph III.B also requires OftaCoop to publish a copy of the consent order and complaint, annually for five years, on its web site, if any, or any official publication it sends to its members.

Paragraphs IV, V, and VI impose various obligations on OftaCoop to report or provide access to information to the Commission to facilitate monitoring of compliance with the consent order.

Finally, paragraph VII provides that the consent order will expire in 20 years.

### B. Impact of new Puerto Rico law on the proposed consent order and inclusion of a proviso

During the investigation, Puerto Rico passed a new law (Act 228 of December 15, 2015) permitting healthcare cooperatives

such as OftaCoop to jointly negotiate contracts with payors. Under this new law, healthcare cooperatives must file their payor agreements with the Puerto Rico Public Corporation for the Supervision and Insurance of Cooperatives (COSSEC). A committee whose members are not competitors in the market will oversee the negotiations, and must approve or disapprove each agreement.

Puerto Rico has neither issued any regulations nor do we have any record to evaluate how Puerto Rico will supervise negotiations. Therefore, the Commission is unable to assess to whether Act 228 complies with state action requirements.[2] Although it is too early to assess Puerto Rico's implementation of the new law, the Commission believes the circumstances here make it appropriate to defer to Puerto Rico's expressed intention to actively supervise joint negotiations between healthcare cooperatives and payors. Puerto Rico officials have only been recently granted that authority, and it is appropriate to allow them an opportunity to utilize that authority. As a result, the proposed consent order does not bar collective price negotiations. This is consistent with the consent order in another matter involving healthcare providers where state officials had authority to actively supervise private conduct but had not exercised it.[3]

In light of Act 228, the order also includes a proviso designed to clarify the scope of the prohibitions in Paragraph II. First, it provides that the provisions of Paragraph II do not prohibit OftaCoop, in exercising its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between OftaCoop and any of its members that the member will refuse to deal individually (or will deal only through OftaCoop). Second, the proposed consent order does not prevent OftaCoop from exchanging information when necessary to

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2 The state action doctrine shields certain anticompetitive conduct by the states from federal antitrust scrutiny. *See Parker v. Brown*, 317 U.S. 341 (1943).

3 *See Minnesota Rural Health Cooperative*, C-4311 (Jan. 4, 2011) (consent order, in settling charges that a group of doctors and hospitals used coercive tactics in negotiations with payors, prohibited using coercion in negotiations, but did not bar joint negotiations), available at https://www.ftc.gov/news-events/press-releases/2010/06/minnesota-health-care-provider-group-settles-ftc-price-fixing.

conduct joint payor contract negotiations on behalf of its members. Such information would not, however, ordinarily include whether an individual member is participating in a particular contract or the terms on which it is negotiating with a payor independently of OftaCoop.

Complaint

**IN THE MATTER OF**

# ADVOCATE HEALTH CARE NETWORK, ADVOCATE HEALTH AND HOSPITALS CORPORATION,
**AND**
# NORTHSHORE UNIVERSITY HEALTHSYSTEM

ADMINISTRATIVE COMPLAINT, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

*Docket No. 9369; File No. 141 0231*
*Complaint, December 17, 2015 – Decision, March 20, 2017*

This case addresses the $2.2 billion acquisition by Advocate Healthcare Network of certain assets of NorthShore University HealthSystem. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for general acute care inpatient hospital services in the North Shore Area, in northern Cook County and southern Lake County, in Illinois. The Order dismisses the Complaint because the respondents abandoned the proposed merger.

*Participants*

For the *Commission*: *Emily Bowne, Alex Bryson, Timothy Carson, Christopher Caputo, Charles Dickinson, Jamie France, Sean Pugh, Anthony Saunders, Sophia Vandergrift,* and *Michelle Yost Hale.*

For the *Respondents*: *Robert McCann* and *Kenneth Vorrasi, Drinker Biddle & Reath LLP; David Dahlquist, Winston & Strawn LLP.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondents Advocate Health Care Network ("AHCN"), Advocate Health and Hospitals Corporation ("AHHC," and together with AHCN,

"Advocate"), and NorthShore University HealthSystem ("NorthShore"), have executed an affiliation agreement ("Affiliation Agreement") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

## I.

## NATURE OF THE CASE

1. Advocate and NorthShore are the two leading providers of general acute care ("GAC") inpatient hospital services in the northern suburbs of Chicago, Illinois. The proposed transaction between Respondents ("Transaction") would join these two hospital systems to create by far the largest hospital system in northern Cook County and southern Lake County.

2. The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Respondents consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.

3. Advocate and NorthShore are close, if not each other's closest, competitors in the North Shore area. A strategy consultant retained by NorthShore concluded that Advocate was the "#1 provider in NorthShore's service area" and "NorthShore and Advocate are the #1 or #2 players in almost every service line" in NorthShore's "core service area." Other NorthShore documents refer to Advocate as its "top," "key," "largest," "main," and "real" competitor. Moreover, both Advocate and NorthShore have a history of upgrading medical facilities, investing in new technologies, and adjusting their approach to managed care contracting because of competition from each other.

4. The Transaction will substantially lessen competition in the market for GAC inpatient hospital services sold and provided

to commercial payers (*i.e.*, health plans) and their insured members, respectively ("GAC inpatient hospital services"). The relevant geographic market in which to analyze the effects of the Transaction is the area in northern Cook County and southern Lake County, defined as the "North Shore Area." The North Shore Area is bounded by six hospitals—NorthShore Evanston Hospital, Swedish Covenant Hospital, Presence Resurrection Medical Center, Northwest Community Hospital, Advocate Condell Medical Center, and Vista Medical Center East—and contains five additional hospitals—NorthShore Glenbrook Hospital, NorthShore Highland Park Hospital, NorthShore Skokie Hospital, Advocate Lutheran General Hospital, and Northwestern Lake Forest Hospital. Collectively, Respondents own and operate more than half the GAC hospitals located within the North Shore Area.

5. Respondents are already the two largest providers, by admissions, of GAC inpatient hospital services in the North Shore Area. Respondents employ and are affiliated with large networks of physicians, offer a vast suite of GAC inpatient hospital services, and operate with additional competitive advantages over other hospitals in the North Shore Area. Post-Transaction, Respondents would control 55% of the GAC inpatient hospital services market, by admissions, in the North Shore Area, while the next largest hospital would have only 15% of this market. The Transaction would significantly increase market concentration and result in such a highly concentrated market that the Transaction is presumptively unlawful under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

6. Today, Advocate and NorthShore compete for inclusion in commercial payers' hospital networks. Without either of these hospital systems, it would be very difficult for commercial payers to market a health plan provider network to employers with employees living or working in the North Shore Area. Competition between Advocate and NorthShore results in lower prices, higher quality, and greater service offerings.

7. By eliminating competition between the parties, the Transaction is likely to increase Respondents' bargaining leverage with commercial payers, and enhance Respondents' ability to

negotiate more favorable reimbursement terms, including reimbursement rates (*i.e.*, prices). Faced with higher rates and other less favorable terms, commercial payers will be forced to pass on those higher healthcare costs to employers and their employees in the form of increased premiums, co-pays, deductibles, and other out-of-pocket expenses. The merged firm will also have a diminished incentive to improve its quality of care or increase its service offerings to patients in the North Shore Area.

8. Entry or expansion by other hospitals will not be likely, timely, or sufficient to counteract the adverse competitive effects that likely will result from the Transaction. Illinois's Certificate of Need regulatory framework makes it difficult for health systems to receive approval to build new hospitals or expand existing facilities. Additionally, potential entrants would need to devote significant time and resources to conduct studies, develop plans, acquire land, and construct and open a competitive hospital. Respondents' combined size and the breadth and depth of the GAC inpatient hospital services they provide make it unlikely that there will be entry on a sufficient scale to counteract or constrain post-Transaction price increases.

9. Respondents' principal efficiency claim—that the merger will enable Respondents to lower costs and participate in a low-price, ultra-narrow network insurance product offered to commercial payers—is neither substantiated nor merger-specific, and ultimately not cognizable. Respondents' other efficiency claims, including their purported claims for improved quality, are likewise not substantiated, not merger-specific, and not cognizable. Even assuming Respondents' purported efficiencies were cognizable, they are insufficient to justify the Transaction in light of its potential to harm competition.

## II.

## BACKGROUND

### A.

### Jurisdiction

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

11. The Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

### B.

### Respondents

12. Respondents AHCN and AHHC are Illinois not-for-profit corporations, with AHCN acting as the sole corporate member of AHHC. Together and with other controlled corporations, they constitute and operate Advocate, a not-for-profit health system affiliated with the Evangelical Lutheran Church in America and the United Church of Christ. Headquartered in Downers Grove, Illinois, Advocate operates 11 GAC hospitals and a two-campus Children's Hospital, all in Illinois. Five of Advocate's GAC hospitals—Christ Medical Center, Illinois Masonic Medical Center, Lutheran General Hospital, South Suburban Hospital, and Trinity Hospital—are located in Cook County, and two—Condell Medical Center and Good Shepherd Hospital—are located in Lake County. For the fiscal year ending on December 31, 2014, Advocate generated $5.2 billion in revenue.

13. Advocate is the largest hospital system in the Chicago metropolitan area. Including its 12 hospitals, Advocate has more than 250 healthcare practice sites at which physicians and other clinicians provide clinical health services, with 37 outpatient service locations, 25 imaging facilities, and five outpatient surgical centers. Two of Advocate's hospitals, Advocate

Lutheran General Hospital ("Advocate Lutheran General") and Advocate Condell Medical Center ("Advocate Condell"), are in the North Shore Area. Advocate Lutheran General, Advocate's second largest hospital with 638 licensed beds, is in Park Ridge, Illinois, a town in northern Cook County, and offers a range of GAC inpatient hospital services. Advocate Lutheran General generated more than $490 million in inpatient revenue in 2014. Advocate Condell is in Libertyville, Illinois, in southern Lake County. Advocate Condell has 273 licensed beds, and provides a wide range of GAC inpatient hospital services. Advocate Condell's inpatient revenue in 2014 exceeded $173 million. Both Advocate Lutheran General and Advocate Condell are Licensed Level I Adult Trauma Centers.

14. Advocate employs approximately 1,375 physicians as part of its employed physician group, the Advocate Medical Group, and clinically integrates with an additional 3,825 non-employed physicians. Advocate Physician Partners ("APP"), a joint venture in which Advocate holds a 50% interest, contracts with commercial payers on behalf of Advocate's hospitals as well as its employed and clinically integrated non-employed physicians.

15. Respondent NorthShore is an Illinois not-for-profit corporation and health system. Headquartered in Evanston, Illinois, NorthShore owns and operates four GAC hospitals. Three of these GAC hospitals—Evanston Hospital ("NS Evanston"), Glenbrook Hospital ("NS Glenbrook"), and Skokie Hospital ("NS Skokie")—are in northern Cook County, while the fourth—Highland Park Hospital ("NS Highland Park")—is in southern Lake County. For the fiscal year ending on September 30, 2014, NorthShore generated $1.9 billion in revenue.

16. NorthShore's four hospitals compete with Advocate's hospitals, particularly Advocate Condell and Advocate Lutheran General, across a wide range of GAC inpatient hospital services. NS Evanston, located in Evanston, Illinois, is NorthShore's largest hospital, with 354 licensed beds. NS Evanston is a Licensed Level I Adult Trauma Center. NS Evanston's inpatient revenue for its fiscal year ending in September 2014 surpassed $243 million. NS Glenbrook is in Glenview, Illinois, and has 173 licensed beds. NS Highland Park, located in Highland Park, Illinois, has 149 licensed beds. NS Skokie is in Skokie, Illinois,

and has 125 licensed beds. NS Glenbrook, NS Highland Park, and NS Skokie are Licensed Level II Adult Trauma Centers. The inpatient revenues for NS Glenbrook, NS Highland Park, and NS Skokie in the fiscal year ending in September 2014 were approximately $106 million, $85 million, and $91 million, respectively.

17. NorthShore's employed physician group, NorthShore Medical Group, employs approximately 900 physicians and clinically integrates with an additional 1,200 non-employed physicians who are on staff and have admitting privileges at one or more of NorthShore's hospitals. Of these 1,200 non-employed physicians, approximately 520 participate in NorthShore Physician Associates, an independent physician association ("IPA") whose membership also includes employed physicians within NorthShore Medical Group. NorthShore's IPA negotiates contracts with commercial payers on behalf of NorthShore's employed physicians and participating non-employed physicians.

## C.

## The Transaction

18. In early 2014, NorthShore initiated discussions with Advocate regarding a potential affiliation. On September 11, 2014, Respondents entered into the Affiliation Agreement, according to which AHCN will change its name to Advocate NorthShore Health Partners ("ANHP") and become the sole corporate member of NorthShore, thereby acquiring NorthShore in a transaction valued at $2.2 billion. The combined entity would operate 15 GAC hospitals in Illinois, 11 of which are located in Cook and Lake Counties. ANHP would be the 11th largest non-profit hospital system in the United States.

## III.

## THE RELEVANT SERVICE MARKET

19. The relevant service market is GAC inpatient hospital services sold and provided to commercial payers and their insured members, respectively. This service market encompasses a broad cluster of medical and surgical diagnostic and treatment services

offered by both Advocate and NorthShore that typically require an overnight hospital stay. GAC inpatient hospital services include, but are not limited to, many emergency services, internal medicine services, and surgical procedures offered by both Respondents. Although the Transaction's likely effect on competition could be analyzed separately for each individual inpatient service, it is appropriate to evaluate the Transaction's likely effects across this cluster of GAC inpatient hospital services because these services are offered to residents of the North Shore Area under similar competitive conditions. Thus, grouping the hundreds of individual GAC inpatient hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects with "no loss of analytic power."

20. Outpatient services are not included in the GAC inpatient hospital services market because commercial payers and patients cannot substitute outpatient services for inpatient care in response to a price increase on GAC inpatient hospital services. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions than GAC inpatient hospital services.

21. Similarly, the GAC inpatient hospital services market also excludes the most complex and specialized tertiary and quaternary services, such as some major surgeries and organ transplants. These services are offered by a different set of competitors under different competitive conditions than, and are not substitutes for, GAC inpatient hospital services.

22. Finally, the GAC inpatient hospital services market excludes services related to psychiatric care, substance abuse, and rehabilitation services. These services are also offered by a different set of competitors under different competitive conditions than, and are not substitutes for, GAC inpatient hospital services.

## IV.

## THE RELEVANT GEOGRAPHIC MARKET

23. The relevant geographic market in which to analyze the effects of the Transaction is no broader than the North Shore Area. The North Shore Area is defined as the area bounded by six

GAC inpatient hospitals: NS Evanston, Swedish Covenant Hospital, Presence Resurrection Medical Center, Northwest Community Healthcare Hospital, Advocate Condell, and Vista Medical Center East.

24. The North Shore Area is the main area of competition between NorthShore's four hospitals and the two Advocate hospitals with which NorthShore most directly competes—Advocate Lutheran General and Advocate Condell. It also comprises the population center from where these six hospitals draw a significant portion of their patients.

25. The North Shore Area substantially overlaps with NorthShore's primary service area, which NorthShore's ordinary course documents identify as the 51 zip codes that surround the NorthShore hospital system. Approximately 73% of patients residing within the North Shore Area stay there to receive GAC inpatient hospital services.

26. The appropriate geographic market to analyze the Transaction is the area where a hypothetical monopolist of the relevant services could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). If a hypothetical monopolist could impose a SSNIP, the boundaries of that geographic area are an appropriate geographic market.

27. North Shore Area residents strongly prefer to obtain GAC inpatient hospital services close to where they live or work. Indeed, it would be very difficult for a commercial payer to market successfully to patients in the North Shore Area a health plan provider network that excluded all hospitals located within the North Shore Area. Since a significant number of patients within the North Shore Area would not view hospitals outside of that area as practical alternatives, a hypothetical monopolist of all North Shore Area hospitals could profitably impose a SSNIP

## V.

## MARKET STRUCTURE AND THE TRANSACTION'S PRESUMPTIVE ILLEGALITY

28. Advocate and NorthShore are the two largest providers, by admissions, of GAC inpatient hospital services in the North Shore Area.

29. The Transaction will create a highly concentrated market that is presumptively illegal under the Merger Guidelines and the relevant case law. Based on commercial GAC inpatient admissions of patients residing within the six-county Chicagoland metropolitan area[1] and seeking care in the North Shore Area, NorthShore's share of GAC inpatient hospital services in the North Shore Area market is 35%, and Advocate's share is 20%. Post-Transaction, Respondents will control 55% of this market. Northwest Community, the third largest competitor in the North Shore Area, has a 15% share of the GAC inpatient hospital services market. No other competitor has more than a 9% share.

30. The Herfindahl-Hirschman Index ("HHI") is commonly used by courts and antitrust agencies to measure market concentration. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. A merger or acquisition is presumed likely to create or enhance market power—and is presumptively illegal—when the post-acquisition HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels far exceed these thresholds. As measured by commercial inpatient admissions from patients residing within the six-county Chicagoland metropolitan area and seeking inpatient care at a hospital within the North Shore Area, the post-Transaction HHI for commercial GAC inpatient hospital services will be 3,517—an increase of 1,423 points. The market shares and HHI figures for commercial GAC inpatient admissions for hospitals in the North Shore Area are summarized in the table below.

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1 The six-county Chicagoland metropolitan area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties.

| GAC INPATIENT HOSPITAL SERVICES<br>Share of Commercial GAC Inpatient Admissions for Hospitals Within North Shore Area<br>Limited to commercial patients residing in the 6-county Chicagoland metropolitan area | | |
|---|---|---|
| **Hospital** | **Share of Admissions** | |
| | **Pre-Transaction** | **Post-Transaction** |
| **NorthShore Evanston Hospital**<br>**NorthShore Glenbrook Hospital**<br>**NorthShore Highland Park Hospital**<br>**NorthShore Skokie Hospital** | **35%** | **55%** |
| **Advocate Condell Medical Center**<br>**Advocate Lutheran General Hospital** | **20%** | |
| Northwest Community Healthcare Hospital | 15% | 15% |
| Swedish Covenant Hospital | 9% | 9% |
| Northwestern Lake Forest Hospital | 8% | 8% |
| Presence Resurrection Medical Center | 7% | 7% |
| Vista Medical Center East | 6% | 6% |
| **HHI** | **2,094** | **3,517** |
| **Change in HHI** | **1,423** | |

## VI.

## ANTICOMPETITIVE EFFECTS

### A.

### Competition Among Hospitals Benefits Consumers

31. Competition between hospitals occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial payers' health plan provider networks. Second, in-

network hospitals compete to attract patients, including commercial payers' health plan members.

32. In the first stage of hospital competition, hospitals compete to be included in commercial payers' health plan provider networks. To become an in-network provider, a hospital negotiates with a commercial payer and, if mutually agreeable terms can be reached, enters into a contract. The financial terms under which a hospital is reimbursed for services rendered to a health plan's members are a central component of those negotiations, regardless of the payment method.

33. In-network status benefits a hospital by giving it preferential access to the health plan's members. Health plan members typically pay far less to access in-network hospitals than those that are out-of-network. Thus, all else being equal, an in-network hospital will attract more patients from a particular health plan than an out-of-network one. This dynamic motivates hospitals to offer lower rates and other more favorable terms to commercial payers to win inclusion in their networks.

34. From the payers' perspective, having hospitals in-network is beneficial because it enables the payer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

35. Under a fee-for-service payment model, a hospital receives payment (*i.e.*, reimbursement) for the services it provides to a commercial payer's health plan members. Such payment is typically on a per-service, per-diem, or discount-off-charges method. Under a risk-based payment model, a hospital is reimbursed a fixed payment for all services provided to a particular member. As a result, the hospital has an incentive to lower overall utilization of services by patients. Regardless of whether a contract's reimbursement method is based on fee-for-service terms, risk-based terms, or some combination of both, relative bargaining leverage plays a key role in negotiations between commercial payers and hospitals.

36. A critical determinant of the relative bargaining positions of a hospital and a commercial payer during contract negotiations

is whether other, nearby comparable hospitals are available to the commercial payer and its health plan members as alternatives in the event of a negotiating impasse. The presence of alternative hospitals limits a hospital's bargaining leverage and thus constrains its ability to obtain more favorable reimbursement terms from commercial payers. The more attractive these alternative hospitals are to a commercial payers' health plan members in a local area, the greater the constraint on that hospital's bargaining leverage. Where there are few or no meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

37. A merger between hospitals that are close substitutes in the eyes of commercial payers and their health plan members therefore tends to lead to increased bargaining leverage for the merged entity and, as a result, more favorable reimbursement terms, because it eliminates an available alternative for commercial payers. This increase in leverage is greater when the merging hospitals are closer substitutes for (and competitors to) each other.

38. Changes in the reimbursement terms negotiated between a hospital and a commercial payer, including increases in reimbursement rates, significantly impact the commercial payer's health plan members. "Self-insured" employers rely on a commercial payer for access to its health plan provider network and negotiated rates, but these employers pay the cost of their employees' healthcare claims directly and thus bear the full and immediate burden of any rate increases in the healthcare services used by their employees. "Fully insured" employers pay premiums to commercial payers—and employees pay premiums, co-pays, and deductibles—in exchange for the commercial payer assuming financial responsibility for paying hospital costs generated by the employees' use of hospital services. When hospital rates increase, commercial payers pass on these increases to their fully insured customers in the form of higher premiums, co-pays, and deductibles.

39. In the second stage of hospital competition, hospitals compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket cost for in-network

hospitals, hospitals in the same network compete to attract patients on non-price features—that is, by offering better quality of care, amenities, convenience, and patient satisfaction than their competitors. Hospitals also compete on these non-price dimensions to attract patients covered by Medicare and Medicaid, and other patients without commercial insurance. A merger of competing hospitals eliminates that non-price competition and reduces the merged entity's incentive to improve and maintain quality.

## B.

## The Transaction Would Eliminate Beneficial Price Competition

40. Advocate and NorthShore are close—if not each other's closest—competitors in the North Shore Area. Indeed, NorthShore considers Advocate to be its "main" and "real" competition for inpatient hospital services. Other NorthShore documents refer to Advocate as its "top," "key," and "largest" competitor. NorthShore's strategic advisors point to Advocate as the "#1 provider in NorthShore's service area," noting further that Advocate's "ACO strategy impacts growth of NorthShore's [primary care physician] base and future profitability." NorthShore's strategic advisors also find that "NorthShore and Advocate are the #1 or #2 players in almost every service line" in NorthShore's "core service area." NorthShore has significantly altered its managed care contracting strategy in response to competition from Advocate. NorthShore's ordinary course documents similarly identify Advocate's "approach to risk" and "ACO strategy" as significant competitive threats. Because Advocate and NorthShore are close substitutes, the Transaction would eliminate a significant incentive for the Respondents to compete on price and other reimbursement terms post-merger.

41. Diversion analysis, a standard economic tool that uses data on where patients receive hospital services to determine the extent to which hospitals are substitutes, confirms that Advocate and NorthShore are close competitors. Diversion analysis shows that if NorthShore's four hospitals were not available to Chicago-area patients, approximately 20% of NorthShore's patients would seek care within the Advocate system. Diversion analysis similarly

shows that if Advocate Lutheran General and Advocate Condell were not available to Chicago-area patients, approximately 20% and 25% of their patients, respectively, would seek care at a NorthShore hospital.

42. Offering hospital coverage in the North Shore Area is essential for a commercial payer to market successfully a health plan provider network to employers in the North Shore Area. At present, Advocate and NorthShore serve as key alternate providers of GAC inpatient hospital services for healthcare consumers living in the North Shore Area. Other hospitals in Chicago, including those located downtown and in the outlying suburbs, are not adequate substitutes for Advocate and NorthShore. Similarly, commercial payers do not view the five non-Respondent hospitals in the North Shore Area as comparable alternatives to the Respondents due to differences in their size, scope of services, and location.

43. Healthcare consumers in the North Shore Area strongly prefer that their networks include at least one of the Respondents. For example, in 2013, [redacted] health plan provider network included [redacted] but excluded [redacted]. When [redacted] subsequently dropped out of [redacted] immediately deemed the new network—which now excluded both NorthShore and Advocate—inadequate for its area employees. As a result, [redacted].

As this example demonstrates, commercial payers will have little choice but to accept the reimbursement terms demanded by the merged system or exclude the merged system at the risk of having its network fail.

44. The Transaction would increase the Respondents' bargaining leverage in contract negotiations with commercial payers. This increase in bargaining leverage would enhance Respondents' ability to negotiate higher reimbursement rates and more favorable reimbursement terms relating to risk-based contracting.

45. The growth of "narrow network" health insurance products—which, in contrast to "broad networks," include less than all of the hospitals in a geographic market—will further increase the merged system's bargaining leverage with commercial payers. Such networks offer a tradeoff to consumers by including fewer participating hospitals, but at often significantly discounted prices relative to other available provider networks. Hospitals are willing to accept the lower reimbursement terms required to participate in narrow networks with the expectation that fewer providers will ensure that each hospital will gain increased volumes of patients and procedures. Today, commercial payers treat the merging parties as substitutes—typically including one Respondent while excluding the other—when constructing narrow network products for North Shore Area employers. As such, virtually every narrow network marketed to consumers across the North Shore Area will need to include the combined system post-merger.

46. By eliminating competition between Advocate and NorthShore, the Proposed Transaction will give the Respondents leverage to negotiate more favorable terms to participate in narrow networks, including securing higher reimbursement rates. For example, [redacted] narrow network product includes [redacted] but excludes [redacted]. Competition between Advocate and NorthShore allowed [redacted] to obtain lower rates. [redacted]

## C.

## The Transaction Would Eliminate Vital Quality and Service Competition

47. Competition drives hospitals to invest in quality initiatives and new technologies to further differentiate themselves from competitors. Advocate and NorthShore compete with one another across other various non-price dimensions. The Transaction would eliminate this competition, which has provided patients in the North Shore Area with higher quality care and more extensive healthcare service offerings. Advocate and NorthShore closely track each other's quality and brand recognition, and Respondents

have substantially invested in improving and expanding their services and facilities to compete against one another.

48. For example, NorthShore responded to its strategic advisor's analysis of healthcare competition—which identified Advocate's move to risk-based contracting as a competitive threat to NorthShore—by forming a "Care Transformation Team." The Care Transformation Team has undertaken significant investments to improve NorthShore's health outcomes and quality of care. These investments include enhancements to NorthShore's already well-regarded health information technology and data analytics, advancements in disease management, and strengthening the clinical integration between NorthShore and its physicians

49. NorthShore also created the NorthShore Orthopedic Institute in 2013 in response to a significant loss of volume of orthopedic cases to Advocate Lutheran General. NorthShore also opened six new integrated delivery rooms at NS Highland Park to stem losses in obstetric admissions market share to Advocate Condell. Similarly, NorthShore has heavily invested in upgrading and modernizing NS Skokie, which it acquired in 2009, to attract patients from Advocate Lutheran General.

50. Patients benefit from this direct competition in the quality of care and services offered to them by Respondents. The Transaction will dampen the merged firm's incentive to compete on quality of care and service offerings, to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.

## VII.

## ENTRY BARRIERS

51. Neither entry by new market participants nor expansion by current market participants would deter or counteract the Transaction's likely harm to competition for GAC inpatient hospital services in the North Shore Area.

52. New hospital entry or expansion in the North Shore Area would not be likely, timely, or sufficient to offset the

Transaction's likely harmful competitive effects. Construction of a new GAC hospital or substantial expansion of an existing one involves high costs and serious financial risk, including the time and resources it would take to conduct studies, develop plans, acquire land, obtain regulatory approvals, and construct and open a competitive facility.

53. Even if hospital construction or expansion were likely, such entry would not be timely. Illinois's Certificate of Need ("CON") regulations pose an additional barrier to entry. The CON regulations require hospitals seeking to build new hospitals, add licensed beds or new clinical services to existing hospitals, or purchase medical equipment above a capital threshold to undergo an extensive application process and justify the need for additional hospital beds or an expansion of current facilities. Obtaining CON approval is a time-consuming process. Moreover, construction of a new hospital would take substantially longer than two years from initial planning stages to opening.

54. Potential entry or expansion would also be insufficient to counteract the anticompetitive effects of the Transaction. Entrants would face significant challenges in replicating the competitiveness and reputation of either Advocate or NorthShore, both of whom offer a broad cluster of GAC inpatient hospital services, have multiple hospitals in the relevant market, generate billions of dollars in annual revenue, and provide healthcare services to tens of thousands of inpatients per year.

## VIII.

## EFFICIENCIES

55. Respondents' claimed efficiencies are not sufficient to outweigh the Transaction's likely harm to competition. The purported benefits would not enhance competition for GAC inpatient hospital services and fall far short of the cognizable efficiencies needed to outweigh the Transaction's likely significant harm to competition in the North Shore Area.

56. Respondents' principal claim is that the Transaction would result in sufficient cost savings to enable them to participate in a low-price, ultra-narrow network that would be offered by

commercial payers. However, Respondents have failed to substantiate the cost savings they claim must be achieved for NorthShore to reduce its cost structure sufficiently to participate in such a product at the price necessary for it to be successful. Moreover, NorthShore's willingness to participate in an ultra-narrow network insurance product is not a merger-specific efficiency. Therefore, the purported efficiency is not cognizable.

57. Respondents' other efficiency claims, including those relating to quality improvements, are not substantiated, not merger-specific, and not nearly of the magnitude necessary to justify the Transaction in light of its potential to harm competition. In any event, Respondents' claim that the Transaction will reduce healthcare costs is based on a number of speculative and unsubstantiated assumptions.

## IX.

## VIOLATION

### COUNT I – ILLEGAL AGREEMENT

58. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth herein.

59. The Affiliation Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

### COUNT II – ILLEGAL ACQUISITION

60. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth.

61. The Transaction, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## NOTICE

Notice is hereby given to the Respondents that the twenty-fourth day of May, 2016, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

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

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference no later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

## NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant service and geographic markets, with the ability to offer such products and services as Advocate and NorthShore were offering and planning to offer prior to the Transaction.

2. A prohibition against any transaction between Advocate and NorthShore that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Advocate and NorthShore provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant

markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore NorthShore as a viable, independent competitor in the relevant service and geographic markets.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventeenth day of December, 2015.

By the Commission.

## ORDER DISMISSING COMPLAINT

On December 17, 2015, the Commission issued the Administrative Complaint in this matter, alleging that an affiliation agreement among the three Respondents in this administrative proceeding violated Section 5 of the Federal Trade Commission Act, and that the contemplated merger, if consummated, would violate both Section 7 of the Clayton Act and Section 5 of the FTC Act. On December 21, 2015, pursuant to Section 13(b) of the FTC Act and Section 16 of the Clayton Act, the Commission filed a complaint in United States District Court for the Northern District of Illinois seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating their proposed merger until final resolution of this administrative proceeding.[1]

1 Complaint, *FTC v. Advocate Health Care Network et al.*, No. 1:15-cv-11473 (N.D. Ill.) (Dec. 21, 2015).

On October 31, 2016, the Court of Appeals for the Seventh Circuit reversed the denial of the Commission's motion for a preliminary injunction by the U.S. District Court for the Northern District of Illinois and remanded the case to the District Court.[2] On March 7, 2017, the District Court issued an Order enjoining consummation of the proposed merger. On March 10, 2017, Respondents signed a Termination Agreement terminating the Affiliation Agreement between Advocate and NorthShore, and Complaint Counsel and Respondents filed a Joint Motion to Dismiss Complaint.[3] Respondents have abandoned the proposed merger, and the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.[4]

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

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2 *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) (Opinion and Final Judgment).

3 *See* Joint Motion To Dismiss Complaint (March 10, 2017).

4 *See, e.g.*, *In the Matter of The Penn State Hershey Medical Center and PinnacleHealth System,* Docket No. 9368, Order Dismissing Complaint (Oct. 23, 2016); *In the Matter of Superior Plus Corp. and Canexus Corporation*, Docket No. 9371, Order Dismissing Complaint (Aug. 2, 2016); *In the Matter of Staples Inc. and Office Depot, Inc.*, Docket No. 9367, Order Dismissing Complaint (May 18, 2016).

Complaint

**IN THE MATTER OF**

# CARMAX, INC.

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

*Docket No. C-4605; File No. 142 3202*
*Complaint, March 22, 2017 – Decision, March 22, 2017*

This consent order addresses CarMax, Inc.'s advertisements on its website for numerous used vehicles that were subject to open recalls for safety issues. The complaint alleges that respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. The consent order prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to a rigorous inspection unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues.

*Participants*

For the *Commission*: *Courtney Estep, Michael White* and *Evan Zullow.*

For the *Respondent*: *Milo Cividanes* and *Stu Ingis, Venable LLP.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that CarMax, Inc., a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Virginia corporation with its principal office or place of business at 12800 Tuckahoe Creek Parkway, Richmond, VA 23238. Respondent has marketed, advertised, offered for sale, and sold used motor vehicles.

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Respondent has disseminated or has caused to be disseminated advertisements promoting the sale of used motor vehicles.

4. Respondent's advertisements have included, but are not necessarily limited to, advertisements and marketing materials posted on the website www.carmax.com, excerpts of which are attached as Exhibits A through D. Until at least November 2014, on its website, including on pages prominently titled, "Why CARMAX?" and "CarMax Quality Certified," it has made claims regarding the rigorous inspections CarMax completes on every used vehicle it sells. These marketing materials have included the following representations:

> "**125+ Point Inspection**
> Experienced technicians put every vehicle through a rigorous Certified Quality Inspection – over 125 points must check out before it meets our high standards."
>
> "**No cars with flood or frame damage**
> Not every car that looks good is good. We're confident in the safety and reliability of our vehicles because our technicians are trained to detect those with hidden damage."
>
> **Every used car is renewed**
> CarMax cars undergo (on average) 12 hours of renewing—sandwiched between
> two meticulous inspections—for a car that doesn't look or feel used."

**Exhibit A at 1.**

"Every car we sell is carefully inspected and reconditioned to the best condition possible – in fact, we spend over 12 hours, on average, on each used car."

"We check more than 125 points . . . ." The website then lists several categories, including engine, steering system, and brake system.

**Exhibit B at 1-3.**

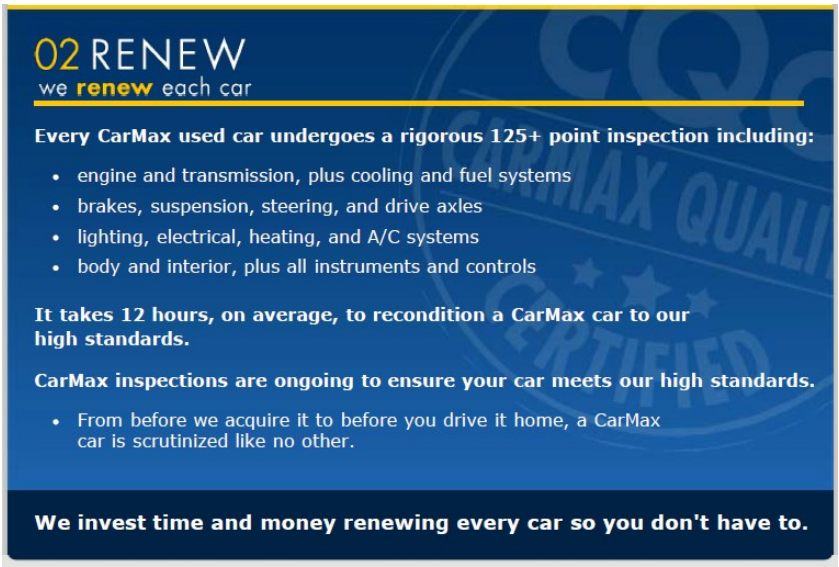



**Exhibit C.**

**"Our top 10 most frequently asked questions…**

**1. Are all of your used cars inspected?**
Yes. All of our used cars are CarMax Quality Certified, which means every vehicle on our lot must pass a 125+ point Certified Quality Inspection by one of our technicians. This comprehensive and detailed inspection includes an investigation to ensure that the car does not have flood or frame damage."

**Exhibit D.**

5. Respondent's advertisements also have included a television commercial, which is attached as Exhibits E (video), F (transcript), and G (screenshot). The visual component of this commercial has depicted a vehicle undergoing an inspection and "reconditioning" by a team of CarMax employees – as many as six employees simultaneously. The commercial has further depicted the employees inspecting and fixing a wide variety of components of the vehicle, including underneath the front hood, underneath the body of the car, and within the interior of the car. As these images are displayed, an audio voiceover has made the following representations: "To the car that just survived hours of reconditioning, sorry, we know that was a bit invasive. But if we didn't hoist you up in the air and poke around a little, we wouldn't be CarMax. We expect a lot from our cars and we need to make sure that you'll make the grade. … Oh, just relax. It's going to be a long time before anybody peeks at your undercarriage again." For only approximately three seconds of the thirty second commercial, in tiny, blurry white font at the bottom of the screen, the commercial displays text stating that "Some CarMax vehicles are subject to open safety recalls. See carmax.com for details." **Exhibits E, F, and G.**

6. Even though it has made the claims set forth in Paragraphs 4 and 5, Respondent has regularly advertised vehicles subject to open recalls for safety issues on its website.

7. In some instances, these open recalls for safety issues have included recalls for defects that can cause serious injury. For example, at least until November 2014, Respondent advertised used vehicles with open recalls for safety issues for a key ignition switch defect, which can affect engine power, power steering, braking, and airbag deployment, thereby increasing the risk of a crash and occupant injury. Respondent, at least until November 2014, also advertised used vehicles with open recalls for safety issues for defects with airbags, thereby increasing the risk of air bags rupturing and striking occupants with metal fragments upon deployment.

8. In numerous instances, when Respondent has advertised used vehicles subject to open recalls for safety issues, making the claims set forth in Paragraphs 4 and 5, it provided no accompanying clear and conspicuous disclosure of this fact.

## VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

### Count I

9. In connection with the marketing, advertising, offering for sale, or sale of used motor vehicles, Respondent has represented, directly or indirectly, expressly or by implication, that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues.

10. In numerous instances in connection with the representation set forth in Paragraph 9, Respondent has failed to disclose, or disclose adequately, that used vehicles it sells are subject to open recalls for safety issues.

11. Respondent's failure to disclose, or disclose adequately, the material information set forth in Paragraph 10 above, in light of the representation described in Paragraph 9, above, constitutes a deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**THEREFORE**, the Federal Trade Commission, this twenty-second day of March, 2017, has issued this complaint against respondent.

By the Commission.

Complaint

## Exhibit A



CARMAX

Why CarMax?

Quality, value, service, and a company you can trust

15 great reasons to start at CarMax

**Low, no-haggle prices**
Get a fair price up front without spending hours negotiating for it.

**Flexible financing options**
We work with a variety of financial institutions to provide the best possible financing. If approved, you see your offers when we do—just choose the one that's right for you. If you find a better option, you have three business days to refinance, penalty- and interest-free.

**Thousands of cars priced under $12,000**
With over 35,000 cars in stock across the country, you're sure to find a car that fits your needs and budget. Most can be transferred to a store near you, often for free!

**Our Sales Consultants are paid the same**
Fixed commissions (except in CA) put their best interests in line with yours, so they can focus on helping to find the car that best fits your needs.

**125+ point inspection**
Experienced technicians put every vehicle through a rigorous Certified Quality Inspection—over 125 points must check out before it meets our high standards.

**No cars with flood or frame damage**
Not every car that looks good is good. We're confident in the safety and reliability of our vehicles because our technicians are trained to detect those with hidden damage.

**Every used car is renewed**
CarMax cars undergo (on average) 12 hours of renewing—sandwiched between two meticulous inspections—for a car that doesn't look or feel used.

**Free Full Vehicle History Report**
Every used car we sell comes with one, available online or from your Sales Consultant.

**Clean Title Guarantee**
We guarantee every car to have accurate mileage and not ever to have been designated salvaged or flood-damaged—or we'll buy it back.

**5-Day Money-Back Guarantee**
If you change your mind for any reason, you can return a car hassle-free within 5 days.
(See your Sales Consultant for written details.)

**Limited 30-Day Warranty (60-Day in CT, 90-Day in MA and NY)**
Repairs made under warranty cost you nothing—parts and labor are included.
(See your Sales Consultant for written details.)

**MaxCare® extended service plans**

Enjoy added security with purchase of an available MaxCare Extended Service Plan —you can choose one that meets your driving needs, and include the cost in your financing!

**Nearly every make and model all in one place**

Don't drive all over town to find the vehicle you need. Almost all of our stores carry over 30 top brands—from Acura to Volvo.

**We'll buy your car even if you don't buy ours®**

We'll buy any car we appraise, regardless of make, mileage, or condition. And your offer will be the same, whether you buy from us or not. Bring in your car today!
Learn more about appraisals

**Experience that's measured in millions**

That's millions, as in over 4,000,000 cars sold and over 16,000,000 appraised. There's simply no substitute for what we've learned about cars and what you want when it comes to buying and selling cars. That's why we're America's #1 used car retailer.
Learn more about CarMax

Complaint

## Exhibit B



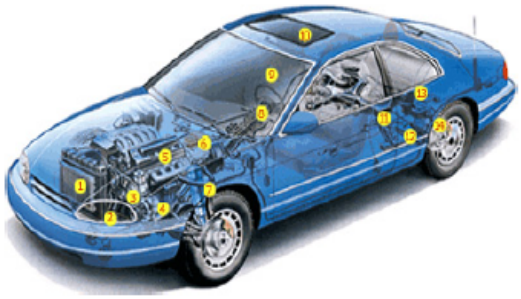
Website Feedback

### CarMax Quality Certified

CarMax quality is knowing that you can depend on your car, day after day, year after year. Every car we sell is carefully inspected and reconditioned to the best condition possible—in fact, we spend over 12 hours, on average, on each used car. To give our customers even more confidence in our cars, we offer a 5-Day Money-Back Guarantee and a Limited 30-Day Warranty (60-Day in CT, 90-Day in MA and NY).* We believe in our cars, and we think you will, too.

CQI CARMAX CERTIFIED QUALITY INSPECTION

*See store for written details



**We check more than 125 points, including:**

**1. Cooling System**
- Radiator
- Coolant
- Radiator/Heater Hoses
- Recovery System
- Cooling Fan
- Belts

Top

**2. Lighting System**
- Brake Lights
- Turn Signal Lights
- Dash Lights
- Instrument Lights
- Back-Up Lights

**8. Steering System**
- Tie Rods
- Idler Arms
- Center Links
- Pump
- Hoses
- Lines
- Shaft
- Couplings
- Alignment

Top

**9. Body/Interior**
- Carpet
- Upholstery

Complaint



Hazard Lights
Side Marker Lights
Hood Lights
Trunk Lights
Courtesy Lights
Reading Lights
Glove Box Lights
Tag Lights

Top

**3. Heating & A/C System**

Compressor
Clutch
Condenser
Evaporator
Hoses
Lines
Refrigerant Level
Cooling Fan

Top

**4. Electrical System**

Alternator/Regulator
Starter
Battery
Gauges
Horn
Windshield Wiper
Windshield Washer

Top

**5. Engine**

Engine Performance
Emission Controls
Emission Filters
Vacuum Hoses
Oil Pressure
Motor Mounts
Trim
Hood Latches
Trunk Release
Fuel Door Release
Paint

Top

**10. Accessories**

Clock
Sunroof
Power Antenna
Rear Defroster
Rear Defogger
Radio
Tape/CD Player
Power Seats
Warning Chimes
Cigarette Lighter
Cruise Control
Trip Computer
Electronic Instrument Cluster
Tachometer

Top

**11. Miscellaneous**

Odometer
Tilt, Lock & Telescopic Steering Wheel
Spare Tire
Jack
Door Locks
Trunk Locks
Remote Control
Locks

Top

**12. Drive Axles**

Constant Velocity Joints



**Exhibit B, Page 2**

Complaint



Exhaust
Spark Plugs
Secondary Ignition System
Catalytic Converter

Top

**6. Transmission**

Fluid
Shift Points
Slipping
Transmission Mounts
Noise
Clutch Operation
4WD Operation
Leakage
Hoses
Lines
Modulator
Linkages

Top

**7. Suspension System**

Frame Integrity
Ball Joints
Tires
Wheels
Springs
Torsion Bars
Sway Bar
Links
MacPherson Struts

Top

Constant Velocity Boots
Universal Joints
Gears
Bearings
Vibration/Backlash

Top

**13. Fuel System**

Fuel Tank
Fuel Lines
Hoses
Fuel Pump

Top

**14. Brake System**

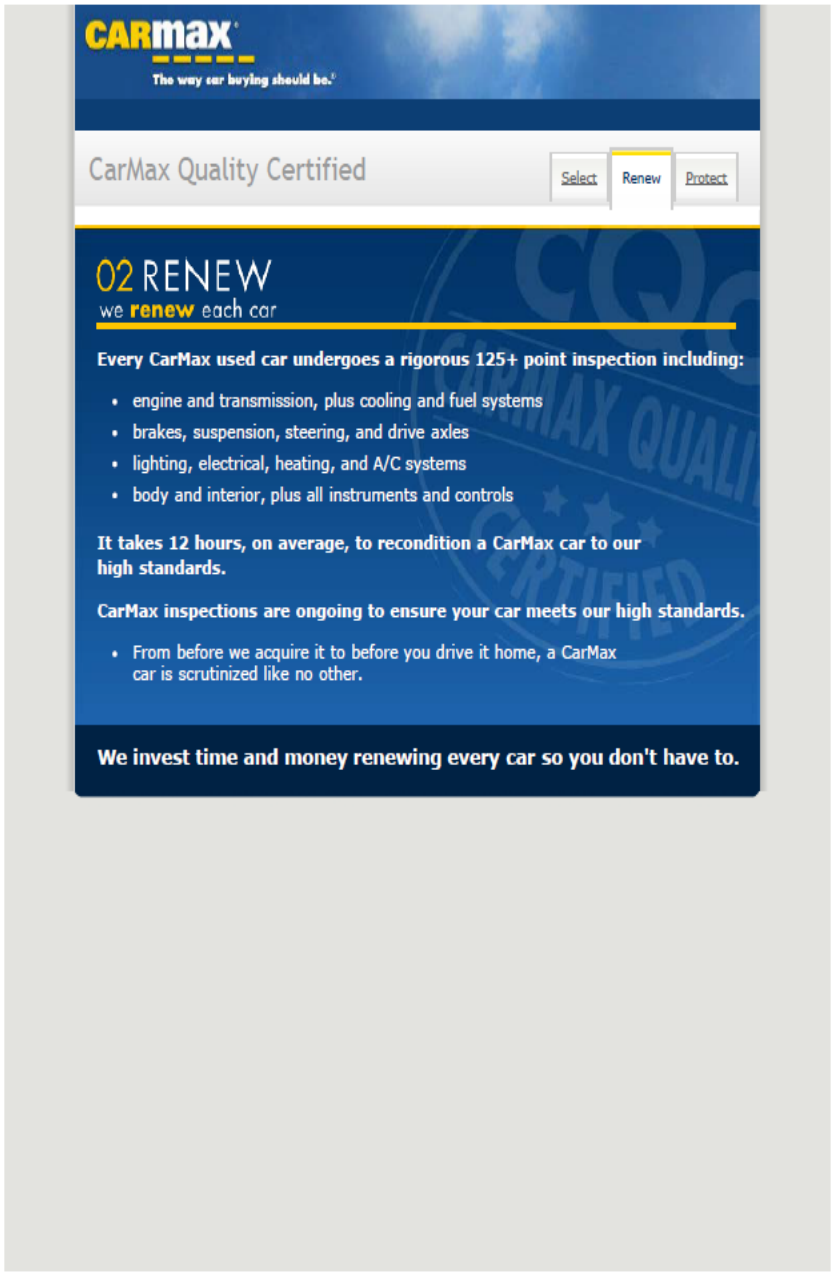
Anti-Lock System
Fluid Level
Master Cylinder
Booster
Front Right Shoes/Pads
Front Left Shoes/Pads
Rear Right Shoes/Pads
Rear Left Shoes/Pads
Parking Brake
Hoses
Lines
Calipers
Wheel Cylinders
Springs
Linkages

Top

Complaint

## Exhibit C

CarMax

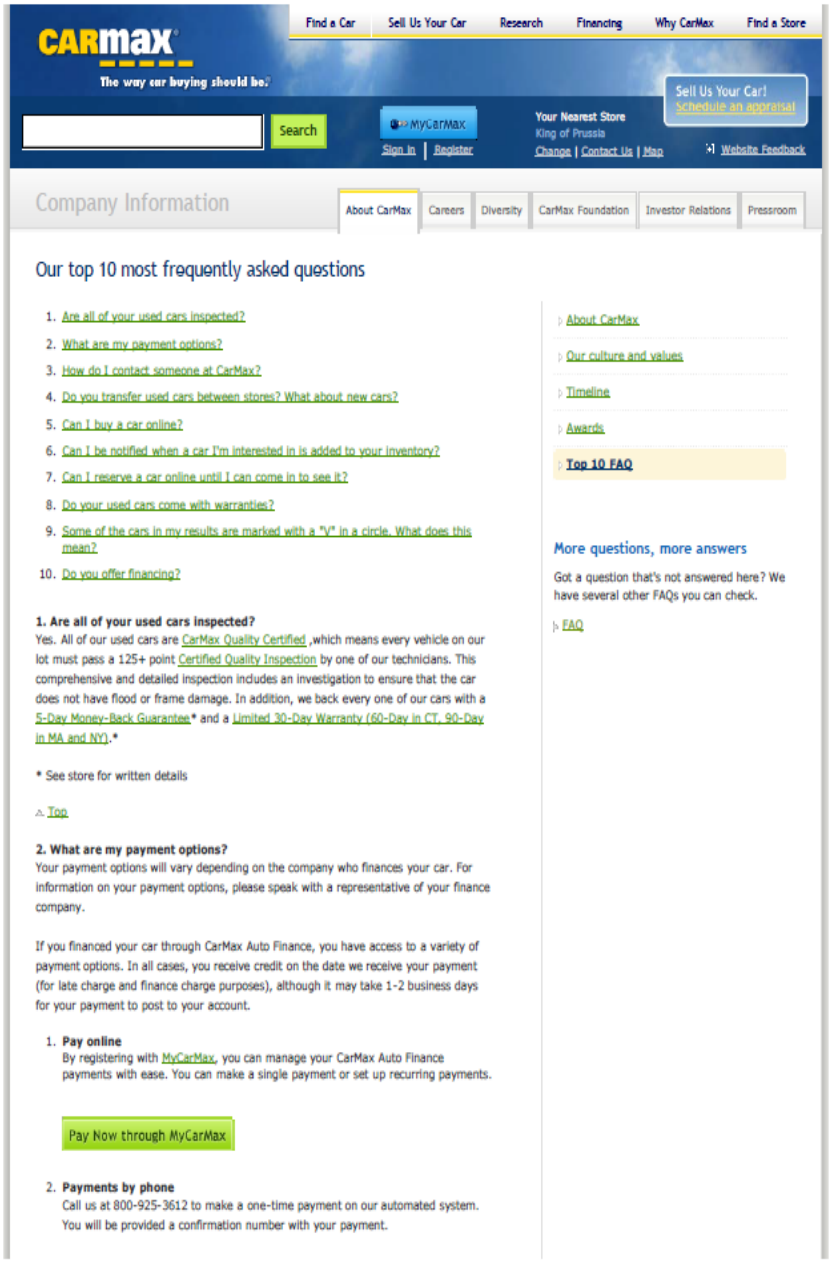



http://www.carmax.com/enus/popup/carmax_quality.html?k=02[7/17/2014 12:15:57 PM]

Complaint

## Exhibit D

CarMax FAQ



CARmax

The way car buying should be.

Find a Car | Sell Us Your Car | Research | Financing | Why CarMax | Find a Store

Search

MyCarMax

Sign In | Register

Your Nearest Store
King of Prussia
Change | Contact Us | Map

Sell Us Your Car!
Schedule an appraisal

Website Feedback

Company Information

About CarMax | Careers | Diversity | CarMax Foundation | Investor Relations | Pressroom

Our top 10 most frequently asked questions

1. Are all of your used cars inspected?
2. What are my payment options?
3. How do I contact someone at CarMax?
4. Do you transfer used cars between stores? What about new cars?
5. Can I buy a car online?
6. Can I be notified when a car I'm interested in is added to your inventory?
7. Can I reserve a car online until I can come in to see it?
8. Do your used cars come with warranties?
9. Some of the cars in my results are marked with a "V" in a circle. What does this mean?
10. Do you offer financing?

**1. Are all of your used cars inspected?**
Yes. All of our used cars are CarMax Quality Certified ,which means every vehicle on our lot must pass a 125+ point Certified Quality Inspection by one of our technicians. This comprehensive and detailed inspection includes an investigation to ensure that the car does not have flood or frame damage. In addition, we back every one of our cars with a 5-Day Money-Back Guarantee* and a Limited 30-Day Warranty (60-Day in CT, 90-Day in MA and NY).*

* See store for written details

Top

**2. What are my payment options?**
Your payment options will vary depending on the company who finances your car. For information on your payment options, please speak with a representative of your finance company.

If you financed your car through CarMax Auto Finance, you have access to a variety of payment options. In all cases, you receive credit on the date we receive your payment (for late charge and finance charge purposes), although it may take 1-2 business days for your payment to post to your account.

1. **Pay online**
   By registering with MyCarMax, you can manage your CarMax Auto Finance payments with ease. You can make a single payment or set up recurring payments.

   Pay Now through MyCarMax

2. **Payments by phone**
   Call us at 800-925-3612 to make a one-time payment on our automated system. You will be provided a confirmation number with your payment.

About CarMax
Our culture and values
Timeline
Awards
Top 10 FAQ

More questions, more answers
Got a question that's not answered here? We have several other FAQs you can check.
FAQ

http://www.carmax.com/cms/company-info/about-us-faq.html[7/17/2014 12:29:42 PM]

CarMax FAQ

3. **By postal mail**

**Send payments to:**
CarMax Auto Finance
P.O. Box 3174
Milwaukee, WI 53201-3174

**Payoffs should be mailed to:**
CarMax Auto Finance
Attn: Payoff Department
P.O. Box 440609
Kennesaw, GA 30160

We recommend mailing your payment 7-10 days before your due date to ensure that we receive it on time.

4. **Western Union/Moneygram®**

**Western Union**
You may go to any Western Union location to have your payment sent to us. Call 1-800-238-5772 to find the nearest location. You will need to reference our city code, "CarMax," along with the state code of "Georgia." Please be sure to reference your account number to ensure proper posting. We typically receive and post these payments to your account within one full business day. Our business days are Monday-Friday. Western Union may charge a fee for this service.

**MoneyGram ExpressPayments® Service**
You may go to any MoneyGram retail agent location to have your payment sent to us. Call 1-800-MoneyGram to find the nearest location. At the agent location, please provide the clerk with the following; Receive Code "4645," company name "CarMax," city "Kennesaw," state "GA," and your account number to ensure proper posting. We typically receive and post these payments to your account within one full business day. Our business days are Monday-Friday. MoneyGram may charge a fee for this service.

For more information about CAF payment options, call us at 1-800-925-3612.

Top

**3. How do I contact someone at CarMax?**
To get an immediate answer to your question, start at your nearest CarMax Superstore.

If the store is unable to resolve your concern, use the Corporate Contact Form, or call us at (800) 519-1511, Mon-Fri, 8:30 am to 8:00 pm EST.

Send written customer comments to:
CarMax
Attn: Customer Relations
12800 Tuckahoe Creek Parkway
Richmond, VA 23238

**CarMax Auto Finance**
Submit questions about your existing account through the CarMax Auto Finance Contact Form (note: please do not submit potentially sensitive information, such as your account number or social security number, through the website).

You can also contact CAF by phone at (800) 925-3612, or write to:
CarMax Auto Finance
Attn: Customer Service Department
P.O. Box 440609
Kennesaw, GA 30160

For questions about financing a vehicle, please contact your nearest CarMax store.

Complaint

CarMax FAQ

**Website questions**

Submit all questions or concerns about carmax.com® through our Web Feedback Form. Please note, we can only answer technical questions related to the CarMax website through the following link. For information on specific vehicles or CarMax policies, please contact your local CarMax store.

Top

**4. Do you transfer used cars between stores? What about new cars?**

Yes. We can transfer most used cars to the store nearest you from another store. In some cases, a transfer fee will apply. We are unable to transfer new vehicles, Toyota Certified Used vehicles in Laurel, Maryland or Kenosha, Wisconsin, and any used vehicle identified as nontransferable. Learn more about transferring vehicles.

Top

**5. Can I buy a car online?**

Although you cannot complete a car-buying transaction online, you can begin the process. Each car page includes several links to help you get started, including "Request more information," "Schedule a test drive," and "Request financing information." Clicking these links allows you to submit a request to one of the dedicated Internet Sales Consultants at your nearest store. Of course, you are also welcome to call your nearest store; the phone number and address will be listed at the bottom of every page in our website.

Top

**6. Can I be notified when a car I'm interested in is added to your inventory?**

Yes. All you have to do is click the "Create alert" link at the top of the search results page. You'll then have the chance to specify exactly what type of car you're searching for and give us your email address so we can notify you when one becomes available.

Top

**7. Can I reserve a car online until I can come in to see it?**

Yes. You can hold most of our cars for a specific appointment time, online or by phone. Choose the "Hold This Car" option on the car's page, then choose the date and time you'd like to come in. Once your car is reserved, it will be no longer be available for sale to anyone but you until after your appointment.

Top

**8. Do your used cars come with warranties?**

All of our used cars are CarMax Quality Certified ,which means every CarMax used car comes with a Limited 30-Day Warranty (60-Day in CT, 90-Day in MA and NY)*. Please see your local CarMax store for written details. We also offer an optional MaxCare® extended service plan for all our used vehicles. Learn more about MaxCare extended service plans.

* See store for written details

Top

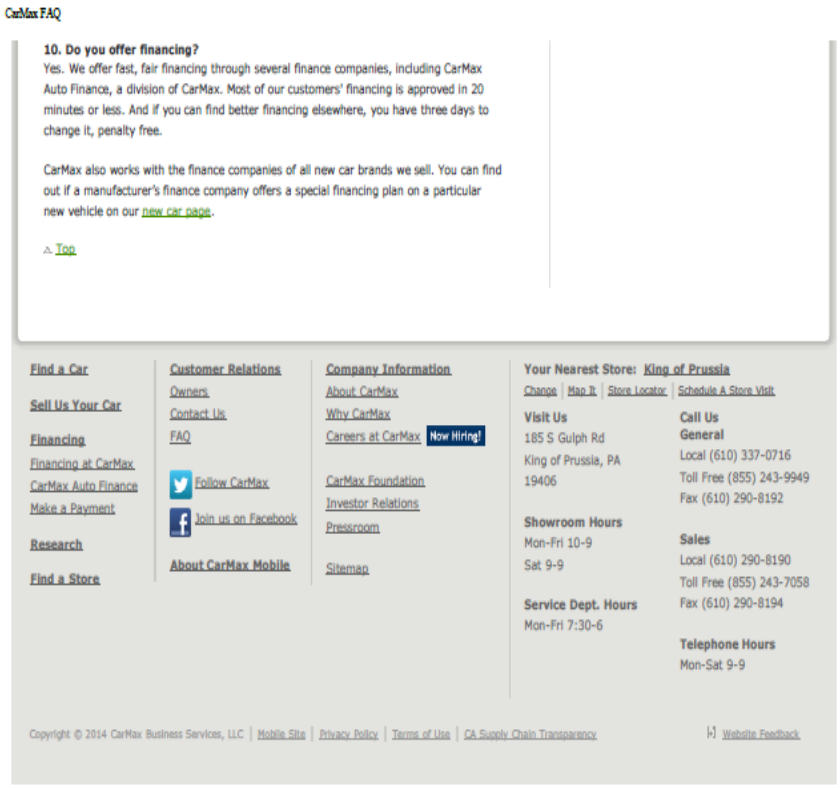
**9. Some of the cars in my results are marked with a "V" in a circle. What does this mean?**

The "V" stands for ValuMax.® ValuMax vehicles are thoroughly inspected and reconditioned older vehicles, 6+ years old and/or 60,000+ miles. They all offer the CarMax 5-Day Money-Back Guarantee* and Limited 30-Day Warranty (60-Day in CT, 90-Day in MA and NY),* and are chosen for their exceptional value.

* See store for written details

Top

Complaint



CarMax FAQ

**10. Do you offer financing?**

Yes. We offer fast, fair financing through several finance companies, including CarMax Auto Finance, a division of CarMax. Most of our customers' financing is approved in 20 minutes or less. And if you can find better financing elsewhere, you have three days to change it, penalty free.

CarMax also works with the finance companies of all new car brands we sell. You can find out if a manufacturer's finance company offers a special financing plan on a particular new vehicle on our new car page.

Top

Find a Car
Sell Us Your Car
Financing
Financing at CarMax
CarMax Auto Finance
Make a Payment
Research
Find a Store

Customer Relations
Owners
Contact Us
FAQ
Follow CarMax
Join us on Facebook
About CarMax Mobile

Company Information
About CarMax
Why CarMax
Careers at CarMax Now Hiring!
CarMax Foundation
Investor Relations
Pressroom
Sitemap

Your Nearest Store: King of Prussia
Change | Map It | Store Locator | Schedule A Store Visit

Visit Us
185 S Gulph Rd
King of Prussia, PA
19406

Showroom Hours
Mon-Fri 10-9
Sat 9-9

Service Dept. Hours
Mon-Fri 7:30-6

Call Us
General
Local (610) 337-0716
Toll Free (855) 243-9949
Fax (610) 290-8192

Sales
Local (610) 290-8190
Toll Free (855) 243-7058
Fax (610) 290-8194

Telephone Hours
Mon-Sat 9-9

Copyright © 2014 CarMax Business Services, LLC | Mobile Site | Privacy Policy | Terms of Use | CA Supply Chain Transparency | Website Feedback

http://www.carmax.com/cms/company-info/about-us-faq.html[7/17/2014 12:29:42 PM]

Complaint

**Exhibit E**

# [Video File]

Complaint

## Exhibit F



OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1423202

TITLE CARMAX, INC.

DATE RECORDED: DECEMBER 22, 2015
TRANSCRIBED: JANUARY 6, 2016

PAGES 1 THROUGH 5

CARMAX TV ADVERTISEMENT

PEVM CARMAX AD 2015-12-22

FEDERAL TRADE COMMISSION

I N D E X

FEDERAL TRADE COMMISSION

In the Matter of: )
CarMax, Inc. ) Matter No. 1423202
)
----------)
December 22, 2015

The following transcript was produced from a digital recording provided to For The Record, Inc. on January 5, 2016.

P R O C E E D I N G S

- - - - -

CARMAX TV ADVERTISEMENT

ANNOUNCER: To the car that just survived hours of reconditioning, sorry, we know that was a bit invasive. But if we didn't hoist you up in the air and poke around a little, we wouldn't be CarMax. We expect a lot from our cars and we need to make sure that you'll make the grade. You have to admit you're looking awfully nice. Oh, just relax. It's going to be a long time before anybody peaks at your undercarriage again.

(End of advertisement.)

(The recording was concluded.)

C E R T I F I C A T I O N  O F  T Y P I S T

MATTER NUMBER: 1423202

CASE TITLE: CARMAX, INC.

TAPING DATE: DECEMBER 22, 2015

TRANSCRIPTION DATE: JANUARY 6, 2016

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JANUARY 6, 2016

ELIZABETH M. FARRELL

C E R T I F I C A T I O N  O F  P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE

## Exhibit G

Video Image Screenshot With Text Disclaimer:

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent CarMax, Inc. is a Virginia corporation with its principal office or place of business at 12800 Tuckahoe Creek Parkway, Richmond, VA 23238.

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

## ORDER

## DEFINITIONS

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

A. Unless otherwise specified, "Respondent" shall mean CarMax, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be made through the same means through which the representation requiring the disclosure is presented.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

**I.**

**IT IS HEREBY ORDERED** that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the marketing, advertising, offering for sale, or sale of used motor vehicles to consumers shall not, in any manner, expressly or by implication:

A. Represent that motor vehicles that Respondent offers for sale are safe, have been repaired for safety issues, or have been subject to a rigorous inspection, unless:

1. The used motor vehicles are not subject to any open recalls relating to safety, and the representation is otherwise not misleading, or

2. Respondent discloses, clearly and conspicuously, and in close proximity to such representation, any material qualifying information related to open recalls, including but not limited to:

a. the fact that its used motor vehicles may be subject to recalls for safety issues that have not been repaired, and

b. how consumers can determine whether an individual used motor vehicle is subject to an open recall for safety issues that has not been repaired,

and the representation is otherwise not misleading; *provided further that* prior to the consummation of the sale of an individual used motor vehicle to a consumer, Respondent must clearly and conspicuously provide to the consumer either (a) any written notification from a manufacturer that Respondent has received that the motor vehicle is subject to an open recall for a safety issue, or a document that conveys the same information using a substantially similar format, or (b) a written notification that clearly and conspicuously conveys that the vehicle is subject to an open recall that is unrepaired, and the safety risks associated with the recall, that is made available by the U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") or a commercial provider of recall information.

B. Misrepresent the following:

1. Whether there is or is not an open recall for safety issues on any used motor vehicle;

2. Whether Respondent repairs used motor vehicles for open safety recalls; and

3. Any other material fact about the safety or recall status of the used motor vehicles it advertises for sale.

## II.

**IT IS FURTHER ORDERED** that Respondent, within sixty (60) days of entry of this Order, must provide, by first class mail to the last known address of every consumer who purchased a used motor vehicle from Respondent between July 1, 2013 and November 20, 2014, a notice on Respondent's letterhead that clearly and conspicuously states the following:

> "We want to alert you that some of the used cars we recently sold had been recalled for safety issues, but weren't repaired yet when we sold them. You can check whether the used car you bought from us is subject to an unrepaired recall at the National Highway Traffic Safety Administration's recall website, https://vinrcl.safercar.gov/vin/. That site also provides information on how to get your car fixed if it's been recalled."

Respondent shall not include any advertising, marketing, or other promotional information in the notice. Moreover, the mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a clear and conspicuous fashion the disclosure "Important Safety Recall Information."

*Provided, however, that* Respondent is not required to provide this notice for (A) any used motor vehicle that Respondent can demonstrate was not subject to an open recall for a safety issue at the time of purchase and delivery; (B) any used motor vehicle that was the subject of one or more open recalls for safety issues at the time of purchase and delivery that Respondent can demonstrate have subsequently been fixed; (C) any used motor vehicle that the consumer no longer owns or possesses because the consumer returned it to Respondent within five (5) days of the date of purchase; or (D) any used motor vehicle whose owner, between March 31, 2014, and November 20, 2014, received from Respondent a letter that did not include any advertising, marketing, or other promotional information, informing the owner clearly and conspicuously that the owner purchased a vehicle that may be affected by the GM ignition switch safety recall (NHTSA Campaign Number 14V171000).

For purposes of Subpart (A) of this proviso, records showing that the vehicle was not listed as subject to an open recall for a safety issue, as of the date of the purchase, on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar.gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed to be

sufficient to demonstrate that the vehicle was not subject to an open recall for a safety issue at the time of purchase and delivery.

For purposes of Subpart (B) of this proviso, (i) business records which demonstrate that a vehicle with an open recall for a safety issue has been repaired, generated by the Respondent in the ordinary course of business; or (ii) records showing that the vehicle is no longer listed as subject to an open recall for a safety issue on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar.gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed sufficient to demonstrate that an open recall for a safety issue has been fixed.

## III.

**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. Each advertisement or other marketing material that makes any representation covered by the order unless, in comparison to an advertisement or other marketing material already maintained by Respondent pursuant to this Section, the advertisement or marketing material: (i) is a duplicate, or (ii) differs only in the description of the vehicle or other ways not related to any representations covered by this order, including a website which differs only with respect to individual vehicle details displayed in inventory or search page(s) of the site;

B. All materials that were relied upon in disseminating the representation;

C. All evidence in its possession or control that relates to used vehicle advertising and contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

## IV.

**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 supervisory responsibilities with respect to the advertising or marketing of used motor vehicles for sale to consumers or to providing recall disclosures to consumers, and shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## V.

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation 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 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 Carmax, Inc.*

## VI.

**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 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 March 22, 2037, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

## Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases[1] December 15, 2016

Unrepaired auto recalls pose a serious threat to public safety. Car manufacturers and the National Highway Traffic Safety Administration have recalled tens of millions of vehicles in each of the last several years for defects that pose significant safety risks to consumers. In 2015, for example, recalls affected 51 million vehicles nationwide.[2] And defects that have been the subject of recalls have led to severe injuries and even death for many consumers. Federal law requires that all new cars sold in the United States be free from recalls, but it does not prohibit auto dealers from selling used cars with open recalls. As a result, absent a change in law, neither NHTSA nor any other federal agency has the authority to ban the sale of used cars that have open recalls across the industry.

Section 5 of the Federal Trade Commission Act, however, enables the Commission to stop car sellers from engaging in false

1 In the Matters of General Motors Company, File No. 1523101; Jim Koons Management Company, File No. 1523104; Lithia Motors, Inc., File No. 1523102; CarMax, Inc., File No. 1423202; West-Herr Automotive Group, Inc., File No. 1523105; and Asbury Automotive Group, Inc., File No 1523103.

2 Gordon Trowbridge, National Highway Traffic Safety Administration, *U.S. Department of Transportation launches new public awareness campaign*, Jan. 21, 2016, https://www.nhtsa.gov/About-NHTSA/Press- Releases/nhtsa_launches_safe_cars_save_lives_campaign_01212015.

or misleading advertising practices that mask the existence of open recalls, and we are committed to doing just that. As part of this effort, the Commission is issuing final orders against General Motors Company, Jim Koons Management Company, and Lithia Motors, Inc. and announcing proposed orders against CarMax, Inc., West-Herr Automotive Group, Inc., and Asbury Automotive Group, Inc. In these enforcement actions, the Commission is challenging what we allege are deceptive advertising claims by these companies that highlight the rigorous inspections they perform on their used cars, but fail to clearly disclose the existence of unrepaired safety recalls.

More specifically, we allege that the companies named in these actions touted the rigorousness of their car inspections by claiming, for example, to engage in a "172-point inspection and reconditioning," an "exhaustive 160-checkpoint Quality Assurance Inspection," or a "rigorous and extensive inspection." Some of these inspected cars were subject to open recalls. We charge that the companies' representations about their inspections, absent clear and conspicuous information about open recalls, were likely to mislead reasonable consumers into believing that the inspections included repairing open recalls. Therefore, the companies' failure to disclose this information was deceptive.[3]

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, the orders prohibit each company from making any safety-related claim about its vehicles unless (1) the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously and in close proximity to the representation both that the vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car, and (2) the claims are not otherwise misleading.[4]

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3 Under Section 5 of the FTC Act, "it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *See In re International Harvester Co.,* 104 F.T.C. 949, 1057 (1984).

4 For instance, a claim could still be misleading, even with the required

This means that, if any car on the companies' lots is subject to an open recall, every time the companies make these types of inspection claims, they must prominently disclose that their cars may be subject to open recalls and tell consumers how to determine the recall status of specific cars. And they must provide this information wherever the inspection claims are made – in the showroom, on the lot, and in any TV, radio, or website ad that consumers may view before they even visit a car dealer.

Further, the orders require each company to warn consumers who recently purchased one of its used cars that the vehicle may have an open recall. The Commission can seek civil penalties for violations of these orders, and we will not hesitate to do so if we discover a violation.[5]

These enforcement actions will help empower consumers to make more informed and safer purchasing decisions in a market that, absent a change in federal law, continues to include cars subject to open recalls. Dealers that repair all of their cars can continue to make truthful claims that they are recall-free, and can benefit from the competitive advantages of doing so. Dealers that cannot, or do not, repair all of their cars must instead prominently disclose that the cars may have open recalls when they make certain safety-related claims, such as claims about comprehensive inspections. Dealers are therefore incentivized to repair open recalls in the cars they advertise. At the same time, dealers can continue conducting their inspection programs and truthfully advertising them, provided they prominently disclose that cars may be subject to open recalls and do not misrepresent the recall status or safety of their cars.[6]

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disclosure, if a dealer represents that it inspected specific cars when it failed to do so, makes false oral statements to consumers that specific cars are free of recalls, or states a car *may* be subject to a recall (or otherwise implies it does not know the recall status) but in fact knows the car is actually subject to an open recall.

5 *See U.S. v. New World Auto*, No. 16-cv-2401 (N.D. Tex. Aug. 22, 2016) (requiring auto dealers to pay civil penalties for violations of FTC order).

6 Dealer inspection programs often involve checking that vital components of a car, like the brakes and drivetrain, are working properly and thus can provide important consumer benefits.

Finally, we note that other laws, including state product safety, tort, and other consumer protection laws, provide important safeguards to consumers affected by defective cars. Of course, the Commission's orders do not affect the protections afforded by those laws. Rather, the Commission's orders provide independent protection for consumers, requiring that they be given information about open recalls before they purchase a used car.

Congress has been considering legislative proposals that would prohibit the sale of used cars with unrepaired recalls altogether, and we support efforts seeking to address this serious public safety issue. Although the Commission's enforcement actions against individual companies cannot substitute for legislative solutions, they provide important protections for consumers to help ensure that they can make informed and safer purchasing decisions in the used car marketplace.

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

The respondent is a car dealership that sells used motor vehicles. According to the FTC complaint, discussed further below, respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these

vehicles are subject to open recalls for safety issues. Federal law currently does not prohibit car dealers from selling used vehicles subject to open safety recalls; Congress and some states are considering legislation that would do so. The Commission, however, can take action under the FTC Act to prohibit companies from making claims that mislead consumers about safety-related and other material issues. Further, the FTC can take such action in addition to (and entirely independent of) any private rights of action consumers themselves can bring under state law. This proposed action thus does not replace or alter any state laws or legislative proposals; rather, it offers additional protections beyond those afforded under other such laws, as they exist now or may be amended.

More specifically, the complaint in this matter alleges that the respondent has posted advertisements on its website that make the following representations:

> **125+ Point Inspection**
> Experienced technicians put every vehicle through a rigorous Certified Quality Inspection – over 125 points must check out before it meets our high standards.
>
> **No cars with flood or frame damage**
> Not every car that looks good is good. We're confident in the safety and reliability of our vehicles because our technicians are trained to detect those with hidden damage.
>
> **Every used car is renewed**
> CarMax cars undergo (on average) 12 hours of renewing—sandwiched between two meticulous inspections—for a car that doesn't look or feel used.

Even though it makes such claims, the respondent has allegedly advertised on its website numerous used vehicles that were subject to open recalls for safety issues. In numerous instances, when the respondent allegedly advertised used vehicles that are subject to open recalls for safety issues, it provided no accompanying clear and conspicuous disclosure of this fact. The

proposed complaint alleges that this failure to disclose constitutes a deceptive act or practice under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to a rigorous inspection unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues. Part II is a provision that orders the respondent to notify consumers who purchased a used motor vehicle from a CarMax dealership between July 1, 2013 and November 20, 2014 that some of the used vehicles it sold during this time had been recalled for safety issues which weren't repaired as of the date they were sold. The notice also must specify how consumers can check whether the vehicle is subject to an unrepaired recall at the National Highway Traffic Safety Administration's website, https://vinrcl.safercar.gov/vin/. This website also provides information on how to get a vehicle fixed if it is subject to an open recall.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires the respondent to maintain for five years, and produce to the Commission upon demand, any relevant ads and associated documentary material. Part IV is an order distribution provision. Part V requires the respondent to notify the Commission of corporate changes that may affect compliance obligations. Part VI requires the respondent to submit a compliance report to the Commission 60 days after entry of the order, and also additional compliance reports within 10 business days of a written request by the Commission. Part VII "sunsets" the order after twenty 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

**IN THE MATTER OF**

# ASBURY AUTOMOTIVE GROUP, INC.
## D/B/A
# COGGIN AUTOMOTIVE GROUP
## AND
# CROWN AUTOMOTIVE GROUP

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

*Docket No. C-4606; File No. 152 3103*
*Complaint, March 22, 2017 – Decision, March 22, 2017*

This consent order addresses Asbury Automotive Group, Inc.'s advertisements to sell used motor vehicles. The complaint alleges that respondent has represented that the certified used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. The consent order prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues.

*Participants*

For the *Commission*: *Courtney Estep, Michael White,* and *Evan Zullow.*

For the *Respondent*: *Lucy Morris* and *Joel Winston, Hudson Cook, LLP; Alexander Okuliar, Orrick, Herrington & Sutcliffe LLP; Dean Calloway* and *George Villasana, in-house attorneys.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Asbury Automotive Group, Inc., also d/b/a Coggin Automotive Group and Crown Automotive Group, a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation, with its principal office or place of business at 2905 Premiere Parkway, NW, Suite 300, Duluth, GA 30097. Respondent has marketed, advertised, offered for sale, and sold used motor vehicles.

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least November 2014, Respondent has disseminated or has caused to be disseminated advertisements promoting the sale of used motor vehicles.

4. Respondent's advertisements include, but are not necessarily limited to, advertisements and marketing materials posted on the websites www.cogginauto.com and www.crownauto.com, excerpts of which are attached as Exhibits A through E. On its website, on a page prominently titled "Coggin Certified," and on other pages similarly touting the "Crown Automotive Certified Program," it makes claims which include the following representations regarding certified used vehicles:

> **"Inspected, Reconditioned & Certified**
> Every Coggin Certified used car or truck has undergone a 150 point bumper-to-bumper inspection by Certified mechanics. We find and fix problems - from bulbs to brakes - before offering a vehicle for sale."

**Exhibit A** (excerpt from www.cogginauto.com)

> "Our Crown Certified Used Vehicles Include: | 150 Point Bumper-to-bumper inspection . . .
>
> ***
>
> **Inspected, Reconditioned & Certified**
> Every Crown Certified used car or truck has undergone a 150 point bumper-to-bumper inspection by Certified mechanics. We find and fix problems from bulbs to brakes before

offering a vehicle for sale."

**Exhibit B** (excerpt from www.crownauto.com).

"…**Are your used cars inspected?**
Answer: Yes, Crown Automotive sends every Crown Certified used vehicle through a rigorous 150 point inspection to ensure that every vehicle is in top shape before you take it home. It is important to Crown that every feature of your vehicle work as it should so that you have peace of mind before you leave the dealership.

***

…**What are certified used cars?**
Answer: It's the reliability of new and the affordability of pre-owned car. A certified used car must go through a rigorous inspection. The certification comes from the manufacturers to ensure top quality of the pre-owned car being sold to you. Crown Automotive also offers Crown Certified used vehicles."

**Exhibit C** (excerpt from www.crownauto.com).

5. Even though it makes the claims set forth in Paragraph 4, Respondent has advertised numerous certified used vehicles subject to open recalls for safety issues on its websites.

6. In some instances, these open recalls for safety issues have included recalls for defects that can cause serious injury. For example, Respondent has advertised a certified used vehicle that has a recall for defects, which, among other things, could cause fuel to leak out and the engine to misfire or stall, thereby increasing the risk of a crash. Respondent has also advertised a certified used vehicle that has an open safety recall for a defect that can cause the vehicle to move in an unexpected or unintended direction, thereby increasing the risk of a crash.

7. In numerous instances, when Respondent has advertised certified used vehicles that are subject to open recalls for safety issues making the claims set forth in Paragraph 4, it has provided no accompanying clear and conspicuous disclosure of this fact.

8. When consumers search for particular categories of vehicles on Respondent's websites, there is no disclosure regarding open recalls for safety issues. An example of such search results includes the following:

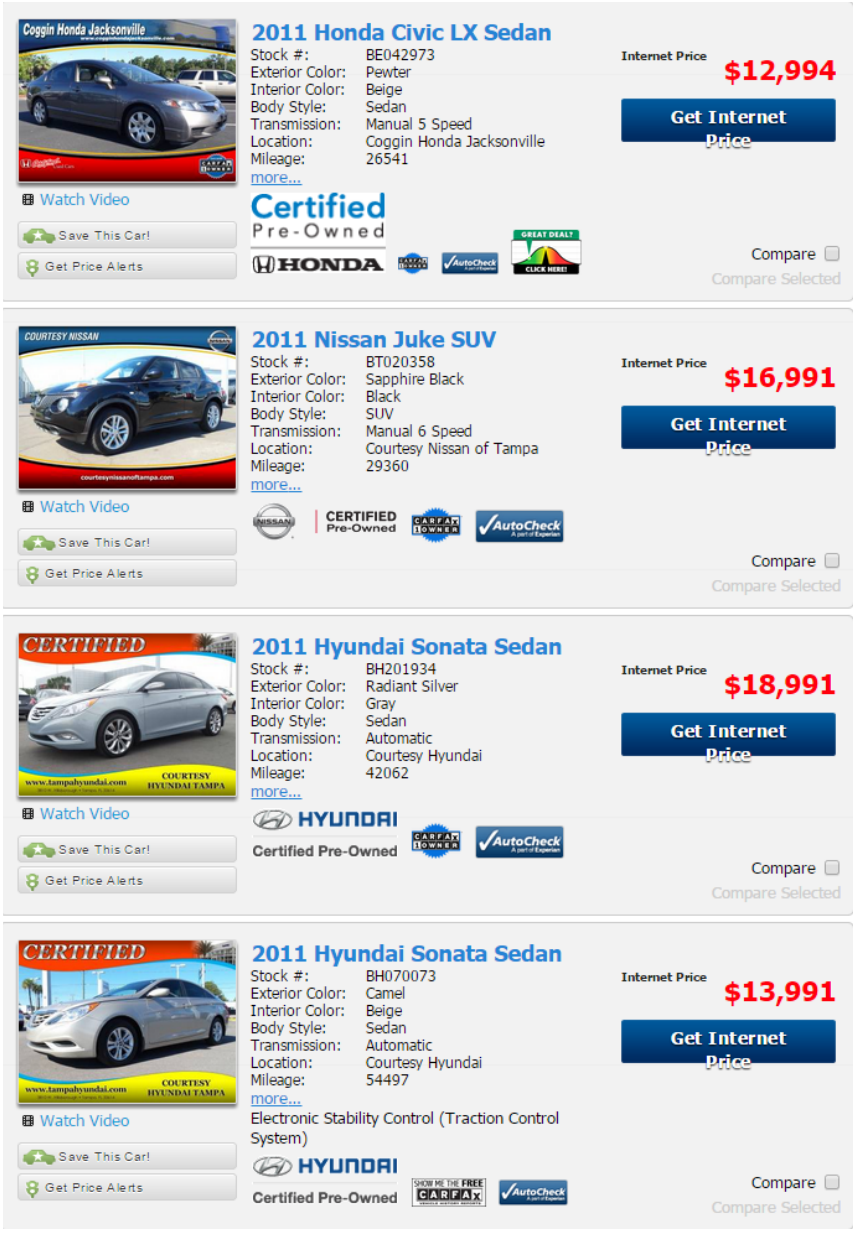



**Exhibit D at 3.**

9. Until at least June 2015, when consumers have viewed specific vehicle listings on Respondent's websites, there has been no disclosure regarding open recalls for safety issues. An example of such a listing includes the following:

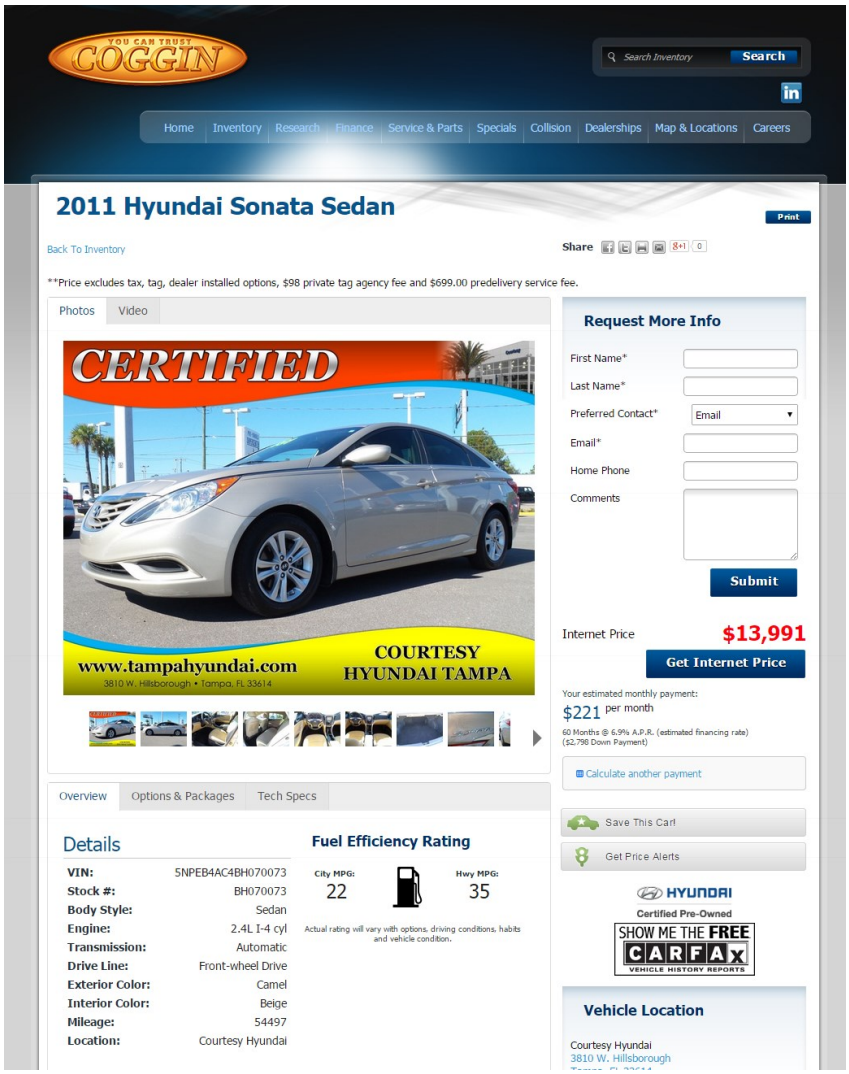



**Exhibit E.**

10. To uncover any information about open recalls for safety issues through Respondent's website, a consumer would have to locate the "Carfax" link on the search results page or the vehicle listing page and click on it to access a vehicle history report, although the "Carfax" link provides no descriptive information or in any way conveys that it contains important safety information

about recalls. Moreover, in numerous instances, even these reports omit information about open recalls for safety issues.

## VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

### Count I

11. In connection with the marketing, advertising, offering for sale, or sale of used motor vehicles, Respondent has represented, directly or indirectly, expressly or by implication, that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues.

12. In numerous instances in connection with the representation set forth in Paragraph 11, Respondent has failed to disclose, or disclose adequately, that used motor vehicles it sells are subject to open recalls for safety issues.

13. Respondent's failure to disclose, or disclose adequately, the material information set forth in Paragraph 12 above, in light of the representation described in Paragraph 11, above, constitutes a deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**THEREFORE**, the Federal Trade Commission, this twenty-second day of March, 2017, has issued this complaint against Respondent.

By the Commission.

Complaint

## Exhibit A



# Coggin Automotive Group

FL 34982

## Coggin Certified


Coggin Automotive Certified Used Cars

The Coggin Automotive Certified Used Car program gives you confidence in buying a used car. Coggin Automotive Certified Used Cars give you many of the same assurances you get with a new car, without the high price. We've put the largest selection of used cars, along with a program that offers benefits that make buying a used car a sure thing. Take the time to review this valuable information because at Coggin, our only goal is to make sure you are satisfied with your purchase. All Coggin Certified used cars, trucks, SUVs, crossovers and hybrids come with:

Free CARFAX® Report

Coggin researches your vehicle's history so you can be confident in your purchase decision. Each Coggin Certified used car comes with a free CARFAX® report. Make sure to ask your salesperson to see the full report.

Exclusive 3-Day Exchange Program

Coggin Certified used vehicles offer an unparalleled level of quality and reliability. If you are not satisfied or any reason with your Coggin Certified used car, bring it back within 3 days (or 300 miles) and exchange your vehicle for another.

Inspected, Reconditioned & Certified

Every Coggin Certified used car or truck has undergone a 150 point bumper-to-bumper inspection by Certified mechanics. We find and fix problems - from bulbs to brakes - before offering a vehicle for sale.

Coggin Certified Used Cars

Take a look at all the Coggin Certfied Used Cars offered by Coggin dealers.

Price Protection Guarantee

Coggin will never knowingly be undersold. If you find a lower price on a comparable vehicle within 2 weeks even after the sale - bring it to our attention and we will pay 110% of the difference?. It is that simple.

30-Day / 1,000 Mile Limited Warranty

Coggin stands behind its Certified used vehicles with an industry-leading warranty. At Coggin, every Coggin Certified vehicle is backed by our 30-Day / 1,000 Mile Limited Warranty with $0 deductible.*

Guaranteed Selection

With the largest selection of used cars and trucks in stock and ready for immediate delivery, you are sure to find what you are looking for at Coggin. If we do not have the vehicle you are looking for, we will do our best to find one for you.

Premiere Financing & Extended Service

Coggin and its affiliates help loan over $2 billion every year. We use our size to make the most competitive financing available - regardless of your credit history. For even greater

Complaint



offered by Coggin dealers.

available - regardless of your credit history. For even greater peace of mind, we also offer extended service contracts providing protection up to 125,000 miles.

Coggin Used. **It's Like Buying New.**

*All repairs completed by selling dealer. Benefits available for breakdowns beyond 50 miles. See dealer for details. ? Present buyer's order for comparable vehicle within 48 hours of purchase for a refund of 110% of the difference.

Complaint

## Exhibit B

11/19/2014 Crown Auto Group | New Honda, Ford, Chrysler, Dodge, Jeep, Nissan, BMW, Volvo, Acura dealership in Greensboro, NC 27407

**Crown Auto Group**
Greensboro, NC 27407

**Crown Automotive Certified Program**

CROWN AUTOMOTIVE
AUTOMOTIVE CERTIFIED
**Crown Automotive Certified Used Cars**

Crown Certified used cars gives you many of the same assurances you get with a new car-except for the higher price. We have put our name behind the largest selection of used cars with a package of benefits that makes buying used a sure thing. Please take time to review this valuable information. Because at Crown, our only goal is to make sure you are satisfied with your purchase.

Our Crown Certified Used Vehicles Include: | 150 Point Bumper-to-bumper Inspection | 30-day/ 1,000 mile limited warranty
| 3-day exchange program | Price protection guarantee | Complete vehicle history report from CARFAX

**Free CARFAX® Report**
Crown researches your vehicle's history so you can be confident in your purchase decision. Each Crown Certified used car comes with a free CARFAX® report. Make sure to ask your salesperson to see the full report.

**Price Protection Guarantee**
Crown will never knowingly be undersold. If you find a lower price on a comparable vehicle within 2 weeks even after the sale bring it to our attention and we will pay 110% of the difference. It is that simple.

**Exclusive 3-Day Exchange Program**
Crown Certified used vehicles offer an unparalleled level of quality and reliability. If you are not satisfied or any reason with your Crown Certified used car, bring it back within 3 days (or 300 miles) and exchange your vehicle for another.

**30-Day / 1,000 Mile Limited Warranty**
Crown stands behind its Certified used vehicles with an industry-leading warranty. At Crown, every Crown Certified vehicle is backed by our 30-Day / 1,000 Mile Limited Warranty with $0 deductible.*

**Inspected, Reconditioned & Certified**
Every Crown Certified used car or truck has undergone a 150 point bumper-to-bumper

**Guaranteed Selection**
With the largest selection of used cars and trucks in stock and ready for immediate delivery, you are sure to find what you are looking for at Crown. If we do not have the

http://www.crownauto.com/crown-automotive-certified-program2.htm 1/2

Exhibit B, Page 1

Complaint



inspection by Certified mechanics. We find and fix problems from bulbs to brakes before offering a vehicle for sale.

vehicle you are looking for, we will do our best to find one for you.

### Crown Certified Used Cars

Take a look at all the Crown Certified Used Cars offered by Crown dealers.

### Premiere Financing & Extended Service

Crown and its affiliates help loan over $2 billion every year. We use our size to make the most competitive financing available - regardless of your credit history. For even greater peace of mind, we also offer extended service contracts providing protection up to 125,000 miles.

**Crown Certified Used Vehicles. Buy With Confidence**

*All repairs completed by selling dealer. Benefits available for breakdowns beyond 50 miles. See dealer for details.
+Present buyer's order for comparable vehicle within 48 hours of purchase for a refund of 110% of the difference.

Complaint

## Exhibit C

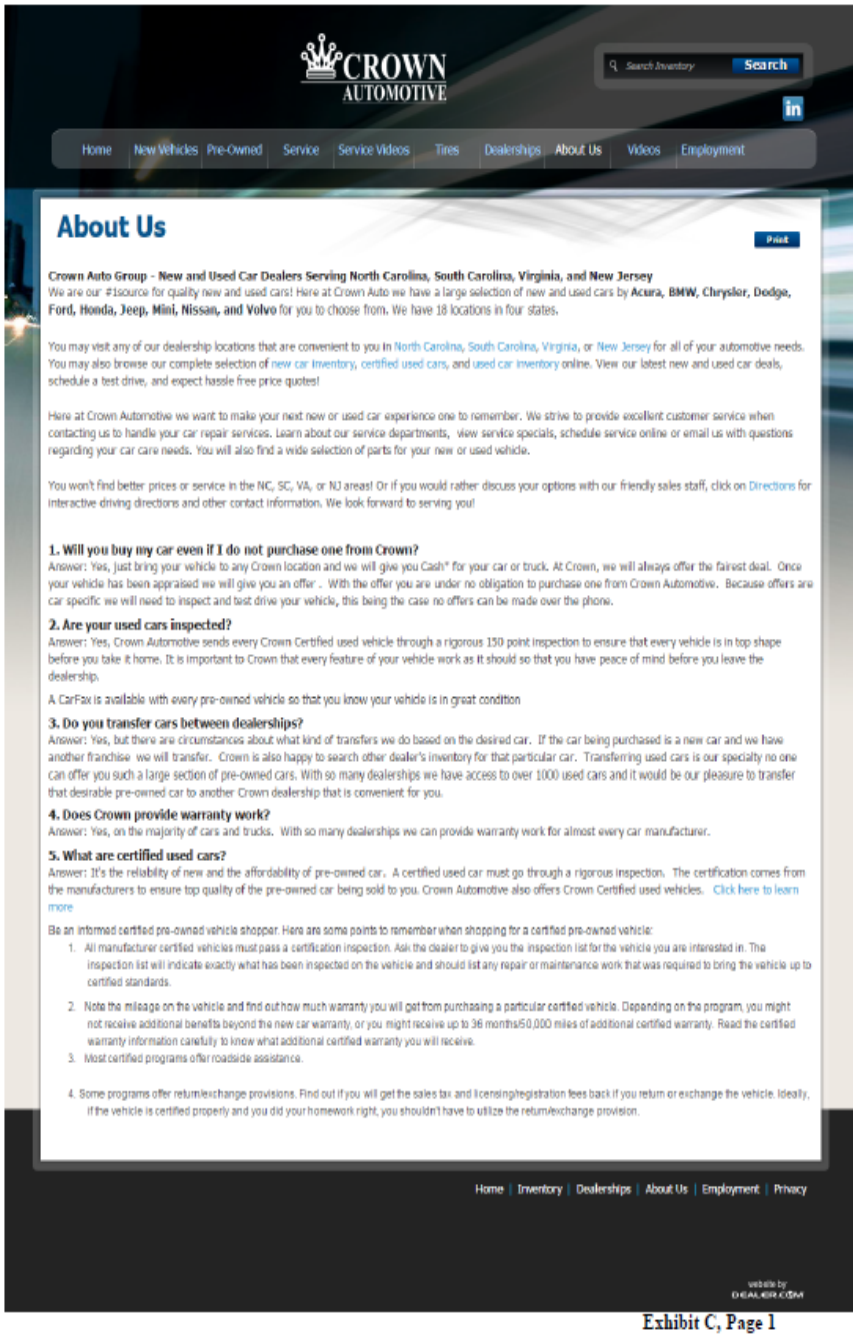



Exhibit C, Page 1

Complaint

## Exhibit D

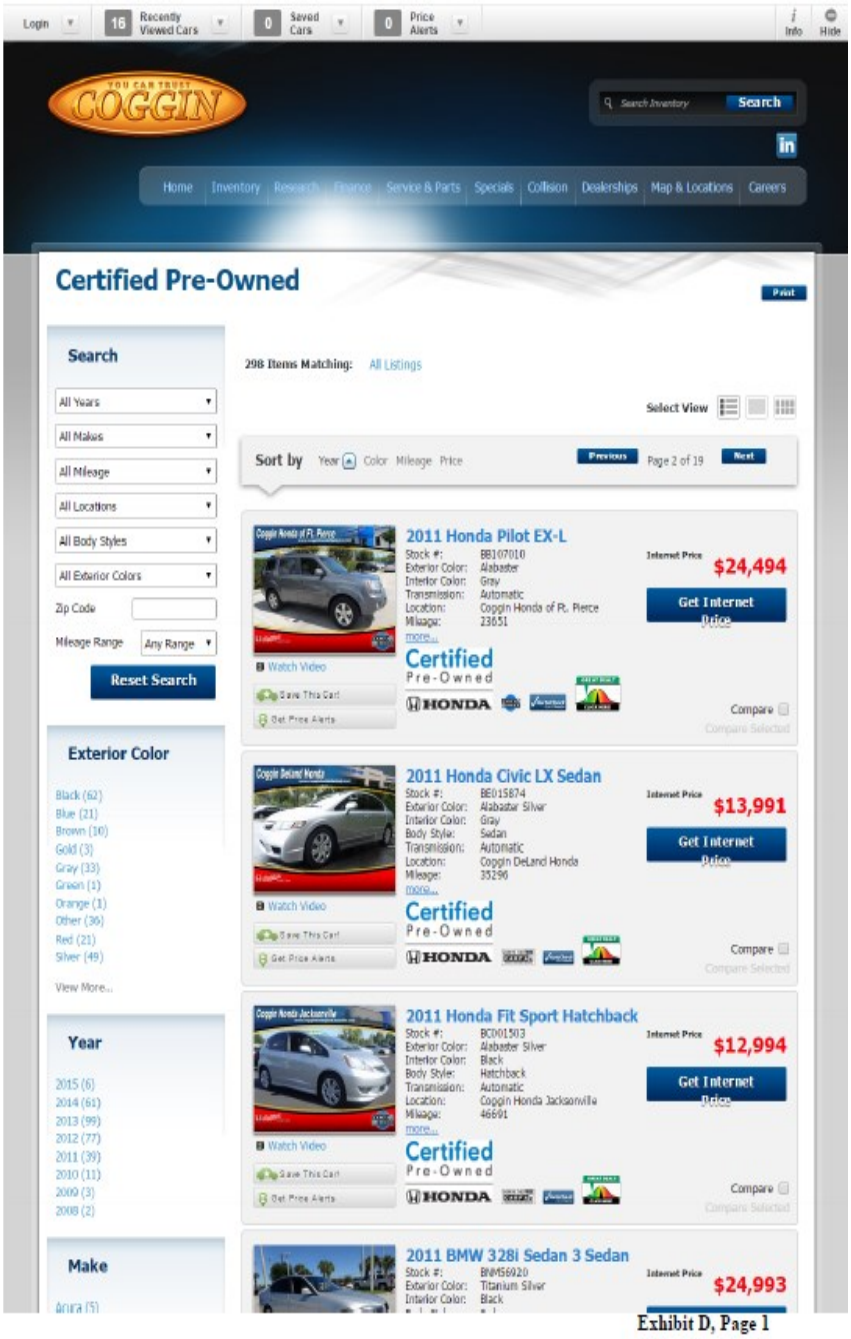



Exhibit D, Page 1

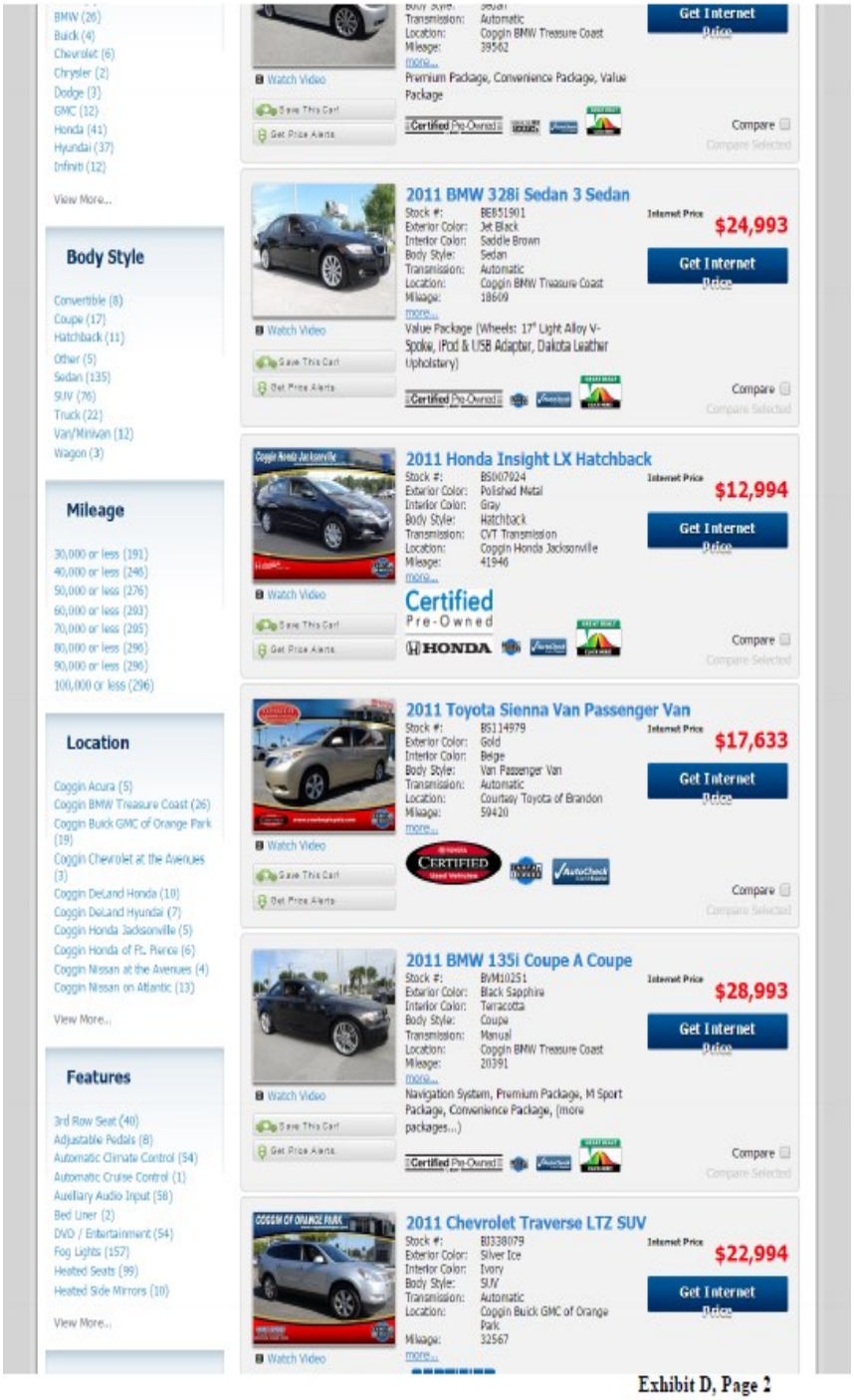



Exhibit D, Page 2

Complaint

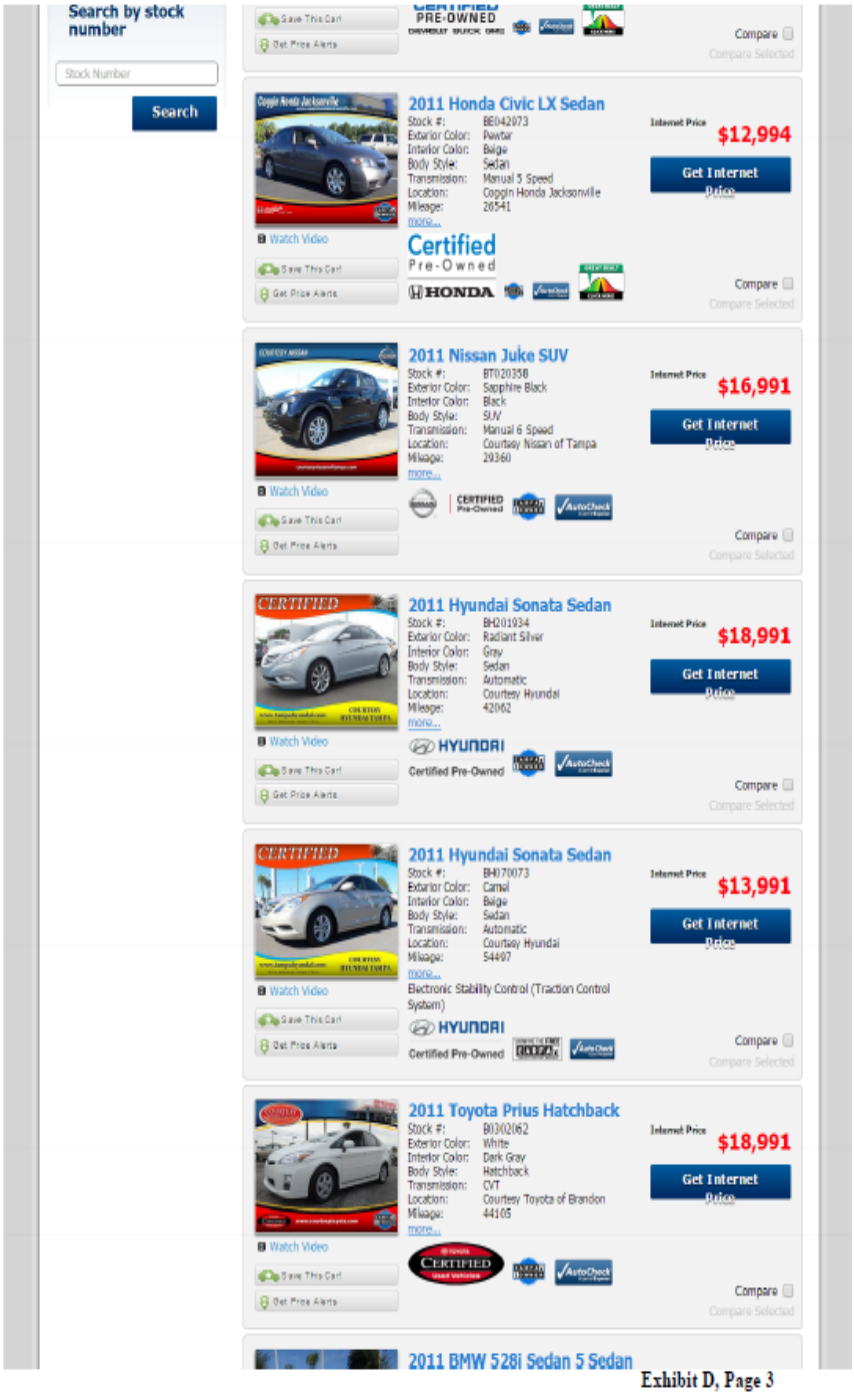



Exhibit D, Page 3

Complaint

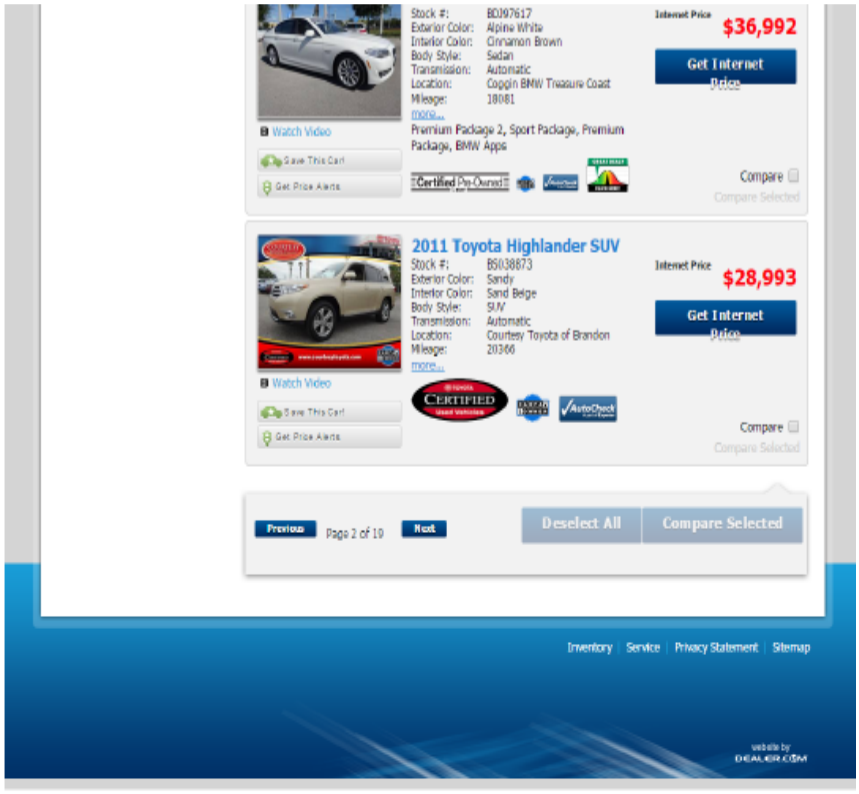



**Exhibit D, Page 4**

Complaint

## Exhibit E

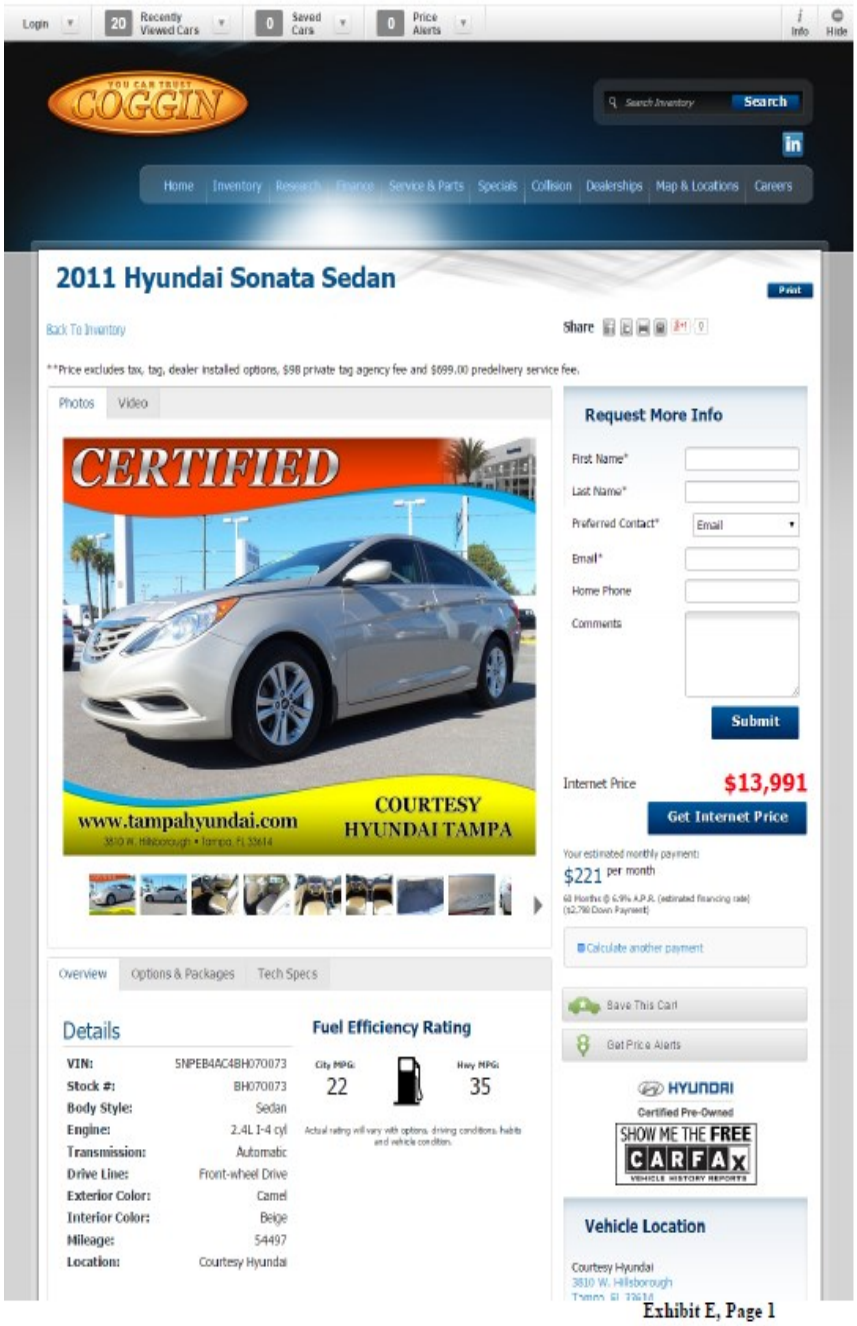
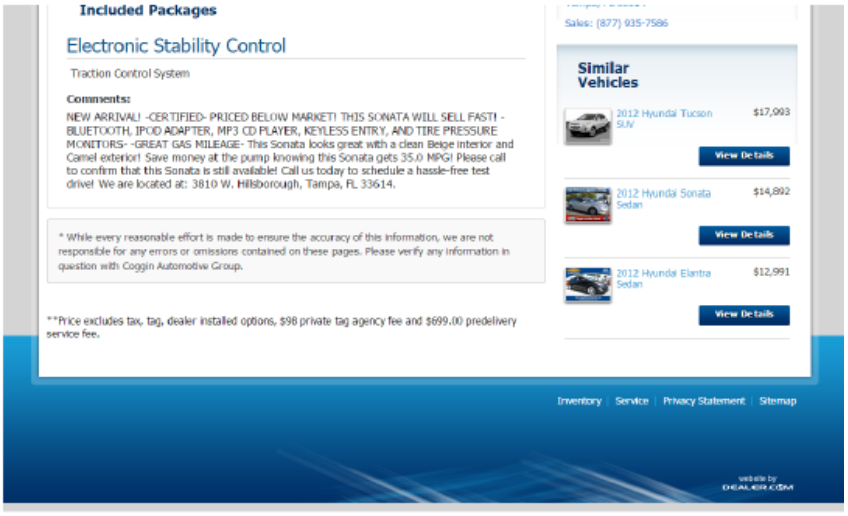



Exhibit E, Page 1




## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record

for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent Asbury Automotive Group, Inc., also d/b/a Coggin Automotive Group and Crown Automotive Group, is a Delaware corporation, with its principal office or place of business at 2905 Premiere Parkway, NW, Suite 300, Duluth, GA 30097.

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

## ORDER

## DEFINITIONS

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

A. Unless otherwise specified, "Respondent" shall mean Asbury Automotive Group, Inc., also d/b/a Coggin Automotive Group and Crown Automotive Group, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be made through the same means through which the representation requiring the disclosure is presented.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

**I.**

**IT IS HEREBY ORDERED** that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the marketing, advertising, offering for sale, or sale of used motor vehicles to consumers shall not, in any manner, expressly or by implication:

A. Represent that used motor vehicles that Respondent offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless:

1. The used motor vehicles are not subject to any open recalls for safety issues, and the representation is otherwise not misleading, or

2. Respondent discloses, clearly and conspicuously, and in close proximity to such representation, any material qualifying information related to open recalls for safety issues, including but not limited to:

a. the fact that its used motor vehicles may be subject to unrepaired recalls for safety issues, and

b. how consumers can determine whether an individual motor vehicle is subject to an open recall for a safety issue that has not been repaired,

and the representation is otherwise not misleading. *Provided further that* if Respondent receives any written notification from a manufacturer that an individual used motor vehicle is subject to an open recall for a safety issue, Respondent must clearly and conspicuously provide to the consumer, prior to the consummation of the sale of that used motor vehicle, either (a) any written notification from a manufacturer that Respondent has received that the motor vehicle is subject to an open recall for a safety issue, or a document that conveys the same information using a substantially similar format, or (b) a written notification that clearly and conspicuously conveys that the vehicle is subject to an open recall that is unrepaired, and the safety risks associated with the recall, that is made available by the U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") or a commercial provider of recall information.

B. Misrepresent the following:

1. Whether there is or is not an open recall for safety issues for any used motor vehicle;

2. Whether Respondent repairs used motor vehicles for open recalls for safety issues; and

3. Any other material fact about the safety of the used motor vehicles it advertises for sale.

## II.

**IT IS FURTHER ORDERED** that Respondent, within sixty (60) days of entry of this Order, must provide, by first class mail to the last known address of every consumer who purchased a certified used motor vehicle from Respondent between July 1,

2013 and September 2, 2015, a notice on Respondent's letterhead that clearly and conspicuously discloses the following:

> "We want to alert you that some of the used vehicles we recently sold had been recalled for safety issues, but weren't repaired as of the date they were sold. You can check whether the vehicle you bought from us is subject to an unrepaired recall at the National Highway Traffic Safety Administration's recall website, https://vinrcl.safercar.gov/vin/. That site also provides information on how to get your vehicle fixed if it's been recalled."

Respondent shall not include any advertising, marketing, or other promotional information in the notice. Moreover, the mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a clear and conspicuous fashion the disclosure "Important Safety Recall Information."

*Provided, however, that* Respondent is not required to provide this notice for (A) any motor vehicle that Respondent can demonstrate was not subject to an open recall for a safety issue at the time of purchase and delivery, or (B) any motor vehicle that was the subject of one or more open recalls for safety issues at the time of purchase and delivery that Respondent can demonstrate have subsequently been fixed.

For purposes of Subpart (A) of this proviso, records showing that the vehicle was not listed as subject to an open recall for a safety issue, as of the date of the purchase, on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar.gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed to be sufficient to demonstrate that the vehicle was not subject to an open recall for a safety issue at the time of purchase and delivery.

For purposes of Subpart (B) of this proviso, (i) repair records generated by the dealer in the ordinary course of business that demonstrate that a vehicle with an open recall for a safety issue has been repaired; or (ii) records showing that the vehicle is no

longer listed as subject to an open recall for a safety issue on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar.gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed sufficient to demonstrate that an open recall for a safety issue has been fixed.

## III.

**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. Each advertisement or other marketing material that makes any representation covered by the order unless, in comparison to an advertisement or other marketing material already maintained by Respondent pursuant to this Section, the advertisement or marketing material: (i) is a duplicate, or (ii) differs only in the description of the vehicle in ways not related to any representations covered by this order;

B. All materials that were relied upon in disseminating the representation;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

## IV.

**IT IS FURTHER ORDERED** that Respondent shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future managers, employees, agents, and representatives having 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, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## V.

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation 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 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 Asbury Automotive Group, Inc.*

## VI.

**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 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 March 22, 2037, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

# Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases[1] December 15, 2016

Unrepaired auto recalls pose a serious threat to public safety. Car manufacturers and the National Highway Traffic Safety Administration have recalled tens of millions of vehicles in each of the last several years for defects that pose significant safety risks to consumers. In 2015, for example, recalls affected 51 million vehicles nationwide.[2] And defects that have been the subject of recalls have led to severe injuries and even death for many consumers. Federal law requires that all new cars sold in the United States be free from recalls, but it does not prohibit auto dealers from selling used cars with open recalls. As a result, absent a change in law, neither NHTSA nor any other federal agency has the authority to ban the sale of used cars that have open recalls across the industry.

Section 5 of the Federal Trade Commission Act, however, enables the Commission to stop car sellers from engaging in false or misleading advertising practices that mask the existence of open recalls, and we are committed to doing just that. As part of this effort, the Commission is issuing final orders against General Motors Company, Jim Koons Management Company, and Lithia Motors, Inc. and announcing proposed orders against CarMax, Inc., West-Herr Automotive Group, Inc., and Asbury Automotive Group, Inc. In these enforcement actions, the Commission is challenging what we allege are deceptive advertising claims by these companies that highlight the rigorous inspections they perform on their used cars, but fail to clearly disclose the existence of unrepaired safety recalls.

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1 In the Matters of General Motors Company, File No. 1523101; Jim Koons Management Company, File No. 1523104; Lithia Motors, Inc., File No. 1523102; CarMax, Inc., File No. 1423202; West-Herr Automotive Group, Inc., File No. 1523105; and Asbury Automotive Group, Inc., File No 1523103.

2 Gordon Trowbridge, National Highway Traffic Safety Administration, *U.S. Department of Transportation launches new public awareness campaign*, Jan. 21, 2016, https://www.nhtsa.gov/About-NHTSA/Press- Releases/nhtsa_launches_safe_cars_save_lives_campaign_01212015.

More specifically, we allege that the companies named in these actions touted the rigorousness of their car inspections by claiming, for example, to engage in a "172-point inspection and reconditioning," an "exhaustive 160-checkpoint Quality Assurance Inspection," or a "rigorous and extensive inspection." Some of these inspected cars were subject to open recalls. We charge that the companies' representations about their inspections, absent clear and conspicuous information about open recalls, were likely to mislead reasonable consumers into believing that the inspections included repairing open recalls. Therefore, the companies' failure to disclose this information was deceptive.[3]

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, the orders prohibit each company from making any safety-related claim about its vehicles unless (1) the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously and in close proximity to the representation both that the vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car, and (2) the claims are not otherwise misleading.[4]

This means that, if any car on the companies' lots is subject to an open recall, every time the companies make these types of inspection claims, they must prominently disclose that their cars may be subject to open recalls and tell consumers how to determine the recall status of specific cars. And they must provide this information wherever the inspection claims are made – in the

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3 Under Section 5 of the FTC Act, "it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *See In re International Harvester Co.,* 104 F.T.C. 949, 1057 (1984).

4 For instance, a claim could still be misleading, even with the required disclosure, if a dealer represents that it inspected specific cars when it failed to do so, makes false oral statements to consumers that specific cars are free of recalls, or states a car *may* be subject to a recall (or otherwise implies it does not know the recall status) but in fact knows the car is actually subject to an open recall.

showroom, on the lot, and in any TV, radio, or website ad that consumers may view before they even visit a car dealer.

Further, the orders require each company to warn consumers who recently purchased one of its used cars that the vehicle may have an open recall. The Commission can seek civil penalties for violations of these orders, and we will not hesitate to do so if we discover a violation.[5]

These enforcement actions will help empower consumers to make more informed and safer purchasing decisions in a market that, absent a change in federal law, continues to include cars subject to open recalls. Dealers that repair all of their cars can continue to make truthful claims that they are recall-free, and can benefit from the competitive advantages of doing so. Dealers that cannot, or do not, repair all of their cars must instead prominently disclose that the cars may have open recalls when they make certain safety-related claims, such as claims about comprehensive inspections. Dealers are therefore incentivized to repair open recalls in the cars they advertise. At the same time, dealers can continue conducting their inspection programs and truthfully advertising them, provided they prominently disclose that cars may be subject to open recalls and do not misrepresent the recall status or safety of their cars.[6]

Finally, we note that other laws, including state product safety, tort, and other consumer protection laws, provide important safeguards to consumers affected by defective cars. Of course, the Commission's orders do not affect the protections afforded by those laws. Rather, the Commission's orders provide independent protection for consumers, requiring that they be given information about open recalls before they purchase a used car.

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5 *See U.S. v. New World Auto*, No. 16-cv-2401 (N.D. Tex. Aug. 22, 2016) (requiring auto dealers to pay civil penalties for violations of FTC order).

6 Dealer inspection programs often involve checking that vital components of a car, like the brakes and drivetrain, are working properly and thus can provide important consumer benefits.

Analysis to Aid Public Comment

Congress has been considering legislative proposals that would prohibit the sale of used cars with unrepaired recalls altogether, and we support efforts seeking to address this serious public safety issue. Although the Commission's enforcement actions against individual companies cannot substitute for legislative solutions, they provide important protections for consumers to help ensure that they can make informed and safer purchasing decisions in the used car marketplace.

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

The respondent is a car dealership that sells used motor vehicles. According to the FTC complaint, discussed further below, respondent has represented that the certified used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. Federal law currently does not prohibit car dealers from selling used vehicles subject to open safety recalls; Congress and some states are considering legislation that would do so. The Commission, however, can take action under the FTC Act to prohibit companies from making claims that mislead consumers about safety-related and other material issues. Further, the FTC can take such action in addition to (and entirely independent of) any private rights of action consumers themselves can bring under

state law. This proposed action thus does not replace or alter any state laws or legislative proposals; rather, it offers additional protections beyond those afforded under other such laws, as they exist now or may be amended.

More specifically, the complaint in this matter alleges that the respondent has posted advertisements on one of its websites that included the following representations:

> Our Crown Certified Used Vehicles Include: | 150 Point Bumper-to-bumper inspection . . .
>
> ***
>
> **Inspected, Reconditioned & Certified**
> Every Crown Certified used car or truck has undergone a 150 point bumper-to-bumper inspection by Certified mechanics. We find and fix problems from bulbs to brakes before offering a vehicle for sale.

Even though it makes such claims, the respondent has allegedly advertised on its websites numerous certified used vehicles that were subject to open recalls for safety issues. In numerous instances, when the respondent allegedly advertised certified used vehicles that are subject to open recalls for safety issues, it provided no accompanying clear and conspicuous disclosure of this fact. The proposed complaint alleges that this failure to disclose constitutes a deceptive act or practice under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues. Part II is a provision that orders the respondent to notify consumers who purchased from it a certified used motor vehicle between July 1, 2013 and September 2, 2015 that some of the

used vehicles it sold during this time had been recalled for safety issues which weren't repaired as of the date they were sold. The notice also must specify how consumers can check whether the vehicle is subject to an unrepaired recall at the National Highway Traffic Safety Administration's website, https://vinrcl.safercar.gov/vin/. This website also provides information on how to get a vehicle fixed if it is subject to an open recall.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires the respondent to maintain for five years, and produce to the Commission upon demand, any relevant ads and associated documentary material. Part IV is an order distribution provision. Part V requires the respondent to notify the Commission of corporate changes that may affect compliance obligations. Part VI requires the respondent to submit a compliance report to the Commission 60 days after entry of the order, and also additional compliance reports within 10 business days of a written request by the Commission. Part VII "sunsets" the order after twenty 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

**IN THE MATTER OF**

# WEST-HERR AUTOMOTIVE GROUP, INC.

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

*Docket No. C-4607; File No. 152 3105*
*Complaint, March 22, 2017 – Decision, March 22, 2017*

This consent order addresses West-Herr Automotive Group, Inc.'s advertisements to sell used motor vehicles. The complaint alleges that respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. The consent order prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues.

*Participants*

For the *Commission*: *Courtney Estep, Michael White,* and *Evan Zullow.*

For the *Respondent*: *Lucy Morris* and *Joel Winston, Hudson Cook, LLP.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that West-Herr Automotive Group, Inc., a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New York corporation, with its principal office or place of business at 3552 Southwestern Blvd, Orchard Park, New York 14127. Respondent has marketed, advertised, offered for sale, and sold used motor vehicles.

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least May 2014, Respondent has disseminated or has caused to be disseminated advertisements promoting the sale of used motor vehicles.

4. Respondent's advertisements include, but are not necessarily limited to, advertisements and marketing materials posted on the website www.westherr.com, excerpts of which are attached as Exhibits A through D. On its website, until at least June 2015, it has made claims regarding the advantages of buying from West-Herr, including the "West-Herr Guarantee." These marketing materials have included the following representations regarding used vehicles:

> "At West Herr, you can choose from over 1,200 pre-owned vehicles, each backed by a West Herr Guarantee. Peace of Mind Vehicles, Value Cars, and Certified Vehicles - all hand selected, and fully reconditioned for your enjoyment...."

**Exhibit A at 3.**

> On a page prominently titled "Why Buy From West-Herr?," found at www.westherr.com/west-herr-used-car-guarantee.htm, it has made the following representations:
>
> "Each vehicle goes through a rigorous multi-point inspection with our factory trained technicians. The service department grades each vehicle, and only the highest quality vehicles make it to our lots. …
>
> Only about 40% of the vehicles we take in on trade meet our standards. What happens to the other 60%? They get wholesaled (about 250 per week) at our auction, to other dealers in the area.

> We prepare a complete history report on every vehicle. This is our 'storybook'."

**Exhibit B at 1.**

5. Even though it has made the claims set forth in Paragraph 4, Respondent has advertised numerous used vehicles subject to open recalls for safety issues on its websites.

6. In some instances, these open recalls for safety issues have included recalls for defects that can cause serious injury. For example, Respondent has advertised a used vehicle that has an open recall for safety issues for defects with the airbag, which can potentially rupture and strike occupants with metal fragments upon deployment. Respondent has also advertised a used vehicle that has an open safety recall for a key ignition switch defect, which can affect engine power, power steering, braking, and airbag deployment, thereby increasing the risk of a crash and occupant injury.

7. In numerous instances, until at least June 2015, when Respondent has advertised used vehicles that are subject to open recalls for safety issues making the claims set forth in Paragraph 4 above, it has provided no accompanying clear and conspicuous disclosure of this fact.

8. Until at least June 2015, when consumers have searched for particular categories of vehicles on Respondent's website, there has been no disclosure regarding open recalls for safety issues. An example of such search results includes the following:

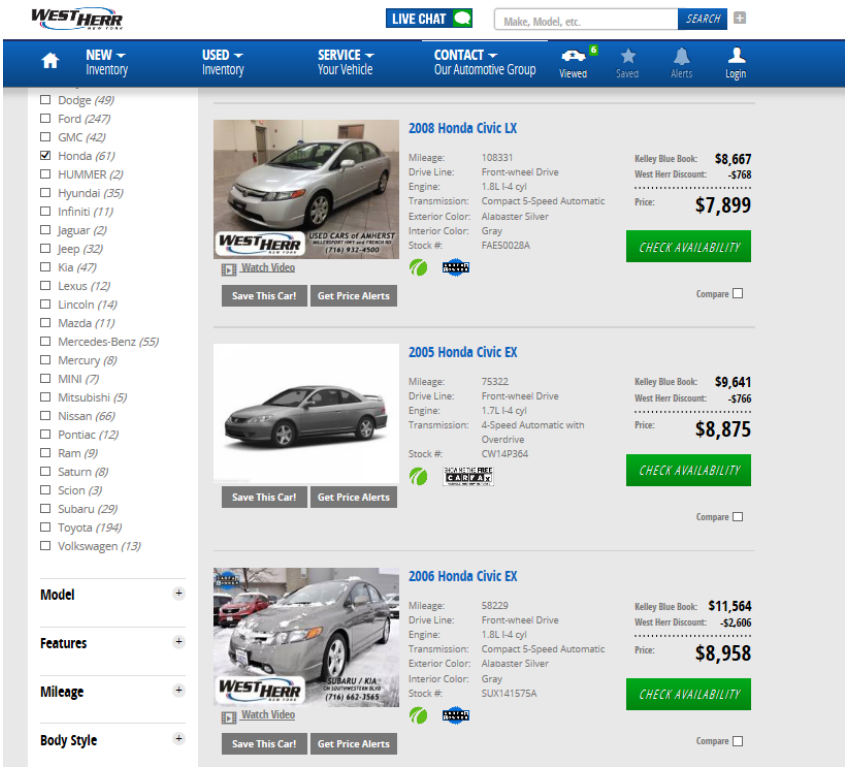



**Exhibit C.**

9. Until at least June 2015, when consumers have viewed specific vehicle listings on Respondent's website, there has been no disclosure regarding open recalls for safety issues. An example of such a listing includes the following:

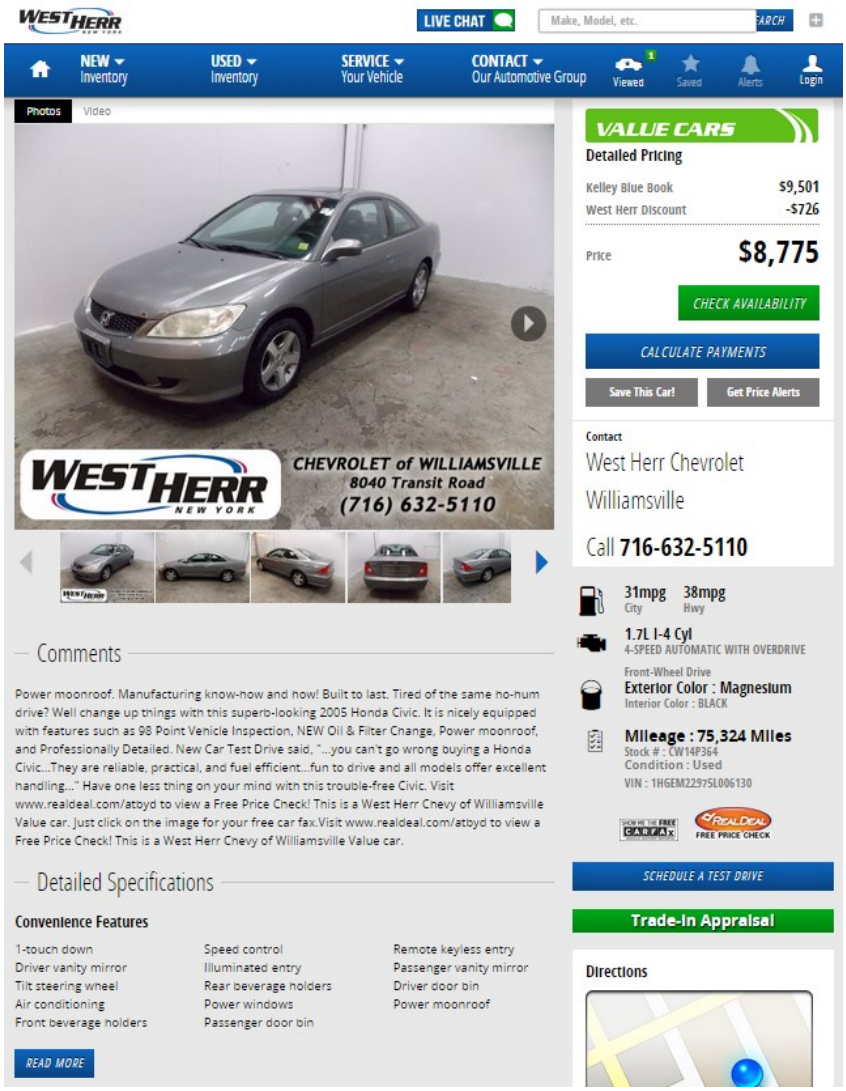



**Exhibit D.**

10. To uncover any information about open recalls for safety issues through Respondent's website, until at least June 2015, a consumer would have to locate the "Carfax" link on the search results page or the vehicle listing page and click on it to access a vehicle history report, although the "Carfax" link provides no descriptive information or in any way conveys that it contains important safety information about recalls. Moreover, in numerous instances, even these reports omit information about open recalls for safety issues.

## VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

### Count I

11. In connection with the marketing, advertising, offering for sale, or sale of used motor vehicles, Respondent has represented, directly or indirectly, expressly or by implication, that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues.

12. In numerous instances in connection with the representation set forth in Paragraph 11, Respondent has failed to disclose, or disclose adequately, that used vehicles it sells are subject to open recalls for safety issues.

13. Respondent's failure to disclose, or disclose adequately, the material information set forth in Paragraph 12 above, in light of the representation described in Paragraph 11, above, constitutes a deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**THEREFORE**, the Federal Trade Commission, this twenty-second day of March, 2017, has issued this complaint against Respondent.

By the Commission.

Complaint

## Exhibit A

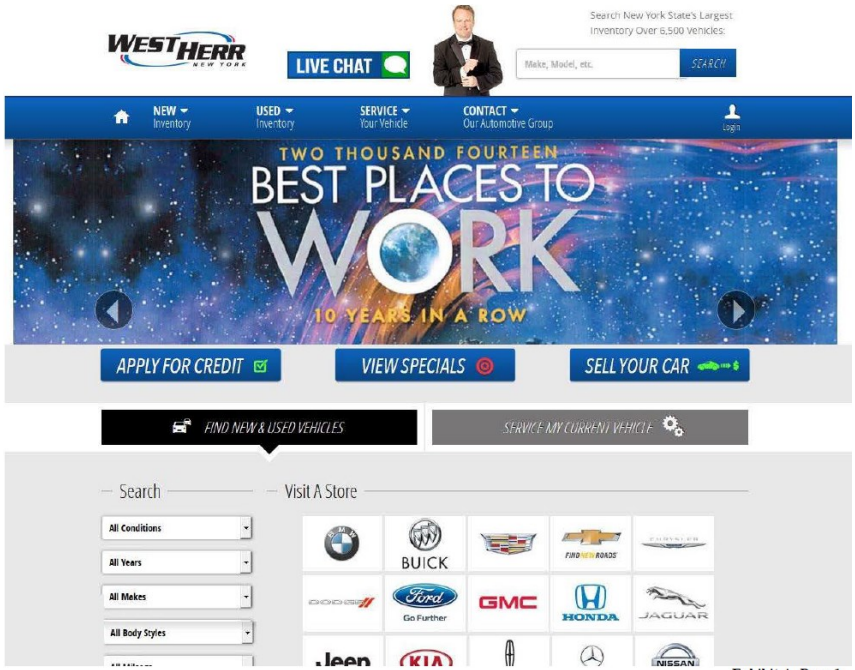



Exhibit A, Page 1

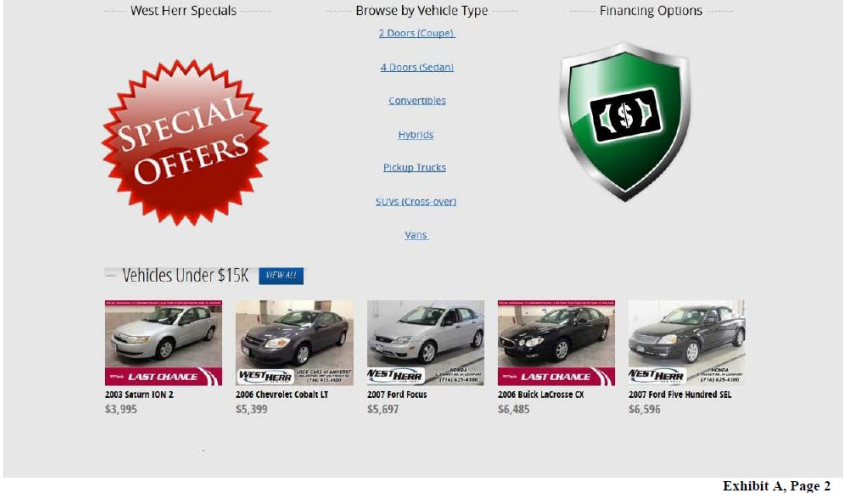
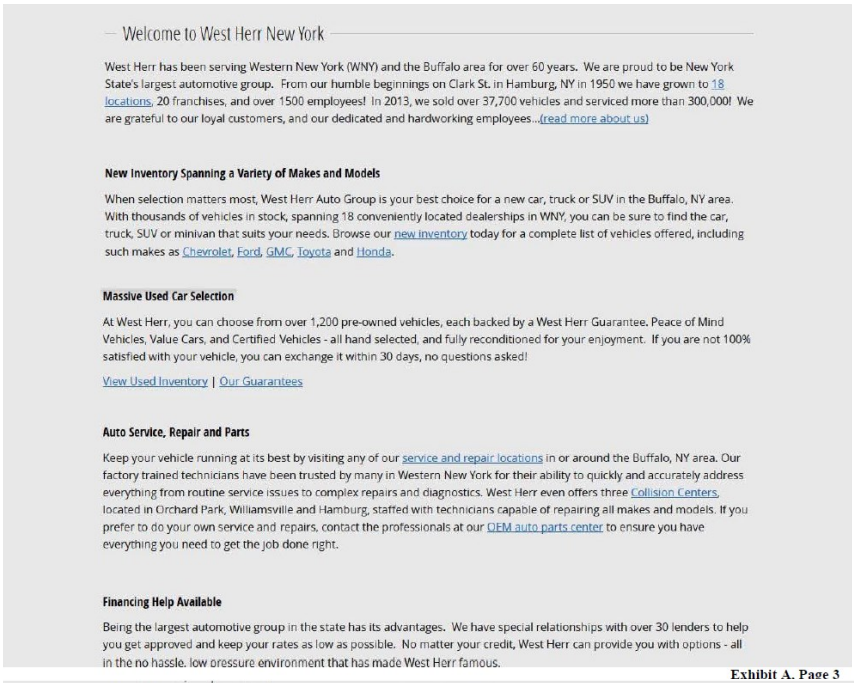



Exhibit A, Page 2



## Welcome to West Herr New York

West Herr has been serving Western New York (WNY) and the Buffalo area for over 60 years. We are proud to be New York State's largest automotive group. From our humble beginnings on Clark St. in Hamburg, NY in 1950 we have grown to 18 locations, 20 franchises, and over 1500 employees! In 2013, we sold over 37,700 vehicles and serviced more than 300,000! We are grateful to our loyal customers, and our dedicated and hardworking employees...(read more about us)

**New Inventory Spanning a Variety of Makes and Models**

When selection matters most, West Herr Auto Group is your best choice for a new car, truck or SUV in the Buffalo, NY area. With thousands of vehicles in stock, spanning 18 conveniently located dealerships in WNY, you can be sure to find the car, truck, SUV or minivan that suits your needs. Browse our new inventory today for a complete list of vehicles offered, including such makes as Chevrolet, Ford, GMC, Toyota and Honda.

**Massive Used Car Selection**

At West Herr, you can choose from over 1,200 pre-owned vehicles, each backed by a West Herr Guarantee. Peace of Mind Vehicles, Value Cars, and Certified Vehicles - all hand selected, and fully reconditioned for your enjoyment. If you are not 100% satisfied with your vehicle, you can exchange it within 30 days, no questions asked!

View Used Inventory | Our Guarantees

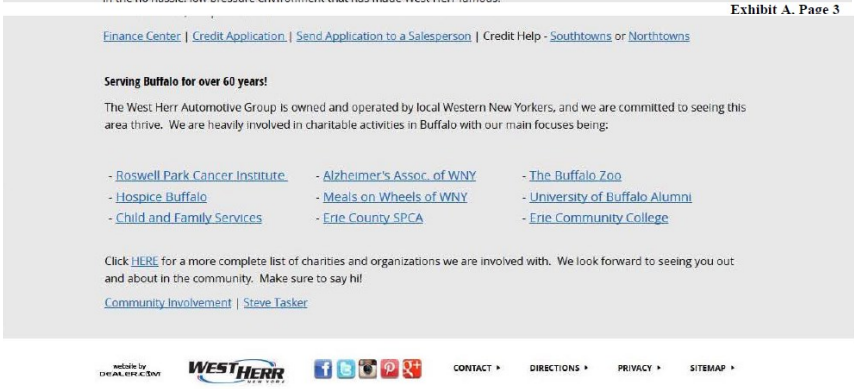
**Auto Service, Repair and Parts**

Keep your vehicle running at its best by visiting any of our service and repair locations in or around the Buffalo, NY area. Our factory trained technicians have been trusted by many in Western New York for their ability to quickly and accurately address everything from routine service issues to complex repairs and diagnostics. West Herr even offers three Collision Centers, located in Orchard Park, Williamsville and Hamburg, staffed with technicians capable of repairing all makes and models. If you prefer to do your own service and repairs, contact the professionals at our OEM auto parts center to ensure you have everything you need to get the job done right.

**Financing Help Available**

Being the largest automotive group in the state has its advantages. We have special relationships with over 30 lenders to help you get approved and keep your rates as low as possible. No matter your credit, West Herr can provide you with options - all in the no hassle, low pressure environment that has made West Herr famous.

**Exhibit A, Page 3**



Finance Center | Credit Application | Send Application to a Salesperson | Credit Help - Southtowns or Northtowns

**Serving Buffalo for over 60 years!**

The West Herr Automotive Group is owned and operated by local Western New Yorkers, and we are committed to seeing this area thrive. We are heavily involved in charitable activities in Buffalo with our main focuses being:

- Roswell Park Cancer Institute
- Hospice Buffalo
- Child and Family Services
- Alzheimer's Assoc. of WNY
- Meals on Wheels of WNY
- Erie County SPCA
- The Buffalo Zoo
- University of Buffalo Alumni
- Erie Community College

Click HERE for a more complete list of charities and organizations we are involved with. We look forward to seeing you out and about in the community. Make sure to say hi!

Community Involvement | Steve Tasker



website by DEALER.COM WEST HERR CONTACT DIRECTIONS PRIVACY SITEMAP

**Exhibit A, Page 4**

Complaint

## Exhibit B



West Herr Auto Group

SALES: (855) 638-2732

**Search New York State's Largest Inventory Over 6,500 Vehicles:**

# Why Buy From West Herr?

Last year, we sold over 14,000 pre-owned vehicles (http://westherrautogroup.cms.dealer.com/all-inventory/index.htm?search=&accountId=&compositeType=used). There were many reasons but here are a few...

**Selection**

With new vehicles arriving every day and over 1,200 used vehicles to choose from, West Herr has the largest pre-owned inventory in Western New York.

**Convenience**

Free vehicle transfers to any of our 18 locations. And most of our vehicles are prepped and ready for same day express delivery! Click the logo to learn more.

**Confidence**

Each vehicle goes through a rigorous multi-point inspection with our factory trained technicians. The service department grades each vehicle, and only the highest quality vehicles make it to our lots. We will never sell a vehicle with a branded title (flood damage, total loss, frame damage, etc.).

Only about 40% of the vehicles we take in on trade meet our standards. What happens to the other 60%? They get wholesaled (about 250 per week) at our auction, to other dealers in the area.

We prepare a complete history report on every vehicle. This is our 'storybook'. Inside, you will find a CARFAX report, all known service history, a detailed reconditioning report, consumer reviews, and market pricing comparisons.

**Price**

We know price is important to you. That's why we use several sophisticated internet pricing tools that allow us to scan the market on a daily basis for competitive vehicle information. We are constantly adjusting our prices to provide the best value possible. We can show you the market comparison on any vehicle, comparing factors like mileage, condition, availability, and equipment.

FREE PRICE CHECK

We do not "mark them up to mark them down" - and have found that by putting a

Contact a Used Car Manager

Choose A Location* Please Select

First Name*

Last Name*

Contact Me by* Please Select

Phone*

Email*

Comments

Exhibit B, Page 1

discounted price up front, the process is easier and more enjoyable for everyone - less negotiation, less stress.

Internet Value Pricing System
No Games. No Gimmicks.

The West Herr IVPS performs a comprehensive search of over 20,000 pre-owned vehicle websites every hour. These real-time results allow us to adjust our prices to the market and ensure you receive a fair price.

Also, look out for specially marked "Last Chance" vehicles for even more savings!


**Satisfaction Guaranteed!**

We want you to love your vehicle. So we have put together some of the most complete guarantees on the market. Most vehicles (all except value cars) come with a 3 day, 150 mile money back guarantee. All pre-owned vehicles from West Herr come with a 30 day, 1,000 mile exchange policy. So if you aren't completely satisfied with your vehicle, you can exchange it, no questions asked!

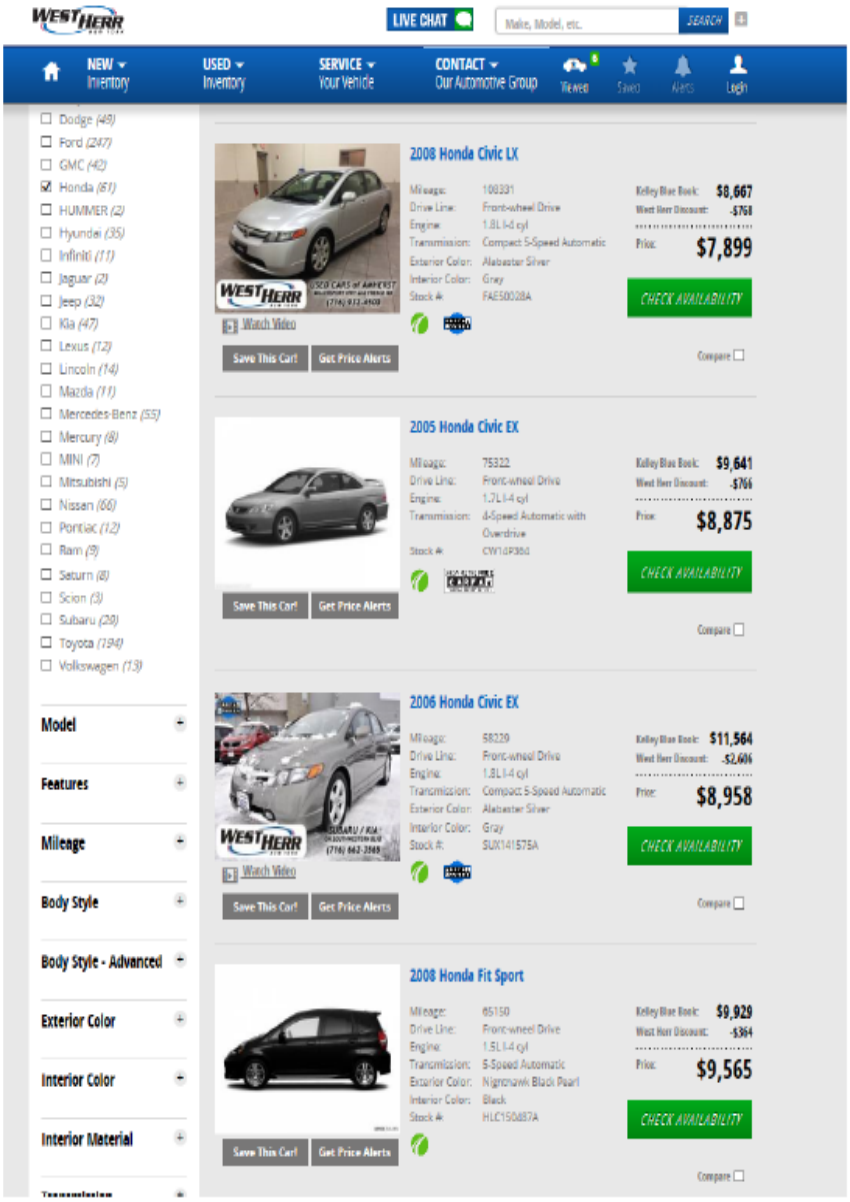

Exhibit B, Page 2




Exhibit B, Page 3

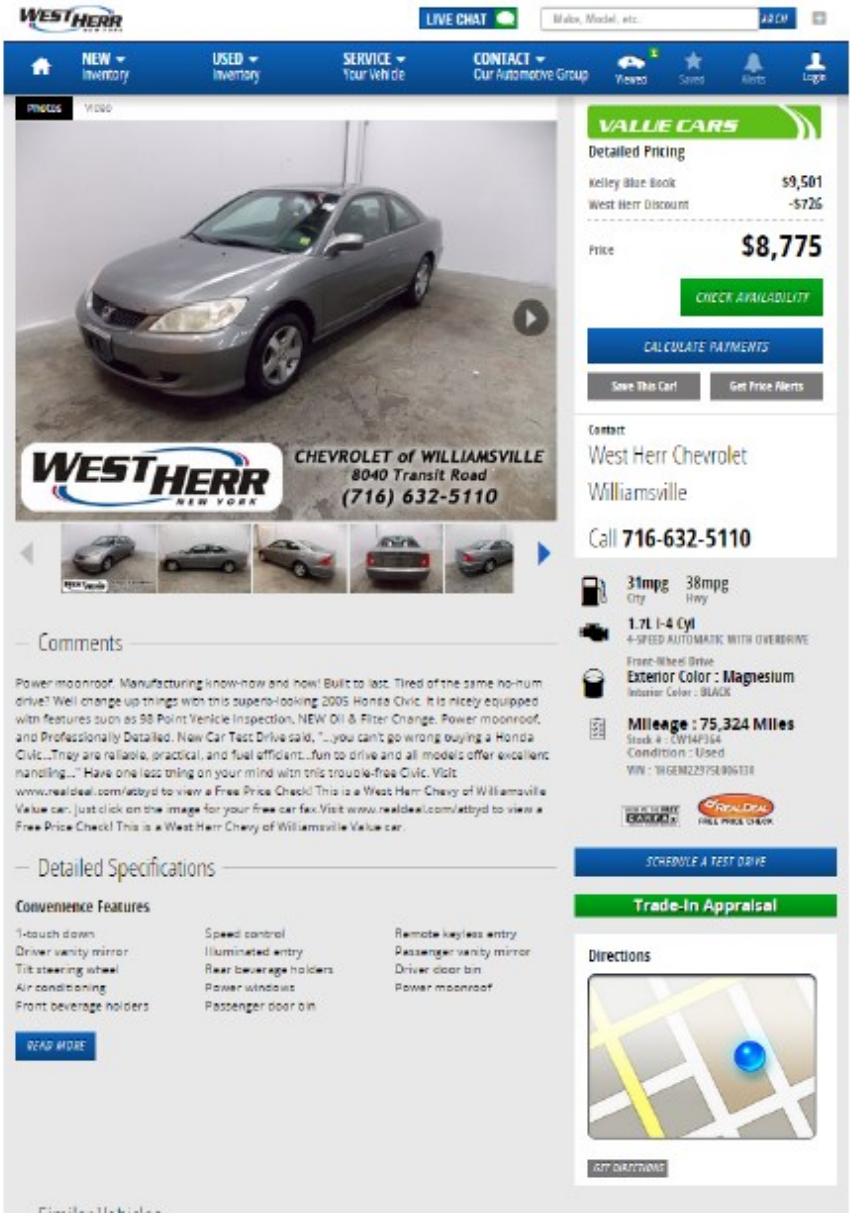
Complaint

## Exhibit C



Complaint

## Exhibit D



## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent West-Herr Automotive Group, Inc., is a New York corporation, with its principal office or place of business at 3552 Southwestern Blvd, Orchard Park, New York 14127.

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

## ORDER

## DEFINITIONS

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

A. Unless otherwise specified, "Respondent" shall mean West-Herr Automotive Group, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be made through the same means through which the representation requiring the disclosure is presented.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

D. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

E. "Motor vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

**I.**

**IT IS HEREBY ORDERED** that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the marketing, advertising, offering for sale, or

sale of used motor vehicles to consumers shall not, in any manner, expressly or by implication:

A. Represent that used motor vehicles that Respondent offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless:

1. The used motor vehicles are not subject to any open recalls for safety issues, and the representation is otherwise not misleading, or

2. Respondent discloses, clearly and conspicuously, and in close proximity to such representation, any material qualifying information related to open recalls for safety issues, including but not limited to:

a. the fact that its used motor vehicles may be subject to unrepaired recalls for safety issues, and

b. how consumers can determine whether an individual motor vehicle is subject to an open recall for a safety issue that has not been repaired,

and the representation is otherwise not misleading. *Provided further that* if Respondent receives any written notification from a manufacturer that an individual used motor vehicle is subject to an open recall for a safety issue, Respondent must clearly and conspicuously provide that written notification, or a document that conveys the same information using a substantially similar format, to the consumer prior to consummation of the sale of that motor vehicle.

B. Misrepresent the following:

1. Whether there is or is not an open recall for safety issues for any used motor vehicle;

2. Whether Respondent repairs used motor vehicles for open recalls for safety issues; and

3. Any other material fact about the safety of the used motor vehicles it advertises for sale.

## II.

**IT IS FURTHER ORDERED** that Respondent, within sixty (60) days of entry of this Order, must provide, by first class mail to the last known address of every consumer who purchased a used motor vehicle from Respondent between July 1, 2013 and June 30, 2015, a notice on Respondent's letterhead that clearly and conspicuously discloses the following:

> "We want to alert you that some of the used vehicles we recently sold had been recalled for safety issues, but weren't repaired as of the date they were sold. You can check whether the vehicle you bought from us is subject to an unrepaired recall at the National Highway Traffic Safety Administration's recall website, https://vinrcl.safercar.gov/vin/. That site also provides information on how to get your vehicle fixed if it's been recalled."

Respondent shall not include any advertising, marketing, or other promotional information in the notice. Moreover, the mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a clear and conspicuous fashion the disclosure "Important Safety Recall Information."

*Provided, however, that* Respondent is not required to provide this notice for (A) any motor vehicle that Respondent can demonstrate was not subject to an open recall for a safety issue at the time of purchase and delivery, or (B) any motor vehicle that was the subject of one or more open recalls for safety issues at the time of purchase and delivery that Respondent can demonstrate have subsequently been fixed.

For purposes of Subpart (A) of this proviso, records showing that the vehicle was not listed as subject to an open recall for a safety

issue, as of the date of the purchase, on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar.gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed to be sufficient to demonstrate that the vehicle was not subject to an open recall for a safety issue at the time of purchase and delivery.

For purposes of Subpart (B) of this proviso, (i) repair records generated by the dealer in the ordinary course of business that demonstrate that a vehicle with an open recall for a safety issue has been repaired; or (ii) records showing that the vehicle is no longer listed as subject to an open recall for a safety issue on the Original Equipment Manufacturer's recall database, on the National Highway Traffic Safety Administration's www.safercar .gov database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results, shall be deemed sufficient to demonstrate that an open recall for a safety issue has been fixed.

## III.

**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. Each advertisement or other marketing material that makes any representation covered by the order unless, in comparison to an advertisement or other marketing material already maintained by Respondent pursuant to this Section, the advertisement or marketing material: (i) is a duplicate, or (ii) differs only in the description of the vehicle in ways not related to any representations covered by this order;

B. All materials that were relied upon in disseminating the representation;

C. All evidence in its possession or control that contradicts, qualifies, or calls 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. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

## IV.

**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, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## V.

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the

corporation 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 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 West-Herr Automotive Group, Inc.*

## VI.

**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 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 March 22, 2037, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the

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

By the Commission.

## Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases[1] December 15, 2016

Unrepaired auto recalls pose a serious threat to public safety. Car manufacturers and the National Highway Traffic Safety Administration have recalled tens of millions of vehicles in each of the last several years for defects that pose significant safety risks to consumers. In 2015, for example, recalls affected 51 million vehicles nationwide.[2] And defects that have been the subject of recalls have led to severe injuries and even death for many consumers. Federal law requires that all new cars sold in the United States be free from recalls, but it does not prohibit auto dealers from selling used cars with open recalls. As a result, absent a change in law, neither NHTSA nor any other federal agency has the authority to ban the sale of used cars that have open recalls across the industry.

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1 In the Matters of General Motors Company, File No. 1523101; Jim Koons Management Company, File No. 1523104; Lithia Motors, Inc., File No. 1523102; CarMax, Inc., File No. 1423202; West-Herr Automotive Group, Inc., File No. 1523105; and Asbury Automotive Group, Inc., File No 1523103.

2 Gordon Trowbridge, National Highway Traffic Safety Administration, *U.S. Department of Transportation launches new public awareness campaign*, Jan. 21, 2016, https://www.nhtsa.gov/About-NHTSA/Press- Releases/nhtsa_launches_safe_cars_save_lives_campaign_01212015.

Statement of the Commission

Section 5 of the Federal Trade Commission Act, however, enables the Commission to stop car sellers from engaging in false or misleading advertising practices that mask the existence of open recalls, and we are committed to doing just that. As part of this effort, the Commission is issuing final orders against General Motors Company, Jim Koons Management Company, and Lithia Motors, Inc. and announcing proposed orders against CarMax, Inc., West-Herr Automotive Group, Inc., and Asbury Automotive Group, Inc. In these enforcement actions, the Commission is challenging what we allege are deceptive advertising claims by these companies that highlight the rigorous inspections they perform on their used cars, but fail to clearly disclose the existence of unrepaired safety recalls.

More specifically, we allege that the companies named in these actions touted the rigorousness of their car inspections by claiming, for example, to engage in a "172-point inspection and reconditioning," an "exhaustive 160-checkpoint Quality Assurance Inspection," or a "rigorous and extensive inspection." Some of these inspected cars were subject to open recalls. We charge that the companies' representations about their inspections, absent clear and conspicuous information about open recalls, were likely to mislead reasonable consumers into believing that the inspections included repairing open recalls. Therefore, the companies' failure to disclose this information was deceptive.[3]

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, the orders prohibit each company from making any safety-related claim about its vehicles unless (1) the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously and in close proximity to the representation both that the vehicles may be subject to open recalls and how consumers can determine the

3 Under Section 5 of the FTC Act, "it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *See In re International Harvester Co.,* 104 F.T.C. 949, 1057 (1984).

recall status of a particular car, and (2) the claims are not otherwise misleading.[4]

This means that, if any car on the companies' lots is subject to an open recall, every time the companies make these types of inspection claims, they must prominently disclose that their cars may be subject to open recalls and tell consumers how to determine the recall status of specific cars. And they must provide this information wherever the inspection claims are made – in the showroom, on the lot, and in any TV, radio, or website ad that consumers may view before they even visit a car dealer.

Further, the orders require each company to warn consumers who recently purchased one of its used cars that the vehicle may have an open recall. The Commission can seek civil penalties for violations of these orders, and we will not hesitate to do so if we discover a violation.[5]

These enforcement actions will help empower consumers to make more informed and safer purchasing decisions in a market that, absent a change in federal law, continues to include cars subject to open recalls. Dealers that repair all of their cars can continue to make truthful claims that they are recall-free, and can benefit from the competitive advantages of doing so. Dealers that cannot, or do not, repair all of their cars must instead prominently disclose that the cars may have open recalls when they make certain safety-related claims, such as claims about comprehensive inspections. Dealers are therefore incentivized to repair open recalls in the cars they advertise. At the same time, dealers can continue conducting their inspection programs and truthfully advertising them, provided they prominently disclose that cars

4 For instance, a claim could still be misleading, even with the required disclosure, if a dealer represents that it inspected specific cars when it failed to do so, makes false oral statements to consumers that specific cars are free of recalls, or states a car *may* be subject to a recall (or otherwise implies it does not know the recall status) but in fact knows the car is actually subject to an open recall.

5 *See U.S. v. New World Auto*, No. 16-cv-2401 (N.D. Tex. Aug. 22, 2016) (requiring auto dealers to pay civil penalties for violations of FTC order).

may be subject to open recalls and do not misrepresent the recall status or safety of their cars.[6]

Finally, we note that other laws, including state product safety, tort, and other consumer protection laws, provide important safeguards to consumers affected by defective cars. Of course, the Commission's orders do not affect the protections afforded by those laws. Rather, the Commission's orders provide independent protection for consumers, requiring that they be given information about open recalls before they purchase a used car.

Congress has been considering legislative proposals that would prohibit the sale of used cars with unrepaired recalls altogether, and we support efforts seeking to address this serious public safety issue. Although the Commission's enforcement actions against individual companies cannot substitute for legislative solutions, they provide important protections for consumers to help ensure that they can make informed and safer purchasing decisions in the used car marketplace.

6 Dealer inspection programs often involve checking that vital components of a car, like the brakes and drivetrain, are working properly and thus can provide important consumer benefits.

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

The respondent is a car dealership that sells used motor vehicles. According to the FTC complaint, discussed further below, respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. Federal law currently does not prohibit car dealers from selling used vehicles subject to open safety recalls; Congress and some states are considering legislation that would do so. The Commission, however, can take action under the FTC Act to prohibit companies from making claims that mislead consumers about safety-related and other material issues. Further, the FTC can take such action in addition to (and entirely independent of) any private rights of action consumers themselves can bring under state law. This proposed action thus does not replace or alter any state laws or legislative proposals; rather, it offers additional protections beyond those afforded under other such laws, as they exist now or may be amended.

More specifically, the complaint in this matter alleges the respondent has posted advertisements on the website www.westherr.com regarding the advantages of buying from West-Herr that have made the following representations:

> "Each vehicle goes through a rigorous multi-point inspection with our factory trained technicians. The service department grades each vehicle, and only the highest quality vehicles make it to our lots. …

> Only about 40% of the vehicles we take in on trade meet our standards. What happens to the other 60%? They get wholesaled (about 250 per week) at our auction, to other dealers in the area."

Even though it makes such claims, the respondent has allegedly advertised on its websites numerous used vehicles that were subject to open recalls for safety issues. In numerous instances, when the respondent allegedly advertised used vehicles that are subject to open recalls for safety issues, it provided no accompanying clear and conspicuous disclosure of this fact. The proposed complaint alleges that this failure to disclose constitutes a deceptive act or practice under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues. Part II is a provision that orders the respondent to notify consumers who purchased from it a used motor vehicle between July 1, 2013 and June 30, 2015 that some of the used vehicles it sold during this time had been recalled for safety issues which weren't repaired as of the date they were sold. The notice also must specify how consumers can check whether the vehicle is subject to an unrepaired recall at the National Highway Traffic Safety Administration's website, https://vinrcl.safercar.gov/vin/. This website also provides information on how to get a vehicle fixed if it is subject to an open recall.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires the respondent to maintain for five years, and produce to the Commission upon demand, any relevant ads and associated documentary material. Part IV is an order distribution provision. Part V requires the respondent to notify the Commission of corporate changes that may affect compliance obligations. Part VI requires the respondent to submit a compliance report to the Commission 60

days after entry of the order, and also additional compliance reports within 10 business days of a written request by the Commission. Part VII "sunsets" the order after twenty 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

**IN THE MATTER OF**

# ENBRIDGE INC.
**AND**
# SPECTRA ENERGY CORP.

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

*Docket No. C-4604; File No. 161 0215*
*Complaint, March 22, 2017 – Decision, March 22, 2017*

This consent order addresses the $28 billion acquisition by Enbridge Inc. of certain assets of Spectra Energy Corp. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the transportation of natural gas from wells in certain natural gas producing areas in the Gulf of Mexico to processing plants or interconnects with other natural gas pipelines. The complaint further alleges that after the Merger, Enbridge will have access to competitively sensitive information of its competitor, the Discovery Pipeline, and gain voting rights over the Discovery Pipeline's significant capital expenditures, including expansions needed to connect to new wells. The consent order requires Enbridge to erect firewalls to limit its access to non-public information relating to the Discovery Pipeline.

*Participants*

For the *Commission*: *Keitha Clopper, Eric Cochran,* and *Holly Vedova.*

For the *Respondents*: *Joseph Matelis, Sullivan & Cromwell LLP; Nelson Fitts, Wachtell, Lipton, Rosen & Katz 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 ("Commission"), having reason to believe that Respondent Enbridge Inc. ("Enbridge") has entered into a transaction with Respondent Spectra Energy Corp ("Spectra"), that such transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade

Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

## I. RESPONDENTS

Enbridge

1. Respondent Enbridge is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 425 1st Street S.W., Suite 200, Fifth Avenue Place, Calgary, Alberta Canada T2P 3L8. Enbridge's principal U.S. subsidiary, Enbridge Energy Partners, L.P., is a master limited partnership with its principal place of business located at 1100 Louisiana Street, Suite 3300, Houston, Texas 77002.

2. Respondent Enbridge is, and at all times relevant herein has been, engaged in, among other things, the gathering, processing, transportation, and storage of natural gas in the United States.

3. Respondent Enbridge and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Spectra

4. Respondent Spectra 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 5400 Westheimer Court, Houston, Texas 77056.

5. Respondent Spectra is, and at all times relevant herein has been, engaged in, among other things, the gathering, processing, transportation, and storage of natural gas in the United States.

6. Respondent Spectra and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton

Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## II. THE PROPOSED MERGER

7. Respondent Enbridge and affiliated companies under its control entered into a merger agreement ("Merger Agreement") with Spectra, dated September 5, 2016, pursuant to which Sand Merger Sub, Inc., a newly created direct wholly owned subsidiary of Enbridge, will merge with and into Spectra, with Spectra surviving the merger (the "Merger"). On September 5, 2016, the Merger's total estimated dollar value was $28 billion.

8. The Merger is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## III. THE RELEVANT MARKET

9. A relevant product market in which to analyze the effects of the Merger is natural gas pipeline transportation. Natural gas producers contract with natural gas pipelines to connect to and transport natural gas from wells to processing plants or interconnects with other natural gas pipelines.

10. Relevant geographic markets in which to analyze the effects of the Merger are no broader than the Green Canyon, Walker Ridge, and Keathley Canyon offshore natural gas producing areas in the Gulf of Mexico (collectively and individually referred to as "Gulf Producing Areas"). The Gulf Producing Areas are off the coast of Louisiana.

11. No economic or practical alternative to natural gas pipeline transportation from wells exists. Other natural gas delivery methods are significantly more costly, less reliable, and potentially more hazardous than pipeline transportation.

## IV. MARKET STRUCTURE

12. Enbridge, through a wholly owned subsidiary, owns and operates the Walker Ridge Pipeline. The Walker Ridge Pipeline is a natural-gas offshore gathering and processing system that consists of 8-inch and 10-inch diameter pipelines that deliver

natural gas north from or through portions of the Walker Ridge and Green Canyon natural gas producing areas to an interconnect at Ship Shoal 332A, a block in the Ship Shoal natural gas producing area.

13. Spectra has an indirect ownership interest in the Discovery Pipeline. The Discovery Pipeline is a natural-gas offshore gathering, transmission, and processing system that consists of a mainline pipeline ranging from 12 inches to 30 inches in diameter. The Discovery Pipeline includes the Keathley Canyon Connector, a 20-inch pipeline that delivers natural gas north from or through portions of the Keathley Canyon, Walker Ridge, and Green Canyon natural gas producing areas to an interconnect with the Discovery Pipeline. The Discovery Pipeline connects directly to shore.

14. Spectra's indirect ownership interest in the Discovery Pipeline stems from its ownership interest in DCP Midstream, LLC ("DCP"). Spectra and the Phillips 66 Company each own 50 percent interests in DCP. DCP has an effective 36.1 percent limited partner interest in DCP Midstream Partners, LP ("DPM"). DCP also owns (i) DCP Midstream GP, LP ("DPM's General Partner"), the entity that is the general partner of DPM and holds a 2 percent general partner interest in DPM, as well as all of DPM's incentive distribution rights; and (ii) DCP Midstream GP, LLC ("DPM GP LLC"), the entity that is the general partner of DPM's General Partner.

15. DPM owns a 40 percent interest in Discovery Product Services LLC. Williams Partners L.P. ("Williams") owns the remaining 60 percent. Discovery Product Services LLC is the sole member of Discovery Gas Transmission LLC, which is the sole owner of the Discovery Pipeline. Williams is the operator of the Discovery Pipeline. Through its indirect ownership interest in DPM, Spectra has access to competitively sensitive information of the Discovery Pipeline and significant voting rights.

16. The Walker Ridge Pipeline and the Discovery Pipeline are the closest two pipelines to wells drilled in certain blocks in the Gulf Producing Areas, including blocks that lie between the pipelines. The length of pipeline needed is a major factor in determining the overall cost for a pipeline to connect to a well.

More distant pipelines likely face higher costs to connect to wells, resulting in higher natural gas pipeline transportation prices for natural gas producers. As such, the Walker Ridge Pipeline and the Discovery Pipeline are the two pipelines most likely to compete successfully for projects in certain blocks in the Gulf Producing Areas.

17. The Merger, if consummated, will result in Respondent Enbridge having ownership interests in the two closest and likely lowest-cost pipelines that provide or can provide natural gas pipeline transportation from blocks, or a subset of blocks, in the Gulf Producing Areas.

18. The Merger likely would reduce competition by allowing Respondent Enbridge and its affiliate that owns and operates the Walker Ridge Pipeline access to competitively sensitive information for the Discovery Pipeline. Respondent Enbridge may use this competitively sensitive information when competing with the Discovery Pipeline, increasing prices for natural gas producers. The exchange of information may also increase the likelihood of tacit or explicit coordination between the Walker Ridge Pipeline and the Discovery Pipeline.

19. The Merger likely would reduce competition by allowing Respondent Enbridge to exercise voting rights over the Discovery Pipeline's significant capital expenditures, including expansions needed to connect to wells. Respondent Enbridge will have the incentive and ability to reduce the competitiveness of the Discovery Pipeline by preventing DPM from participating in bids to connect to wells in competition with Enbridge's Walker Ridge Pipeline.

20. The Merger likely would reduce competition by facilitating coordination between the Walker Ridge Pipeline and the Discovery Pipeline.

## V. BARRIERS TO ENTRY

21. There are substantial barriers to entering any Gulf Producing Areas. Building pipeline underwater is an expensive and lengthy process, often taking several years from the initial proposal to the end of construction. Entry into the relevant

market would not be timely, likely, or sufficient in scope to deter or counteract the anticompetitive effects of the Merger.

## VI. EFFECTS OF THE MERGER

22. The effects of the Merger, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by:

a. increasing the likelihood that Respondent Enbridge would unilaterally exercise market power in the relevant market; and

b. increasing the likelihood of collusive or coordinated interaction between the remaining competitors in the relevant market.

## VII. VIOLATIONS CHARGED

23. The Merger, 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.

24. The Merger Agreement entered into by Respondents Enbridge and Spectra constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**IN WITNESS WHEREOF,** the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-second day of March, 2017, issues its complaint against Respondents.

By the Commission.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed transaction involving Respondent Enbridge Inc. ("Enbridge") and Respondent Spectra Energy Corp ("Spectra"), collectively "Respondents," and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Enbridge Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada with its principal executive offices located at 425 – 1st Street S.W., Suite 200, Fifth Avenue Place, Calgary, Alberta, Canada, and its

United States address for service of process and the Complaint and Decision and Order as follows: Corporate Secretary, Enbridge, 1100 Louisiana Street, Suite 3300, Houston, TX 77002.

2. Respondent Spectra Energy Corp is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 5400 Westheimer Court, Houston, TX 77056.

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. "Enbridge" means Enbridge Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Enbridge Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Merger, Enbridge shall include Spectra.

B. "Spectra" means Spectra Energy Corp, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Spectra Energy Corp, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; *provided, however,* that for purposes of this Order, Spectra does not include the Firewalled

Entities. After the Merger, Spectra shall be included within Enbridge.

C. "Respondents" means Enbridge and Spectra, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Board" means any board of directors or board of managers of a specified entity.

F. "Closing Date" means the date on which the proposed transaction between Respondent Spectra and Respondent Enbridge closes, as defined in the Merger Agreement.

G. "Confidential Business Information" means any information that is not in the public domain. The term "Confidential Business Information":

1. Includes, but is not limited to, all operating, financial or other documents, information, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: bid proposals and all related documents, data, and materials, including initial bid terms, final bid terms, documents that support cost and rate structures underlying the bids; term sheets, responses to requests for proposals or other solicitation for bids; customer files and records; customer contracts; customer lists; customer product specifications; customer purchasing histories; customer service and support materials; customer approvals and related information; price lists; credit records and information; correspondence; referral sources; vendor and

supplier agreements; vendor and supplier files and lists; advertising, promotional and marketing materials, including website content; sales materials; marketing methods; research and development data, files, and reports; technical information; data bases; studies; drawings, specifications and creative materials; production records and reports; service and warranty records; equipment logs; pipeline operation, management, and maintenance records; cost information; expansion and other plans and projects; proprietary design and engineering standards; construction cost estimates; operating guides and manuals; employee and personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind; and

2. Excludes the following:

   a. Information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Merger and relating to any United States, state, or foreign antitrust or competition law; or

   b. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:

      i. Was or becomes generally available to the public other than as a result of disclosure by Respondents;

      ii. Is necessary to be included in Respondents' mandatory regulatory filings; *provided, however,* that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

      iii. Was available, or becomes available, to Respondent Enbridge in the ordinary course

of its business (*e.g.,* information shared by a customer during commercial negotiations, information provided by an industry analyst, and other information of the kind that Enbridge used to compete with DPS and DGT before the Merger), but only if, to the knowledge of Respondent Enbridge, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;

iv. Is information the disclosure of which is consented to by Williams;

v. Is necessary to be exchanged in the course of consummating the Merger;

vi. Is disclosed in complying with this Order;

vii. Is information the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities;

viii. Is disclosed in obtaining legal advice; or

ix. Is shared in connection with collaborative activity that is of the kind that would have occurred in the absence of the Merger (*e.g.,* potential future pipeline interconnections).

H. "DCP" means DCP Midstream, LLC, a limited liability company, organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 370 17$^{th}$ Street, Denver, CO 80202; *provided, however,* that for purposes of the prohibitions and requirements of this Order, DCP does not include any Firewalled Individuals except as

expressly permitted by this Order. DCP is a joint venture between Respondent Spectra and Phillips 66. Among other things, DCP holds a minority limited partnership interest in DPM, which owns a minority interest in DPS.

I. "DGT" means Discovery Gas Transmission LLC, a limited liability company, organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2800 Post Oak Boulevard, Houston, TX 77056.

J. "Director" means an individual who is elected or appointed by, or who is an agent or representative of, a specified Person to serve on a Board of a specified entity.

K. "Discovery Confidential Business Information" means all Confidential Business Information relating to DPS, DGT and the Discovery Pipeline, including, but not limited to, their Natural Gas Pipeline Business.

L. "Discovery Pipeline" means the natural-gas offshore gathering, transmission, processing, and fractionation system owned by DPS and DGT and operated by Williams, including, but not limited to, the Keathley Canyon Connector.

M. "DPM" means DCP Midstream, LP (formerly known as DCP Midstream Partners, L.P.), a limited partnership organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 370 17th Street, Denver, CO 80202; *provided, however,* that for purposes of the prohibitions and requirements of this Order, DPM does not include any Firewalled Individuals except as expressly permitted by this Order. DPM includes: DCP Midstream GP, LP, which is DPM's general partner and which conducts, directs, and manages all activities of DPM; and DCP Midstream GP, LLC,

which is the general partner of DPM's general partner, and which conducts, directs, and manages all activities of DPM's general partner.

N. "DPS" means Discovery Producer Services LLC, a limited liability company, organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2800 Post Oak Boulevard, Houston, TX 77056. DPS is a natural gas gathering, processing, and marketing company, and the sole member of DGT. DPS is jointly owned by DPM and Williams, where DPM is the minority owner and Williams is the majority owner.

O. "Firewalled Entity(ies)" means DCP, DPM, and DPS, individually and collectively; *provided, however,* the Firewalled Entities do not include Williams, Phillips 66, or the Phillips 66 Board Members.

P. "Firewalled Individuals" means the following:

1. All Persons appointed by or who otherwise represent the Respondents as Directors on any Board of DCP;

2. All Persons appointed by or who otherwise represent the Respondents as Directors on any Board of DPM; and

3. Any Director, officer, executive, or senior manager of Respondents who possesses or had access to Discovery Confidential Business Information.

Q. "Government Entity(ies)" means any federal, state, local, or non-U.S. government entity, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

R. "Merger" means the proposed transaction involving Respondent Spectra and Respondent Enbridge as

contemplated by and described in the Merger Agreement.

S. "Merger Agreement" means the Agreement and Plan of Merger among Spectra, Enbridge, and Sand Merger Sub, Inc., dated September 5, 2016, and any amendments, exhibits, or schedules attached thereto.

T. "Monitor" means any Person appointed pursuant to Paragraph III of this Order.

U. "Monitor Agreement" means any Monitor Agreement entered into pursuant to Paragraph III of this Order, including the Monitor Agreement attached to this Order as Public Appendix A.

V. "Natural Gas Pipeline Business" means the business of providing natural gas gathering and transmission services and any related natural gas processing, treatment, fractionation, storage, and pipeline operating services.

W. "Ownership Interest" means any and all rights, title and interest, present or contingent, to own or hold any of the following: (1) any voting or non-voting stock, share capital, equity, membership interest, general or limited partnership interest, or any other interest(s) in a specified entity; or (2) any notes or options convertible into any voting or non-voting stock in a specified entity.

X. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents.

Y. "Phillips 66" means Phillips 66, a corporation organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 3010 Briarpark Drive, Houston, TX 77042.

Z. "Phillips 66 Board Members" means:

1. All Persons appointed by or who otherwise represent Phillips 66 as Directors on any Board of DCP; and

2. All Persons appointed by or who otherwise represent Phillips 66 as Directors on any Board of DPM.

AA. "Relevant Gulf Producing Areas" means the Green Canyon, Walker Ridge, and Keathley Canyon offshore natural gas producing areas in the Gulf of Mexico located off the coast of Louisiana.

BB. "Walker Ridge Pipeline" means that natural-gas offshore gathering and transmission system owned and operated by Respondent Enbridge that extends southward from Ship Shoal 332A into parts of the Ship Shoal, Ewing Banks, Green Canyon, and Walker Ridge protraction areas of the Gulf of Mexico.

CC. "Walker Ridge Pipeline Confidential Business Information" means all Confidential Business Information relating to the Walker Ridge Pipeline, including, but not limited to, its Natural Gas Pipeline Business.

DD. "Williams" means Williams Partners L.P., a limited partnership, organized, existing and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at One Williams Center, Tulsa, OK 74172. Williams includes, among other things, DGT and DPS.

EE. "Williams Confidential Business Information" means all Confidential Business Information that (1) Williams has shared or will share with DPM in connection with the operation of DPS and is not otherwise known to Respondents (*e.g.,* through other collaborations with Williams) and (2) relates to

Williams' Natural Gas Pipeline Business in the Relevant Gulf Producing Areas.

## II.

**IT IS FURTHER ORDERED** that:

A. Beginning on the Closing Date, Respondents and the Firewalled Individuals shall not, except as expressly permitted by or as necessary to comply with this Order:

1. Possess or control any Discovery Confidential Business Information or any Williams Confidential Business Information as of no later than twenty (20) days after the Closing Date;

2. Request, solicit, seek, receive, obtain, or otherwise have access to, directly or indirectly, any Discovery Confidential Business Information or any Williams Confidential Business Information from any Person(s), including, but not limited to, the Firewalled Entities;

3. Disclose, provide, share, convey, discuss, exchange, circulate, or otherwise grant access to, directly or indirectly, any Discovery Confidential Business Information or any Williams Confidential Business Information to or with any Person(s); or

4. Use, directly or indirectly, any Discovery Confidential Business Information or any Williams Confidential Business Information for any purpose, including, but not limited to:

   a. Assisting or informing Respondents' employees who are involved in any way with Respondent Enbridge's Natural Gas Pipeline Business related to the Walker Ridge Pipeline;

   b. Interfering with any suppliers, distributors, resellers, or customers of Williams;

c. Interfering with any contracts affiliated with the Discovery Pipeline; or

d. Interfering in any way with Williams' Natural Gas Pipeline Business;

*provided, however,* that this provision is not intended to inhibit the opportunity of employees of Williams from seeking employment with Respondents.

B. Beginning on the Closing Date, Respondents and the Firewalled Individuals shall not provide, disclose, or otherwise make available, directly or indirectly, any Walker Ridge Pipeline Confidential Business Information to: (1) Phillips 66; (2) DCP; (3) DPM; (4) Williams; (5) DPS; (6) DGT; or (7) any Phillips 66 Board Members.

C. Beginning on the Closing Date, Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure or use of, Discovery Confidential Business Information or Williams Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure that:

1. The Firewalled Entities do not provide, disclose, or otherwise make available any Discovery Confidential Business Information or Williams Confidential Business Information to the Respondents or the Firewalled Individuals, and are in compliance with the requirements of this Order;

2. The Firewalled Individuals are:

   a. In compliance with the requirements of this Order;

b. Prohibited from, directly or indirectly, influencing or attempting to influence or participate in any vote of the DCP Board or the DPM Board pertaining to the Discovery Pipeline; and

c. Prohibited from participating in any discussions or communications with DCP, DPM, Williams, DPS, DGT, Phillips 66 or the Phillips 66 Board Members relating to the Discovery Pipeline or the Walker Ridge Pipeline;

3. Respondents' employees:

a. Who have access to Discovery Confidential Business Information or Williams Confidential Business Information, including, but not limited to, the Firewalled Individuals, are prohibited from providing, disclosing, using, or otherwise making available such Discovery Confidential Business Information or Williams Confidential Business Information in violation of the provisions of this Order; and

b. Associated with the Walker Ridge Pipeline or Respondent Enbridge's Natural Gas Pipeline Business are prohibited from soliciting, obtaining, accessing, disclosing, or using any Discovery Confidential Business Information or Williams Confidential Business Information in violation of the provisions of this Order;

*provided, however,* that: (i) with respect to any action by the Board of DPM or the Board of DCP pertaining to the Discovery Pipeline that requires the vote of one or more of the Firewalled Individuals, then such Firewalled Individual(s) shall cast their votes in an amount and manner proportional to all of the votes cast by the Phillips 66 Board Members (*e.g.,* in the same way as the majority of the Phillips 66 Board Members have cast their votes); and (ii) the Firewalled

Individuals are permitted to receive information about, advocate on behalf of, and participate in voting and cast their vote in connection with: (a) actions relating to an expansion of services by DGT, DPS, or the Discovery Pipeline, completely outside the Natural Gas Pipeline Business in the Gulf of Mexico; and (b) any change in DPM's Ownership Interest in DPS or any material change in the ownership of its underlying assets.

D. As part of the procedures and requirements described in Paragraph II.C. of this Order, Respondents shall:

1. Within ten (10) days after the Closing Date, require all Respondents' employees who have access to Discovery Confidential Business Information or Williams Confidential Business Information, including the Firewalled Individuals, to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order; *provided, however,* for Respondents' employees with access to Discovery Confidential Business Information or Williams Confidential Business Information who have information technology or clerical positions but no operational or commercial responsibilities, Respondents may send an appropriate notification regarding the prohibitions and confidentiality requirements of this Order by e-mail with return receipt requested or other similar transmission, and shall keep a file of such return receipts for one (1) year; and

2. Within ten (10) days after the Closing Date, send a copy of the Order, the Complaint, and the Analysis to Aid Public Comment, by first class mail, return receipt requested, or by hand delivery (with signed confirmation) to:

   a. Phillips 66 Board Members; and

   b. Williams;

3. Require and enforce compliance with appropriate remedial action in the event of non-compliant access, use, or disclosure of Discovery Confidential Business Information or Williams Confidential Business Information in violation of this Order;

4. Distribute information and provide training regarding the procedures to all relevant employees referenced in Paragraph II.D.1 of this Order, at least annually; and

5. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's prohibitions and requirements.

E. No later than thirty (30) days after the Closing Date, Respondents shall submit to the Commission a copy of written procedures and guidelines that will be instituted by Respondents pursuant to Paragraph II.C. of this Order.

F. The purpose of Paragraph II of this Order is to ensure that the Discovery Pipeline and the Walker Ridge Pipeline continue to be operated independently of, and in competition with, each other, and to remedy the lessening of competition as alleged in the Commission's Complaint.

## 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 ("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 Commission hereby appoints Robert E. Ogle ("Mr. Ogle") as the Monitor and approves the Monitor Agreement between Mr.

Ogle and Respondents, attached to this Order as Public Appendix A.

B. Not later than ten (10) days after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to this Order, confer on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order in a manner consistent with the purposes of the Order.

C. The Monitor shall serve for a period of five (5) years after the Closing Date; *provided, however,* the Commission may extend or modify this period, and direct that the Monitor be reinstated, as may be necessary to accomplish the purposes of this Order.

D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' 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 purposes of the Order and in consultation with the Commission or Commission staff, including, but not limited to:

   a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order; and

   b. Assuring that Discovery Confidential Business Information or Williams Confidential Business Information is not obtained, disclosed, or used by Respondents, except as permitted by this Order.

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 Respondents' compliance with the provisions of this Order.

4. Subject to any demonstrated legally recognized privilege, the 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 Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the 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 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. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other 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. For purposes of this Paragraph III, the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph III.D.5 of this Order.

7. Respondents 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 by the Respondents with respect to the performance of Respondents' obligations under this Order.

8. Within thirty (30) days from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents' of their obligations under this Order.

9. Respondents may require the Monitor and each of the Monitor's consultants, 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 related 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.

G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

## IV.

**IT IS FURTHER ORDERED** that, for the term of this Order, Respondents shall not acquire, directly or indirectly, through subsidiaries or otherwise, any Ownership Interest, in whole or in part, in any Person engaged in a Natural Gas Pipeline Business in the Relevant Gulf Producing Areas, without providing advance written notice to the Commission including, but not limited to, any increase in DPM's Ownership Interest in the Discovery Pipeline.

The prior notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the "Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification; Notification shall be filed with the Secretary of the

Commission; Notification need not be made to the Department of Justice; and Notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereafter 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. §802.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested by Respondents and, where appropriate, granted by a letter from the Commission's 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.

## V.

**IT IS FURTHER ORDERED** that:

A. Within five (5) days after the Closing Date, Respondents shall submit to the Commission a letter certifying the date on which the Merger occurred, and specifying Respondents' Ownership Interests in each of the Firewalled Entities as of the Closing Date.

B. Respondents shall submit to the Commission and, if appointed, the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

1. Within thirty (30) days after the date this Order becomes final; and

2. Every thirty (30) days thereafter until Respondents have fully complied with the requirements of Paragraphs II.C. and II.D.1 & 2 of this Order;

3. One (1) year from the date this Order is issued and annually thereafter until this Order terminates; and

4. At such other times as the Commission may request.

## VI.

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

A. Any proposed dissolution of Respondents;

B. Any proposed acquisition, merger, or consolidation of Respondents; or

C. Any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

## VII.

**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 Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

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

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

**VIII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on March 22, 2037.

By the Commission.

## PUBLIC APPENDIX A

## MONITOR AGREEMENT

## 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 Orders ("Consent Agreement") with Enbridge Inc. ("Enbridge") and Spectra Energy Corp ("Spectra"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from Enbridge's proposed merger with Spectra (the "Merger").

The Merger, if consummated, will result in Respondent Enbridge having ownership interests in the two closest and likely

lowest-cost pipelines that provide or can provide natural gas pipeline transportation from many Deepwater Outer Continental Shelf oil and gas leasing and exploration blocks ("blocks") in certain natural gas producing areas in the Gulf of Mexico. Enbridge, through a wholly owned subsidiary, owns and operates the Walker Ridge Pipeline. Spectra has an indirect, minority ownership interest in the Discovery Pipeline. The Complaint alleges that, resulting from the Merger, Enbridge will have access to competitively sensitive information of its competitor, the Discovery Pipeline, and gain voting rights over the Discovery Pipeline's significant capital expenditures, including expansions needed to connect to new wells. Without adequate safeguards, Enbridge could misuse that information and its voting rights, leading to anticompetitive conduct that would make the Discovery Pipeline a less effective competitor or would facilitate coordination in the industry. To remedy these concerns, under the terms of the Proposed Decision and Order ("Order") contained in the Consent Agreement, Enbridge is required to erect firewalls to limit its access to non-public information relating to the Discovery Pipeline. In addition, all board members appointed by Enbridge or Spectra to the boards of directors overseeing the Discovery Pipeline must recuse themselves from any vote pertaining to the Discovery Pipeline, with limited exceptions.

The Commission has placed the Consent Agreement 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make the Order final.

## II. The Parties

### A. Enbridge

Enbridge is an energy delivery company that operates primarily in the United States and Canada. Its primary business is in pipeline transportation of crude oil; however, it also has significant natural gas gathering, processing, transportation, and storage assets. Enbridge owns several interconnected natural gas

pipelines that export natural gas from the Gulf of Mexico to processing plants in Louisiana.

### B. Spectra

Spectra is one of the largest North American pipeline and midstream companies. Spectra predominately focuses on natural gas, providing natural gas gathering, storage, and transportation in the southeastern and northeastern United States and in southeastern Canada. Through a joint venture with Phillips 66 ("Phillips"), Spectra owns an indirect minority interest in the Discovery Pipeline, a natural gas pipeline that transports natural gas from Deepwater areas in the Gulf of Mexico to processing plants in Louisiana.

## III. The Proposed Merger

Respondent Enbridge and affiliated companies under its control entered into a merger agreement with Spectra, dated September 5, 2016, pursuant to which Sand Merger Sub, Inc., a newly created direct wholly owned subsidiary of Enbridge, will merge with and into Spectra, with Spectra surviving the Merger. The combined entity will be the largest energy infrastructure company in North America, with a geographically diverse asset portfolio used in the gathering, processing, storage, and transportation of natural gas and the pipeline transportation of crude oil.

The Commission's Complaint alleges that the Merger, 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 substantially lessening competition for the transportation of natural gas from wells in certain natural gas producing areas in the Gulf of Mexico, to processing plants or interconnects with other natural gas pipelines.

## IV. The Relevant Markets

The Commission's Complaint alleges that the relevant product market within which to analyze the Merger is natural gas pipeline transportation. Natural gas producers contract with natural gas

pipelines to connect to and transport natural gas from wells to processing plants or interconnects with other natural gas pipelines. Even if pipeline transportation rates increased slightly, shippers would continue to use pipelines as no economic or practical alternative to natural gas pipeline transportation exists.

The Commission's Complaint alleges that the relevant geographic markets within which to analyze the Merger are no broader than the Green Canyon, Walker Ridge, and Keathley Canyon offshore natural gas producing areas in the Gulf of Mexico off the coast of Louisiana (collectively and individually referred to as "Gulf Producing Areas"). Other transportation methods for natural gas in the Gulf Producing Area are significantly more costly, less reliable, and potentially more hazardous than the parties' pipelines.

## V. Market Structure

The Commission's Complaint alleges that Enbridge and Spectra own interests in the two pipelines closest to wells drilled in certain blocks in the Gulf Producing Areas, including blocks that lie between the pipelines. Enbridge, through a wholly owned subsidiary, owns and operates the Walker Ridge Pipeline. Spectra holds an indirect minority ownership interest in the Discovery Pipeline, via its 50-50 joint venture with Phillips (DCP Midstream, LLC ("DCP"), which in turn has an effective 36.1 percent limited partner interest in DCP Midstream Partners, LP ("DPM")). DPM owns a 40 percent interest in the Discovery Pipeline; Williams Partners L.P. owns the majority interest (60 percent) in the Discovery Pipeline and is its operator.

The Commission's Complaint alleges that the length of pipeline needed to connect an existing pipeline to a well is a major factor in determining the overall cost for the pipeline to connect to the well. Thus, more distant pipelines likely face higher costs to connect to wells, resulting in higher natural gas pipeline transportation prices for natural gas producers. Where the Walker Ridge Pipeline and the Discovery Pipeline are a producer's nearest options – as they are for many blocks in the Gulf Producing Areas – they each likely could expand to connect to the producer's well for the lowest costs. As such, the Walker Ridge Pipeline and the Discovery Pipeline are the two pipelines

most likely to compete successfully for projects in certain blocks in the Gulf Producing Areas.

## VI. Effects of the Merger

While Spectra does not outright own the Discovery Pipeline or hold a majority interest in it (or operate it), through its indirect, minority ownership interest in DPM, Spectra has access to competitively sensitive information of the Discovery Pipeline and significant voting rights. This relationship creates two primary competitive concerns after the Merger. First, Enbridge-appointed directors will vote on the Discovery Pipeline's significant capital expenditures, which likely will include future expansions needed to connect to wells. Enbridge will have the incentive and ability to reduce the competitiveness of Discovery Pipeline bids for projects for which the parties' pipeline are the closest and lowest-cost options.

Second, Enbridge will have access to the Discovery Pipeline's competitively sensitive information. When its Walker Ridge Pipeline competes with the Discovery Pipeline, Enbridge may use this competitively sensitive information to raise transportation costs for natural gas producers. The exchange of information also may increase the likelihood of tacit or explicit coordination between the Walker Ridge Pipeline and the Discovery Pipeline.

## VII. Entry Conditions

Entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Merger. Barriers to entry are significant. Building pipeline underwater is an expensive and lengthy process, often taking several years from the initial proposal to the end of construction.

## VIII. The Agreement Containing Consent Order

The proposed Order resolves the anticompetitive concerns described above by requiring that (1) Enbridge erect firewalls to limit its access to non-public information relating to the Discovery Pipeline, and (2) all representatives appointed by Enbridge or Spectra to the DCP or DPM boards of directors recuse themselves

from any vote pertaining to the Discovery Pipeline, with two limited exceptions. First, Enbridge's representatives may vote on initiatives to expand the Discovery Pipeline beyond natural gas pipeline services in the Gulf of Mexico. This provision ensures that Enbridge does not have to participate in business ventures unrelated to the Discovery Pipeline's current business. Second, Enbridge's representatives may participate in votes to change DPM's ownership interest in the Discovery Pipeline. The use of firewalls and recusal provisions is appropriate because the competitive concerns arise from a discrete overlap that constitutes a relatively small portion of DCP's and DPM's overall physical footprints and business portfolios.

The proposed Order allows the Commission to appoint a monitor. The Commission has appointed Robert Ogle, who currently is associated with Claro Group LLC. Mr. Ogle will help ensure the effectiveness of the firewall provisions and ongoing compliance with the Order. The Commission routinely appoints monitors for orders involving firewall provisions. Mr. Ogle will serve for a 5-year term, but the Commission may extend or modify the term as appropriate. The Order will have a term of 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

**IN THE MATTER OF**

# VIR2US, INC.

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

*Docket No. C-4609; File No. 162 3248*
*Complaint, March 29, 2017 – Decision, March 29, 2017*

This consent order addresses Vir2us, Inc.'s alleged false representations made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The complaint alleges that Vir2us falsely represented that it was a participant in the APEC CBPR system when, in fact, it never sought or obtained certification. The consent order prohibits Vir2us from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR system.

## *Participants*

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Mary Hildebrand, Lowenstein Sandler.*

## COMPLAINT

The Federal Trade Commission ("Commission" or "FTC"), having reason to believe that Vir2us, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Vir2us, Inc. is a California corporation with its principal office or place of business at 755 Baywood Drive, Petaluma, CA 94954.

2. Respondent provides cybersecurity software, including Xeropass – an identity authenticator solution – and distributes or promotes its Xeropass solution at www.xeropass.com, www.vr2sinternational.com, and on the Mozilla browser add-on page https://addons.mozilla.org/en-US/firefox/addon/xeropass/?src=cb-dl-updated.

3. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on a website for its software add-on, https://addons.mozilla.org/en-US/firefox/addon/xeropass/?src=cb-dl-updated, privacy policies and statements about its practices, including statements related to its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system.

5. In fact, Respondent has not been certified to participate in the APEC CBPR system.

## APEC & the Cross-Border Privacy Rules

6. The APEC CBPR system is a self-regulatory initiative designed to facilitate the protection of consumer data transferred across the APEC region. The CBPR system requires participants to abide by the APEC Privacy Framework's nine information privacy principles: preventing harm, notice, collection limitation, use, choice, integrity, security safeguards, access and correction, and accountability. In the United States, the FTC enforces the CBPR system.

7. Companies that seek to participate in the CBPR system must undergo a review by an APEC-recognized accountability agent to establish compliance with the CBPR program requirements. Companies undergo annual reviews to retain their status as certified CBPR participants. The names of certified companies are posted on a website, www.cbprs.org.

## VIOLATIONS OF SECTION 5 OF THE FTC ACT

8. Respondent has disseminated or caused to be disseminated privacy policies and statements on https://addons.mozilla.org/en-US/firefox/addon/xeropass/?src=cb-dl-updated, including, but not limited to, the following statements:

> All the information you provide may be transferred or accessed by entities around the world as described in this Privacy Policy. . .

> XeroPass abides by the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules System. The APEC CBPR system provides a framework for organizations to ensure protection of personal information transferred among participating APEC economies . . . If you have any questions or concerns about XeroPass' Privacy Policy or data processing or if you would like to make a complaint about a possible breach of local privacy laws, please contact us at XeroPassSupport@vir2us.com . . . XeroPass, A division of Vir2us, Inc. 755 Baywood Drive, Petaluma, CA 94954 USA

9. Through the means described in Paragraph 8, Respondent represented, directly or indirectly, expressly or by implication, that it is certified to participate in the APEC CBPR system.

10. In fact, Respondent is not and never has been certified to participate in the APEC CBPR system. Therefore, the representation set forth in Paragraph 9 is false or misleading.

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

**THEREFORE**, the Federal Trade Commission, this twenty-ninth day of March, 2017, has issued this complaint against Respondent.

By the Commission.

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments, pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent Vir2us, Inc. is a California corporation with its principal office or place of business at 755 Baywood Drive, Petaluma, CA 94954.

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

## ORDER

### Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Vir2us, Inc., a corporation and its successors and assigns.

B. "APEC CBPR" means the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system.

### Provisions

#### I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

**IT IS ORDERED** that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including APEC CBPR.

#### II. Acknowledgments of the Order

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC

managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reporting. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

## III. Compliance Report and Notices

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls

directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Vir2us, Inc.*, FTC File No. 1623248.

## IV. Recordkeeping

**IT IS FURTHER ORDERED** that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and all materials that were relied upon in making the representation.

## V. Compliance Monitoring

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory

process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VI. Order Effective Dates

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on March 29, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will terminate according to this Provision 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, a consent agreement applicable to Vir2us, Inc. ("Vir2us").

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 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false representations that Vir2us made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The APEC CBPR system is a voluntary, enforceable mechanism that certifies a company's compliance with the principles in the CBPR and facilitates privacy-respecting transfers of data amongst APEC member economies. The APEC CBPR system is based on nine data privacy principles: preventing harm, notice, collection limitation, use choice, integrity, security safeguards, access and correction, and accountability. Companies that seek to participate in the APEC CBPR system must undergo a review by an APEC-recognized Accountability Agent, which certifies companies that meet the standards.

Companies under the FTC's jurisdiction are eligible to apply for APEC CBPR certification. The names of certified companies are posted on a public-facing website, www.cbprs.org. Companies must re-apply annually in order to retain their status as current participants in the APEC CBPR system. A company that falsely claims APEC CBPR participation may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

Vir2us markets cybersecurity software solutions. According to the Commission's complaint, Vir2us has set forth in its privacy policy, at https://addons.mozilla.org/en-US/firefox/addon/xeropass/?src=cb-dl-updated, privacy policies and statements about its

practices, including statements related to its participation in the APEC CBPR system.

The Commission's complaint alleges that Vir2us falsely represented that it was a participant in the APEC CBPR system when, in fact, it never sought or obtained certification.

Part I of the proposed order prohibits Vir2us from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR system.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires acknowledgment of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that Vir2us submit an initial compliance report to the FTC. Part IV requires Vir2us to retain documents relating to its compliance with the order. Part V mandates that Vir2us make available to the FTC information or subsequent compliance reports, as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

**IN THE MATTER OF**

# SENTINEL LABS, INC.
## D/B/A
# SENTINELONE AND SENTINELONE.COM

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

*Docket No. C-4608; File No. 162 3250*
*Complaint, March 29, 2017 – Decision, March 29, 2017*

This consent order addresses Sentinel Labs, Inc.'s alleged false representations that SentinelOne made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The complaint alleges that SentinelOne falsely represented that it was a participant in the APEC CBPR system and a TRUSTe privacy program when, in fact, it never sought or obtained either certification. The consent order prohibits SentinelOne from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR and the TRUSTe privacy programs.

*Participants*

For the *Commission*: *Monique F. Einhorn.*

For the *Respondents*: *Janis Kestenbaum, Perkins Coie.*

## COMPLAINT

The Federal Trade Commission ("Commission" or "FTC"), having reason to believe that Sentinel Labs, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sentinel Labs, Inc. is a Delaware corporation also doing business as SentinelOne and SentinelOne.com with a principal office or place of business at 2513 E. Charleston Road, Suite 100, Mountain View, CA 94043.

2. Respondent provides endpoint protection software to enterprise customers.

3. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, https://sentinelone.com/privacy-policy/, privacy policies and statements about its practices, including (1) statements related to its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system, and (2) statements related to its TRUSTe privacy certification.

## APEC & the Cross-Border Privacy Rules

5. The APEC CBPR system is a self-regulatory initiative designed to facilitate the protection of consumer data transferred across the APEC region. The CBPR system requires participants to abide by the APEC Privacy Framework's nine information privacy principles: preventing harm, notice, collection limitation, use, choice, integrity, security safeguards, access and correction, and accountability. In the United States, the FTC enforces the CBPR system.

6. Companies that seek to participate in the CBPR system must undergo a review by an APEC-recognized accountability agent to establish compliance with the CBPR program requirements. Companies undergo annual reviews to retain their status as certified CBPR participants. The names of certified companies are posted on a website, www.cbprs.org.

## TRUSTe Privacy Certification

7. True Ultimate Standards Everywhere, Inc. ("TRUSTe") provides privacy certifications and seals to businesses. A business that meets TRUSTe's designated program requirements for a particular certification program receives a corresponding seal for display on the business's website. Program requirements include specifications related to the transparency of company practices, verification of privacy practices, and consumer choice regarding the collection and use of consumer personal information.

## Violations of Section 5 of the FTC Act

8. Respondent has disseminated or caused to be disseminated privacy policies and statements on https://sentinelone.com/privacy-policy/, including, but not limited to, the following statements:

> Sentinel One has received TRUSTe's Privacy Seal which means that this Privacy Policy and our practices have been reviewed by TRUSTe for compliance with its requirements regarding transparency, accountability and choice regarding the collection and use of your personal information. The TRUSTe certification only covers information collected on our site www.Sentinel One.com and Sentinel One mobile application. The TRUSTe certification does not cover any information collected through any other application or medium. In addition, Sentinel Ones [sic] privacy practices, as described in this policy, comply with the APEC Cross Border Privacy Rules System. To learn more, please visit http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/ECSG/CBPR/CBPR-PoliciesRulesGuidelines.ashx. . . . Any questions about this Privacy Policy should be addressed to support@Sentinel One.com [sic] or to 4440 El Camino Real, Los Altos, CA 94022.

## Count 1

9. Through the means described in Paragraph 8, Respondent represented, directly or indirectly, expressly or by implication, that it is certified to participate in the APEC CBPR system.

10. In fact, Respondent is not and never has been certified to participate in the APEC CBPR system. Therefore, the representation set forth in Paragraph 9 is false or misleading.

## Count 2

11. Through the means described in Paragraph 8, Respondent represented, directly or indirectly, expressly or by implication, that a third party, TRUSTe, reviewed its privacy policy and privacy practices and verified that Respondent complies with its requirements relating to the privacy of personal information.

12. In fact, the third party did not review Respondent's privacy policy and privacy practices, and did not verify that Respondent complies with its requirements relating to the privacy of personal information. Therefore, the representation set forth in Paragraph 11 is false or misleading.

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

**THEREFORE**, the Federal Trade Commission, this twenty-ninth day of March, 2017, has issued this complaint against Respondent.

By the Commission.

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments, pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent Sentinel Labs, Inc. is a Delaware corporation also doing business as SentinelOne and SentinelOne.com with a principal office or place of business at 2513 E. Charleston Road, Suite 100, Mountain View, CA 94043.

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

## ORDER

## Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means Sentinel Labs, Inc., a corporation also dba as SentinelOne and SentinelOne.com, and its successors and assigns.

B. "APEC CBPR" means the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system.

## Provisions

### I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

**IT IS ORDERED** that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to APEC CBPR and the TRUSTe privacy programs.

### II. Acknowledgments of the Order

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reporting. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others,

delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

## III. Compliance Report and Notices

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. Ninety (90) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Sentinel Labs, Inc.*, FTC File No. 1623250.

## IV. Recordkeeping

**IT IS FURTHER ORDERED** that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and the materials that were relied upon in making the representation.

## V. Compliance Monitoring

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VI. Order Effective Dates

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on March 29, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will terminate according to this Provision 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, a consent agreement applicable to Sentinel Labs, Inc. dba SentinelOne and SentinelOne.com ("SentinelOne").

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 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false representations that SentinelOne made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The APEC CBPR system is a voluntary, enforceable mechanism that certifies a company's compliance with the principles in the CBPR and facilitates privacy-respecting transfers of data amongst APEC member economies. The APEC CBPR system is based on nine data privacy principles: preventing harm, notice, collection limitation, use choice, integrity, security safeguards, access and correction, and accountability. Companies that seek to participate in the APEC CBPR system must undergo a review by an APEC-recognized Accountability Agent, which certifies companies that meet the standards.

Companies under the FTC's jurisdiction are eligible to apply for APEC CBPR certification. The names of certified companies are posted on a public-facing website, www.cbprs.org. Companies must re-apply annually in order to retain their status as current participants in the APEC CBPR system. A company that falsely claims APEC CBPR participation may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

SentinelOne provides endpoint protection software to enterprise customers. According to the Commission's complaint,

SentinelOne has set forth on its website, https://www.sentinelone.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the APEC CBPR system.

The Commission's complaint alleges that SentinelOne falsely represented that it was a participant in the APEC CBPR system and a TRUSTe privacy program when, in fact, it never sought or obtained either certification.

Part I of the proposed order prohibits SentinelOne from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR and the TRUSTe privacy programs.

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

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

Complaint

**IN THE MATTER OF**

# TURN INC.

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

*Docket No. C-4612; File No. 152 3099*
*Complaint, April 6, 2017 – Decision, April 6, 2017*

This consent order addresses Turn Inc.'s digital advertising that enables commercial brands and ad agencies to engage in targeted advertising, which is the practice of tracking a consumer's activities or characteristics to deliver ads tailored to the consumer's interests. The complaint alleges that Turn violated Section 5(a) of the FTC Act by falsely representing to consumers the extent to which consumers could restrict the company's tracking of their online activities and the extent to which Turn's opt-out applied to mobile app advertising. The consent order prohibits Turn from misrepresenting (1) the extent to which it collects, uses, discloses, retains, or shares Covered Information; and (2) the extent to which users may limit, control, or prevent Turn's collection, use, disclosure, retention, or sharing of covered information.

*Participants*

For the *Commission*: *Justin Brookman* and *Jamie Hine.*

For the *Respondent*: *Edward Holman, Maggie Lassack, Lydia Parnes*, and *Michael Rubin, Wilson Sonsini Goodrich and Rosati.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Turn Inc., a corporation, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Turn Inc. ("Turn" or "Respondent") is a privately owned Delaware corporation with its principal office or place of business at 901 Marshall Street, Ste. 200, Redwood City, CA 94063.

2. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is described in Section 4 of the FTC Act.

## RESPONDENT'S BUSINESS PRACTICES

3. Respondent is a digital advertising company that enables commercial brands and ad agencies to engage in targeted advertising, the practice of using data about a user's interests in order to deliver online advertising targeted to the user's interests.

4. Respondent advertises itself to be the "largest independent company in the advertising technology sector," and states that half of the global online advertising inventory flows through Respondent's platform. In addition, Respondent claims to reach "over 1.3 billion unique users per month via mobile," and has "rich profile data on more than 99 percent of North American consumers."

5. To track consumers across the Web for advertising and other purposes, Respondent uses "cookies" and "web beacons." "Cookies" are unique, persistent text files stored in a consumer's browser that allow a company to recognize that unique consumer when the consumer's browser makes a connection to the company's servers. Those connections are sometimes enabled by "web beacons," which are invisible embedded codes in web pages that instruct the browser to connect to third party services such as Respondent's. Consumers can delete or otherwise control cookies through settings in their web browsers.

6. To track consumers across mobile apps for advertising and other purposes, Respondent uses device advertising identifiers such as Apple iOS's Identifier for Advertisers ("IDFA") and Google's advertising ID. Device advertising identifiers are useful for targeted advertising companies such as Respondent because many mobile applications cannot set or access browser cookies.

7. Although these device advertising identifiers cannot always be deleted or turned off, consumers concerned about tracking can disassociate themselves from their previous tracking history by resetting the advertising identifier at any time in either Apple's iOS or Google's Android settings. In order to ensure that

resetting the advertising identifier effectively honors the consumer's preference, both Apple and Google contractually prohibit application developers from correlating, or syncing, the device advertising identifier with other identifiers, and from allowing third parties obtaining the advertising identifier via the application to do so. Microsoft Windows allows consumers to prevent advertising companies from collecting device advertising identifiers entirely.

8. Beginning in 2013, Respondent began to participate in a Verizon Wireless program that enabled Respondent and its clients to access certain demographic information provided by Verizon Wireless about Verizon Wireless users. To create a shared identifier allowing Verizon Wireless and companies participating in the program to uniquely identify each Verizon Wireless user, Verizon Wireless appended unique identifiers known as tracking headers ("X-UIDH headers") to its users' mobile Internet traffic. Verizon Wireless injected these X-UIDH headers into all unencrypted web requests for more than 100 million consumers on the Verizon Wireless data network. During the relevant time period, Verizon Wireless users had no means to prevent the transmission of the X-UIDH header.

9. Between February 2013 and January 2015, Respondent synced the X-UIDH header with other identifiers, including cookies and device advertising identifiers. This practice enabled Respondent to "keep state" on Verizon Wireless consumers – maintaining the linkage between the consumer's browser or device and an identifier associated with behavioral, demographic, or tracking data – even after a consumer had deleted cookies, reset the device advertising identifier, or both. That is, even if a consumer deleted cookies or reset the device advertising identifier, Respondent would be able to recognize the user by cross-referencing the unique X-UIDH header associated with the device.

10. Respondent's synchronization with the X-UIDH header also allowed it to recreate unique cookies even after a user had deleted them. In bidding on and delivering online advertising, Respondent was able to constantly synchronize its cookies on a user's device with the X-UIDH header. If a Verizon Wireless user later deleted her cookies, Respondent would attempt to set a

new cookie containing the same unique identifier as the cookie the user had deleted.

11. Until at least April 2015, Respondent's website included a link to a privacy policy. Respondent's privacy policy applied both to ads displayed on browsers and within mobile applications. For example, it described its business as providing "relevant, tailored, and privacy-respecting advertisements to consumers viewing a publisher's properties (*e.g.*, websites, apps, content, etc.)…." (**Exhibit A**, Turn Privacy Guidelines).

12. Until at least April 2015, Respondent's privacy policy referenced only two tracking technologies: cookies and web beacons. The privacy policy also stated, expressly or by implication, that consumers could prevent Respondent's tracking by blocking or otherwise limiting cookies:

> **Cookies and web beacons**
>
> Turn uses cookies in connection with our technology. Cookies help Turn better understand the effectiveness of a Turn Ad (for example, by tracking the way in which you may respond to, select and interact with a Turn Ad or any content provided therein, or the site placement and context in which you view a Turn Ad). Turn's cookies also help control the number of times you view a Turn ad. Most internet browsers automatically accept cookies. You can instruct your browser, by editing in options, to stop accepting cookies or prompt you before accepting a cookie from the websites you visit. If you do not accept cookies, however, you may not be able to enjoy the full functionality of many of the websites you visit.
>
> Turn also uses web beacons, in combination with cookies, to analyze usage patterns. The use of a web beacon allows Turn to record that a particular browser has visited a particular webpage, along with additional Non-PII that the website may choose to include with the beacon.

> **Opt out from Tailored but Anonymous Advertising (Turn's choice mechanism)** If you'd like to opt out of tailored advertising from Turn, please click here to be taken to our opt out page.

(**Exhibit A**, Turn Privacy Guidelines).

13. Despite the representation that consumers could opt out of tracking by instructing their browser to "stop accepting cookies," Respondent continued to track consumers by using the Verizon X-UIDH header.

14. Respondent's opt-out page, linked to its privacy policy, provided instructions on how to opt out of Turn's tailored advertising. That page provided:

> **Opting out may hurt the sites and apps you love!**
>
> Also, if you opt out, you may be making it harder for your favorite websites or apps to survive. This is because advertisers pay more money to deliver a tailored ad, and your favorite website/app makes more money when they show a tailored ad on their properties. Studies have shown that a significant portion of a publisher's revenue can come from tailored advertising, and this is particularly true for smaller websites. See 2014 DAA Study and 2010 NAI Study.
>
> SO — if you still want to get ads, but prefer irrelevant ads over tailored ads based on anonymous information and you don't value the free content you enjoy, Turn will place an opt-out cookie on your browser. The opt-out cookie tells our servers not to deliver tailored, anonymous ads to you that deliver high value to the sites and apps you love. If you delete, block, or restrict cookies, or if you use a different computer or Internet browser, you may need to renew your opt-out choice.

(**Exhibit A**, Turn Privacy Guidelines).

15. Through this statement, Respondent conveyed to consumers and to clients evaluating its services that its opt-out mechanism would be effective in blocking tailored, anonymous ads on websites and apps. However, the opt-out cookie applied only to mobile browsers, and was not effective in blocking tailored, anonymous ads on mobile applications.

## VIOLATIONS OF SECTION 5 OF THE FTC ACT

### Count 1: Misrepresentations about Deleting Cookies

16. As described in paragraph 12, Respondent represented, directly or indirectly, expressly or by implication, that blocking or limiting cookies would restrict Respondent's ability to track consumers.

17. In fact, in many instances, blocking or limiting cookies did not restrict Respondent's ability to track consumers. Respondent continued to track Verizon Wireless customers who had deleted or blocked cookies through the X-UIDH header. Therefore, the representation set forth in paragraph 16 is false or misleading.

### Count 2: Misrepresentations About Effectiveness of Opt-Out Mechanism

18. As described in paragraphs 11-14, Respondent represented, directly or indirectly, expressly or by implication, that consumers could opt out of tailored advertising on mobile applications through Respondent's opt-out page.

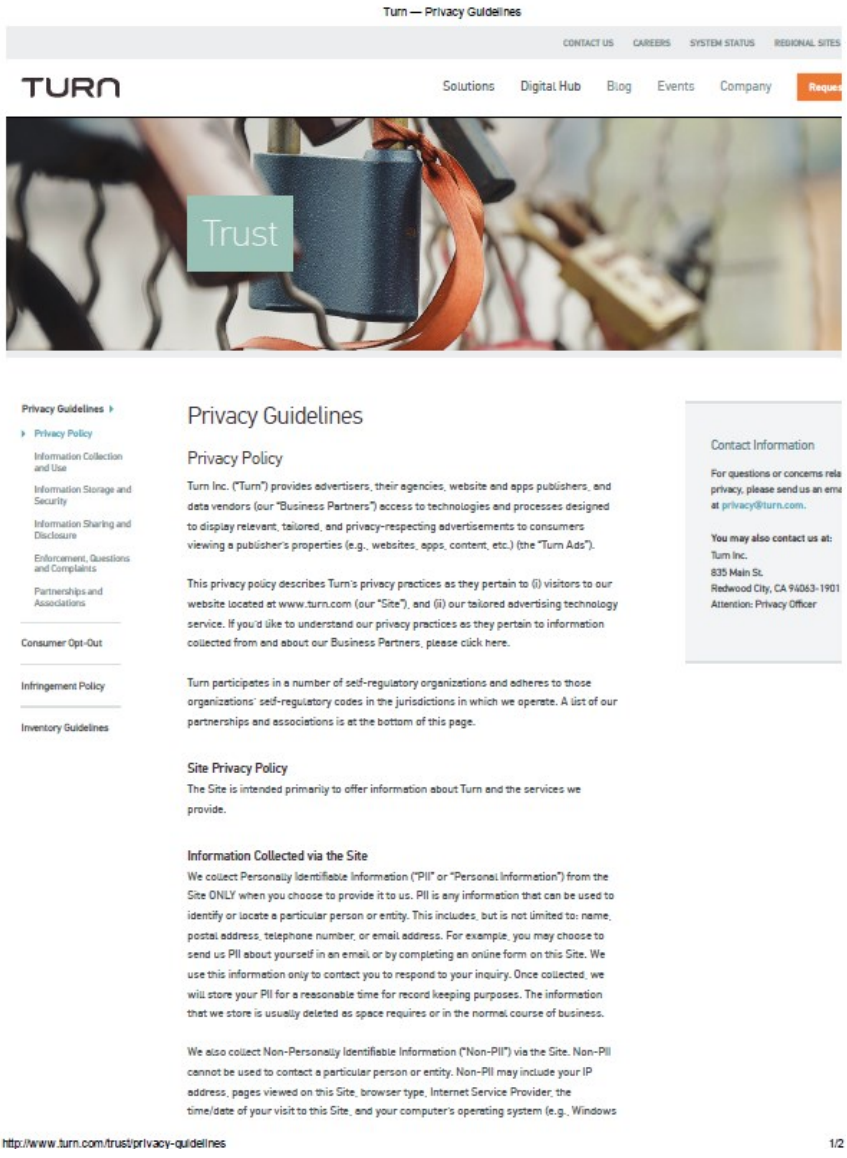
19. In fact, consumers could not opt out of tailored advertising on mobile applications through Respondent's opt-out page. Therefore, the representation set forth in paragraph 18 is false or misleading.

20. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**THEREFORE**, the Federal Trade Commission this sixth day of April, 2017, has issued this complaint against Respondent.

By the Commission.

## Exhibit A



Turn — Privacy Guidelines

CONTACT US CAREERS SYSTEM STATUS REGIONAL SITES

TURN Solutions Digital Hub Blog Events Company Reques

Trust

Privacy Guidelines
- Privacy Policy
  - Information Collection and Use
  - Information Storage and Security
  - Information Sharing and Disclosure
  - Enforcement, Questions and Complaints
  - Partnerships and Associations
- Consumer Opt-Out
- Infringement Policy
- Inventory Guidelines

# Privacy Guidelines

## Privacy Policy

Turn Inc. ("Turn") provides advertisers, their agencies, website and apps publishers, and data vendors (our "Business Partners") access to technologies and processes designed to display relevant, tailored, and privacy-respecting advertisements to consumers viewing a publisher's properties (e.g., websites, apps, content, etc.) (the "Turn Ads").

This privacy policy describes Turn's privacy practices as they pertain to (i) visitors to our website located at www.turn.com (our "Site"), and (ii) our tailored advertising technology service. If you'd like to understand our privacy practices as they pertain to information collected from and about our Business Partners, please click here.

Turn participates in a number of self-regulatory organizations and adheres to those organizations' self-regulatory codes in the jurisdictions in which we operate. A list of our partnerships and associations is at the bottom of this page.

### Site Privacy Policy

The Site is intended primarily to offer information about Turn and the services we provide.

### Information Collected via the Site

We collect Personally Identifiable Information ("PII" or "Personal Information") from the Site ONLY when you choose to provide it to us. PII is any information that can be used to identify or locate a particular person or entity. This includes, but is not limited to: name, postal address, telephone number, or email address. For example, you may choose to send us PII about yourself in an email or by completing an online form on this Site. We use this information only to contact you to respond to your inquiry. Once collected, we will store your PII for a reasonable time for record keeping purposes. The information that we store is usually deleted as space requires or in the normal course of business.

We also collect Non-Personally Identifiable Information ("Non-PII") via the Site. Non-PII cannot be used to contact a particular person or entity. Non-PII may include your IP address, pages viewed on this Site, browser type, Internet Service Provider, the time/date of your visit to this Site, and your computer's operating system (e.g., Windows

Contact Information

For questions or concerns rela
privacy, please send us an ema
at privacy@turn.com.

You may also contact us at:
Turn Inc.
835 Main St.
Redwood City, CA 94063-1901
Attention: Privacy Officer

http://www.turn.com/trust/privacy-guidelines 1/2

Complaint



XP). Turn uses this information for internal purposes such as to administer the Site, improve and customize the Site, help Turn understand and analyze how the Site is being used, and to track aggregate Site usage.

### Cookies and Web Beacons

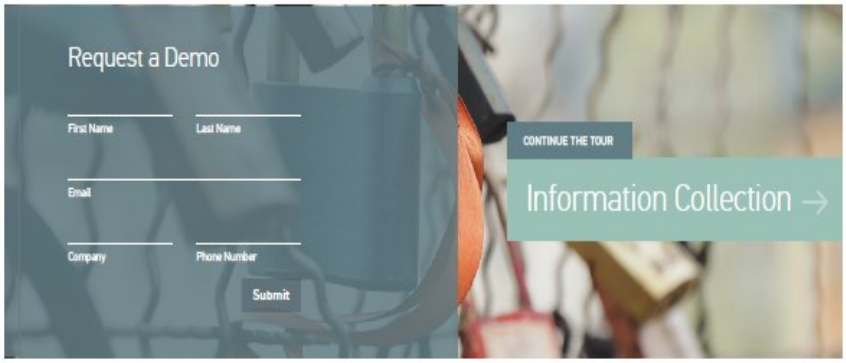
Turn uses cookies (small text files maintained by your browser, which may be session-specific or persistent) on this Site in order to help administer the Site. For more information about cookies, please visit http://www.allaboutcookies.org/cookies. Turn also uses web beacons in combination with cookies to analyze usage patterns on the Site. For more information about web beacons, please visit http://www.allaboutcookies.org/faqs/beacons.html.

### Third Party Websites

Turn Ads may contain links to other websites, including those of our Business Partners. Such websites may use cookies and/or other data collection tools. Turn is not responsible for the privacy practices, policies or the content of such websites. Turn encourages everyone to read the posted privacy policies whenever interacting with any website to learn more about the privacy practices of that website. Turn has no control over the use of any information by third party websites, and you should exercise caution when deciding to disclose any PII. Similarly, while Turn contractually requires that our Business Partners adhere to law and industry self-regulatory codes such as those offered by the NAI, DAA, and eDAA, Turn does not have access to, or control of, the cookies and/or other data collection tools that may be placed on any advertisement by a third-party. This Privacy Policy does not cover the use of cookies and/or other data collection tools by any third party.

### Access / Updating / Deleting your PII

If you'd like us to update, correct, delete, or deactivate any PII that you have provided to us on this Site, please send your request to us at privacy@turn.com and we will process your request within a reasonable period of time after receipt.

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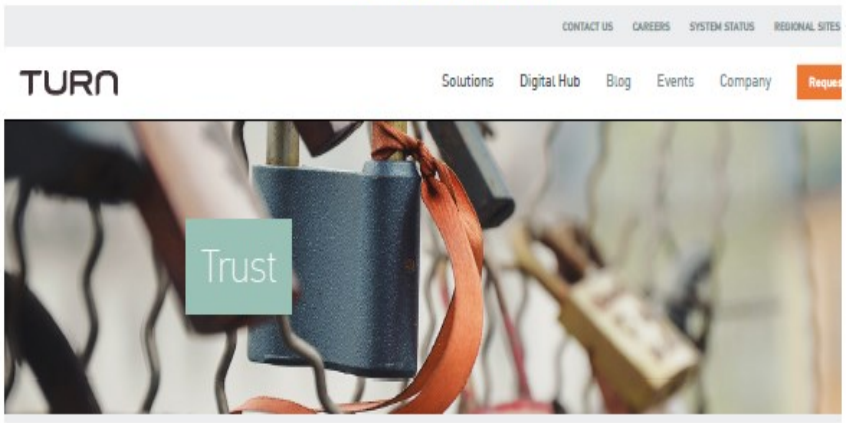
Turn — Information Collection and Use

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# Privacy Guidelines

## Information Collection and Use

### Overview of Turn's technology

Our technology collects information about the website(s) that a browser visits and the advertisements that a browser displays while online. You may encounter our technology when Turn or a Business Partner purchases online advertisements on a website that you visit, an app that you use, etc.; and/or when one of our Business Partners places one of our web beacons on a property that you visit or use.

We use the information collected by our technology in order to help make the Turn Ads you see more relevant to you, and for ad delivery and reporting purposes. By delivering a more relevant ad, Turn is an important participant in the keeping the internet free, dynamic, and vibrant! That is because advertisers will pay more to deliver a tailored ad, and the website or app you love gets more money when you receive a tailored ad. That helps the website or app keep doing what you love – providing you great content at a great price – usually FREE!

Our technology also offers data management services to Business Partners (our "Data Management Platform" or "DMP"). The Turn DMP enables Business Partners to collect, store, and analyze information about a browser or a user which may include PII. We provide Business Partners with a self-serve website tagging technology ("Flextag") that enables them to place data into the DMP. We require Business Partners using the DMP to adhere to the NAI Code and DAA Code or other applicable industry standards. We also contractually require that Business Partners don't bring PII or sensitive Non-PII audience segments into the DMP. However, Business Partners' use of the DMP is subject to their own privacy policies, not this one.

### What information is collected?

Turn does not collect PII via our technology. If we discover that PII has been inadvertently collected by our technology (e.g., where a Business Partner has used Flextag to bring PII into the DMP), we will take reasonable steps to attempt to remove the PII and to address the situation with the party responsible for such inadvertent collection.

Contact Information

For questions or concerns rela
privacy, please send us an ema
at privacy@turn.com.

You may also contact us at:
Turn Inc.
835 Main St.
Redwood City, CA 94063-1901
Attention: Privacy Officer

Complaint

Turn — Information Collection and Use

Our technology does collect and use Non-PII, including: the IP address used to access the Internet, the type of browser used, which, and how many Business Partner web pages have been viewed by a browser, search terms entered on Business Partner websites, referring and exit pages, and the date and time a Turn Ad was viewed. Turn also obtains Non-PII from third party data vendors that receive such Non-PII pursuant to their own privacy policies. Turn takes reasonable steps to attempt to ensure that our data vendors meet our privacy standards, but we cannot be held responsible for their privacy practices.

### How is the information used?

Turn uses this information to analyze trends, identify the audience most likely to respond to an advertisement, and to tailor ads using only Non-PII. By delivering tailored ads, Turn helps advertisers, publishers, and you! You get better ads and the content you love has a better chance to thrive.

We also may aggregate this information and share it with Turn's affiliates, advertisers, employees, customers and Business Partners.

Turn does not create nor use any sensitive data segments to tailor ads on behalf of our advertiser clients. However, we recognize that consumers may have differing opinions regarding which data segments are sensitive. In order to provide transparency around potentially sensitive data segments collected and used by Turn, we will provide examples of them here. For example, we may collect health-related segments of consumers that we believe may have an interest in healthy living because they have visited websites that are focused on health-related topics such as yoga and healthy living. Similarly, we may collect finance-related segments of consumers that we believe may have an interest in investing because they've visited websites that are focused on investment strategies or searched for "investment tips".

While we don't consider any of the above data segments to be sensitive, we think it's important to provide this transparency to help you have a better idea of which segments might be collected by us, so you can make informed decisions.

### Cookies and web beacons

Turn uses cookies in connection with our technology. Cookies help Turn better understand the effectiveness of a Turn Ad (for example, by tracking the way in which you may respond to, select and interact with a Turn Ad or any content provided therein, or the site placement and context in which you view a Turn Ad). Turn's cookies also help control the number of times you view a Turn Ad. Most Internet browsers automatically accept cookies. You can instruct your browser, by editing its options, to stop accepting cookies or prompt you before accepting a cookie from the websites you visit. If you do not accept cookies, however, you may not be able to enjoy the full functionality of many of the websites you visit.

Turn also uses web beacons, in combination with cookies, to analyze usage patterns. The use of a web beacon allows Turn to record that a particular browser has visited a particular webpage, along with additional Non-PII that the website may choose to include with the beacon.

### Opt out from Tailored but Anonymous Advertising (Turn's choice mechanism)

If you'd like to opt out of tailored advertising from Turn, please click here to be taken to our opt out page.

### Third party links and websites

Turn — Information Collection and Use

Turn Ads may contain links to other websites, including those of our Business Partners. Such websites may use cookies and/or other data collection tools. Turn is not responsible for the privacy practices, policies or the content of such websites. Turn encourages everyone to read the posted privacy policies whenever interacting with any website to learn more about the privacy practices of that website. Turn has no control over the use of any information by third party websites, and you should exercise caution when deciding to disclose any PII. Similarly, while Turn contractually requires that our Business Partners adhere to law and industry self-regulatory codes such as those offered by the NAI, DAA, and eDAA, Turn does not have access to, or control of, the cookies and/or other data collection tools that may be placed on any advertisement by a third-party. This Privacy Policy does not cover the use of cookies and/or other data collection tools by any third party.

Information Relating to Children

Our products and services are designed for those 13 years of age and older. We do not knowingly collect PII from anyone under the age of 13 on the Site or via our technology. If we are made aware that we have received PII from someone under 13, we will use reasonable efforts to remove that information from our records.


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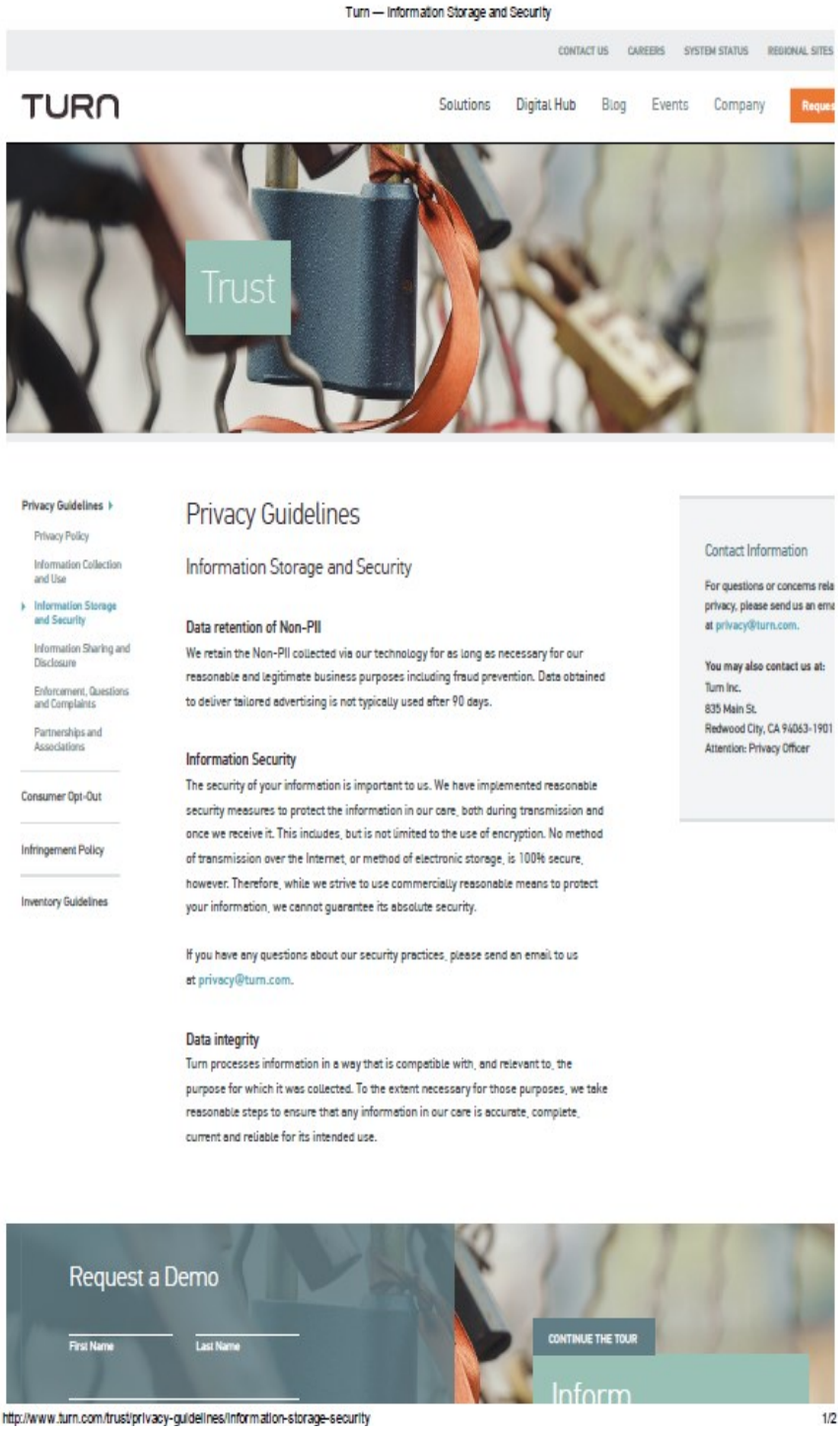
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Data retention of Non-PII
We retain the Non-PII collected via our technology for as long as necessary for our reasonable and legitimate business purposes including fraud prevention. Data obtained to deliver tailored advertising is not typically used after 90 days.
Information Security
The security of your information is important to us. We have implemented reasonable security measures to protect the information in our care, both during transmission and once we receive it. This includes, but is not limited to the use of encryption. No method of transmission over the Internet, or method of electronic storage, is 100% secure, however. Therefore, while we strive to use commercially reasonable means to protect your information, we cannot guarantee its absolute security.
If you have any questions about our security practices, please send an email to us at privacy@turn.com.
Data integrity
Turn processes information in a way that is compatible with, and relevant to, the purpose for which it was collected. To the extent necessary for those purposes, we take reasonable steps to ensure that any information in our care is accurate, complete, current and reliable for its intended use.
Contact Information
For questions or concerns rela
privacy, please send us an ema
at privacy@turn.com.
You may also contact us at:
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835 Main St.
Redwood City, CA 94063-1901
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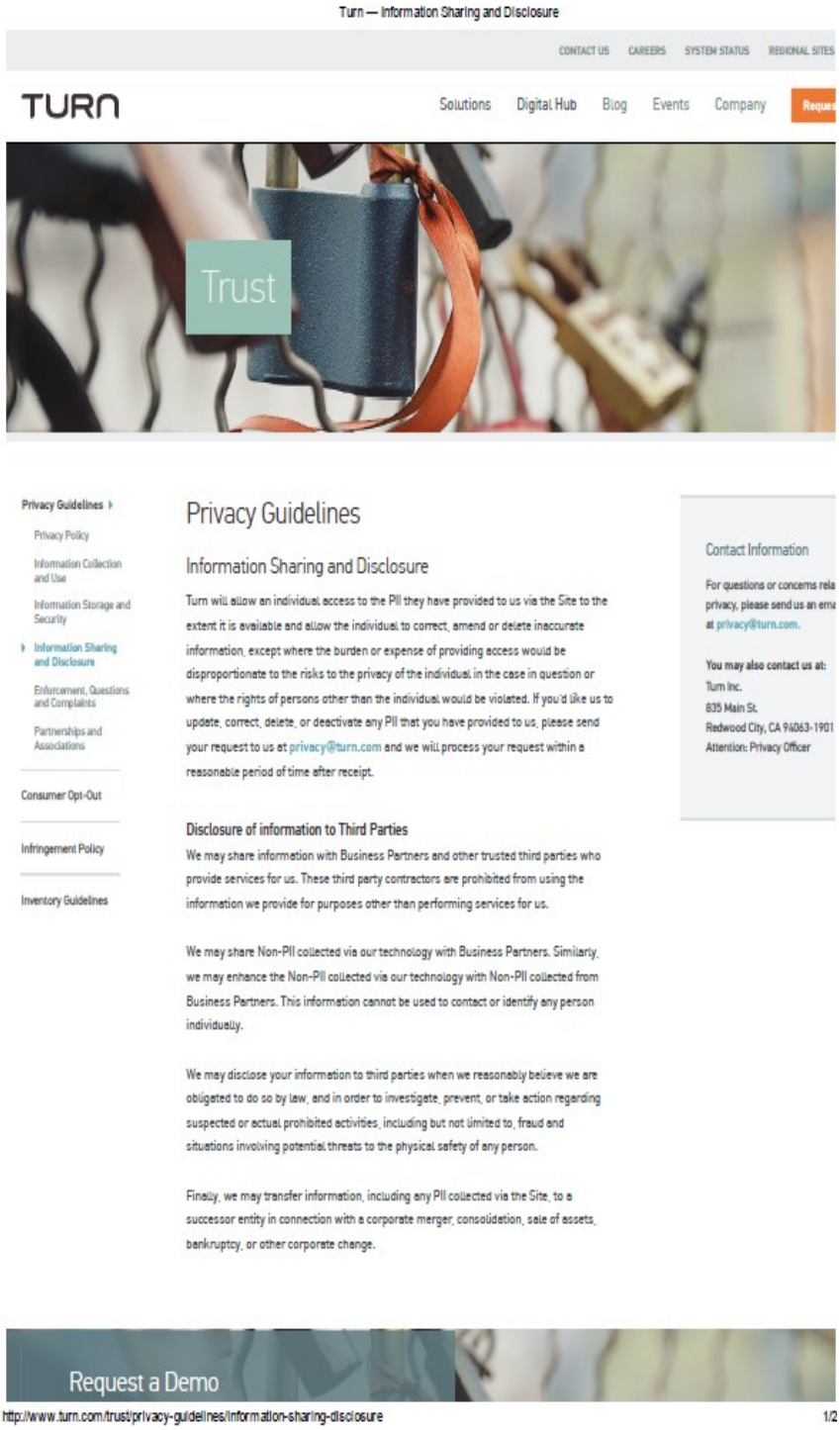
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Turn will allow an individual access to the PII they have provided to us via the Site to the extent it is available and allow the individual to correct, amend or delete inaccurate information, except where the burden or expense of providing access would be disproportionate to the risks to the privacy of the individual in the case in question or where the rights of persons other than the individual would be violated. If you'd like us to update, correct, delete, or deactivate any PII that you have provided to us, please send your request to us at privacy@turn.com and we will process your request within a reasonable period of time after receipt.
Disclosure of information to Third Parties
We may share information with Business Partners and other trusted third parties who provide services for us. These third party contractors are prohibited from using the information we provide for purposes other than performing services for us.
We may share Non-PII collected via our technology with Business Partners. Similarly, we may enhance the Non-PII collected via our technology with Non-PII collected from Business Partners. This information cannot be used to contact or identify any person individually.
We may disclose your information to third parties when we reasonably believe we are obligated to do so by law, and in order to investigate, prevent, or take action regarding suspected or actual prohibited activities, including but not limited to, fraud and situations involving potential threats to the physical safety of any person.
Finally, we may transfer information, including any PII collected via the Site, to a successor entity in connection with a corporate merger, consolidation, sale of assets, bankruptcy, or other corporate change.
Contact Information
For questions or concerns rela
privacy, please send us an ema
at privacy@turn.com.
You may also contact us at:
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Redwood City, CA 94063-1901
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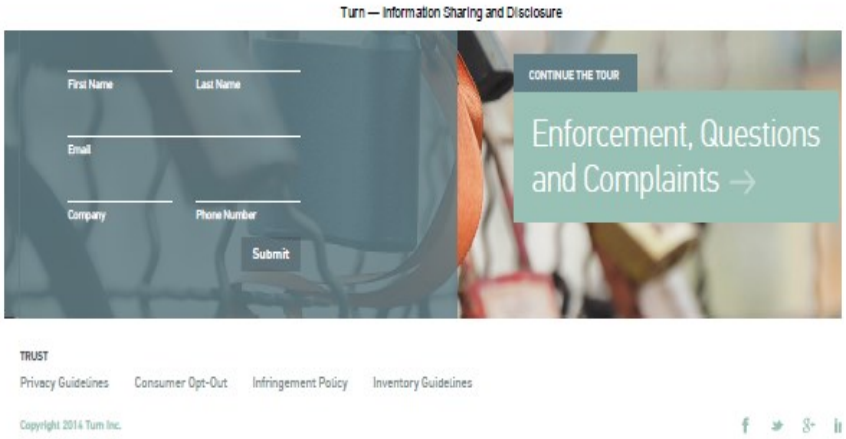
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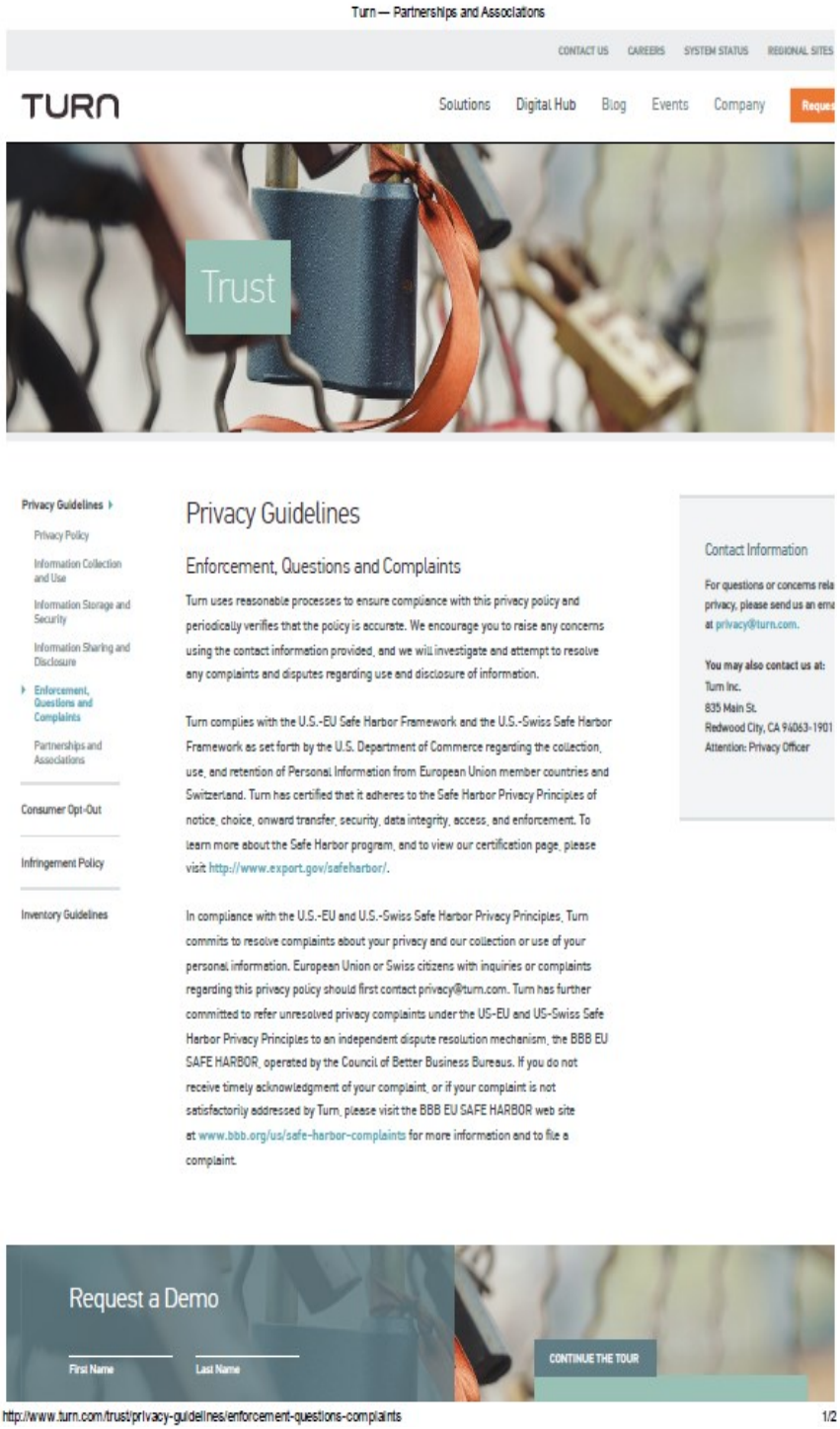
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Turn uses reasonable processes to ensure compliance with this privacy policy and periodically verifies that the policy is accurate. We encourage you to raise any concerns using the contact information provided, and we will investigate and attempt to resolve any complaints and disputes regarding use and disclosure of information.
Turn complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of Personal Information from European Union member countries and Switzerland. Turn has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view our certification page, please visit http://www.export.gov/safeharbor/.
In compliance with the U.S.-EU and U.S.-Swiss Safe Harbor Privacy Principles, Turn commits to resolve complaints about your privacy and our collection or use of your personal information. European Union or Swiss citizens with inquiries or complaints regarding this privacy policy should first contact privacy@turn.com. Turn has further committed to refer unresolved privacy complaints under the US-EU and US-Swiss Safe Harbor Privacy Principles to an independent dispute resolution mechanism, the BBB EU SAFE HARBOR, operated by the Council of Better Business Bureaus. If you do not receive timely acknowledgment of your complaint, or if your complaint is not satisfactorily addressed by Turn, please visit the BBB EU SAFE HARBOR web site at www.bbb.org/us/safe-harbor-complaints for more information and to file a complaint.
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at privacy@turn.com.
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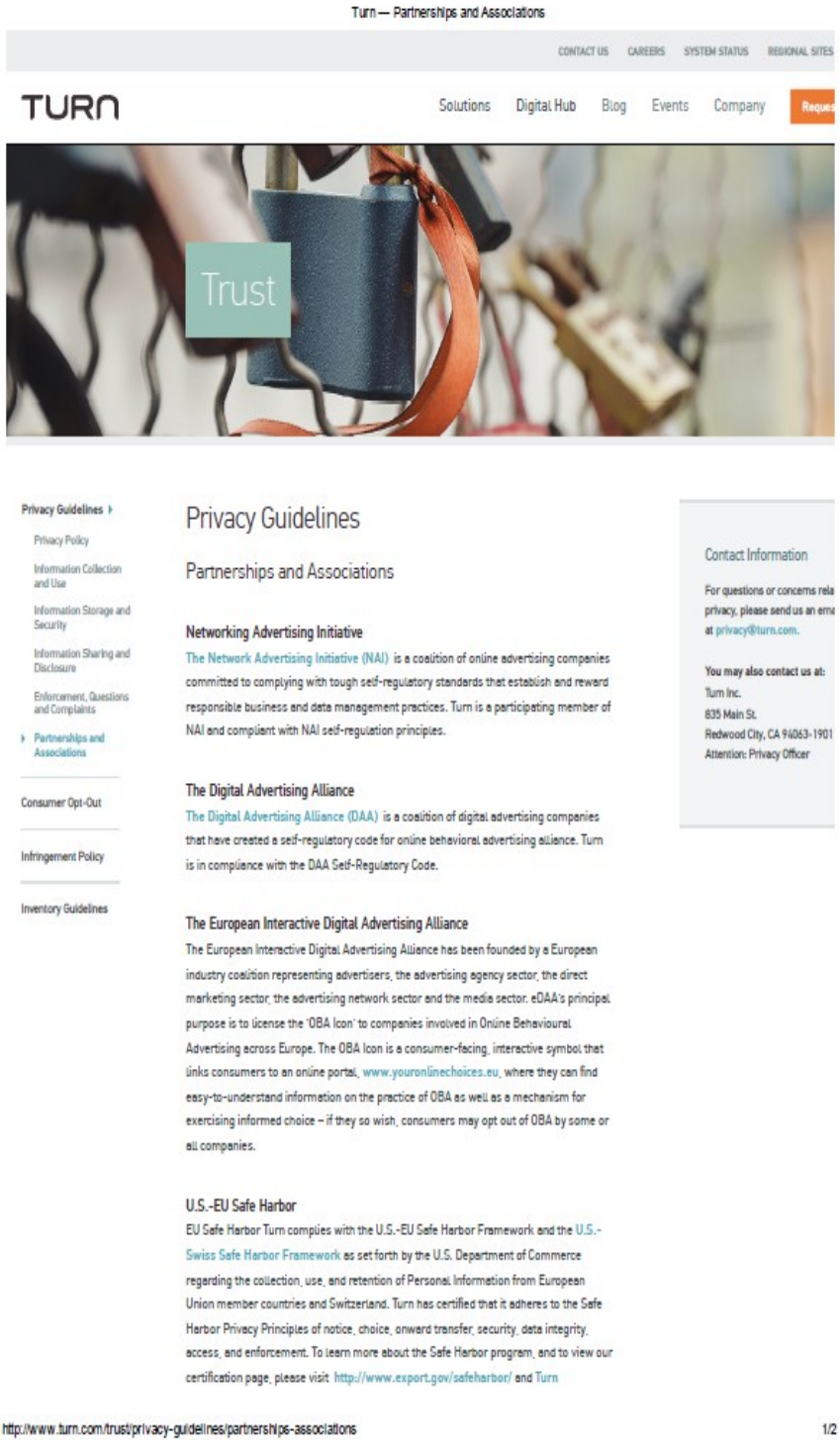
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Networking Advertising Initiative
The Network Advertising Initiative (NAI) is a coalition of online advertising companies committed to complying with tough self-regulatory standards that establish and reward responsible business and data management practices. Turn is a participating member of NAI and compliant with NAI self-regulation principles.
The Digital Advertising Alliance
The Digital Advertising Alliance (DAA) is a coalition of digital advertising companies that have created a self-regulatory code for online behavioral advertising alliance. Turn is in compliance with the DAA Self-Regulatory Code.
The European Interactive Digital Advertising Alliance
The European Interactive Digital Advertising Alliance has been founded by a European industry coalition representing advertisers, the advertising agency sector, the direct marketing sector, the advertising network sector and the media sector. eDAA's principal purpose is to license the 'OBA Icon' to companies involved in Online Behavioural Advertising across Europe. The OBA Icon is a consumer-facing, interactive symbol that links consumers to an online portal, www.youronlinechoices.eu, where they can find easy-to-understand information on the practice of OBA as well as a mechanism for exercising informed choice – if they so wish, consumers may opt out of OBA by some or all companies.
U.S.-EU Safe Harbor
EU Safe Harbor Turn complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of Personal Information from European Union member countries and Switzerland. Turn has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view our certification page, please visit http://www.export.gov/safeharbor/ and Turn
Contact Information
For questions or concerns rela
privacy, please send us an ema
at privacy@turn.com.
You may also contact us at:
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http://www.turn.com/trust/privacy-guidelines/partnerships-associations
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Turn — Partnerships and Associations

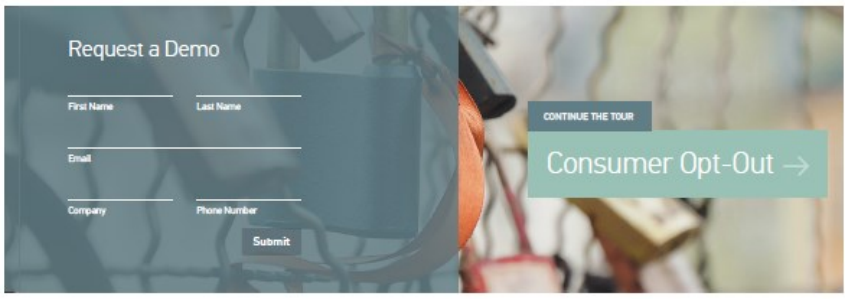
Certification Page.

### The Interactive Advertising Bureau

The Interactive Advertising Bureau is comprised of more than 500 leading media and technology companies that are responsible for selling 86% of online advertising in the United States. On behalf of its members, the IAB is dedicated to the growth of the interactive advertising marketplace, of interactive's share of total marketing spend, and of its members' share of total marketing spend.

### Better Advertising

Turn also partners with Better Advertising, whose mission is to enable advertisers, their partners and industry associations to be more transparent in how consumer data is collected and used for online advertising. Working with Better Advertising's industry leading partners, Turn help develop tools and practices for marketers to ensure consumer privacy protection by providing consumers access to clear information and choices.

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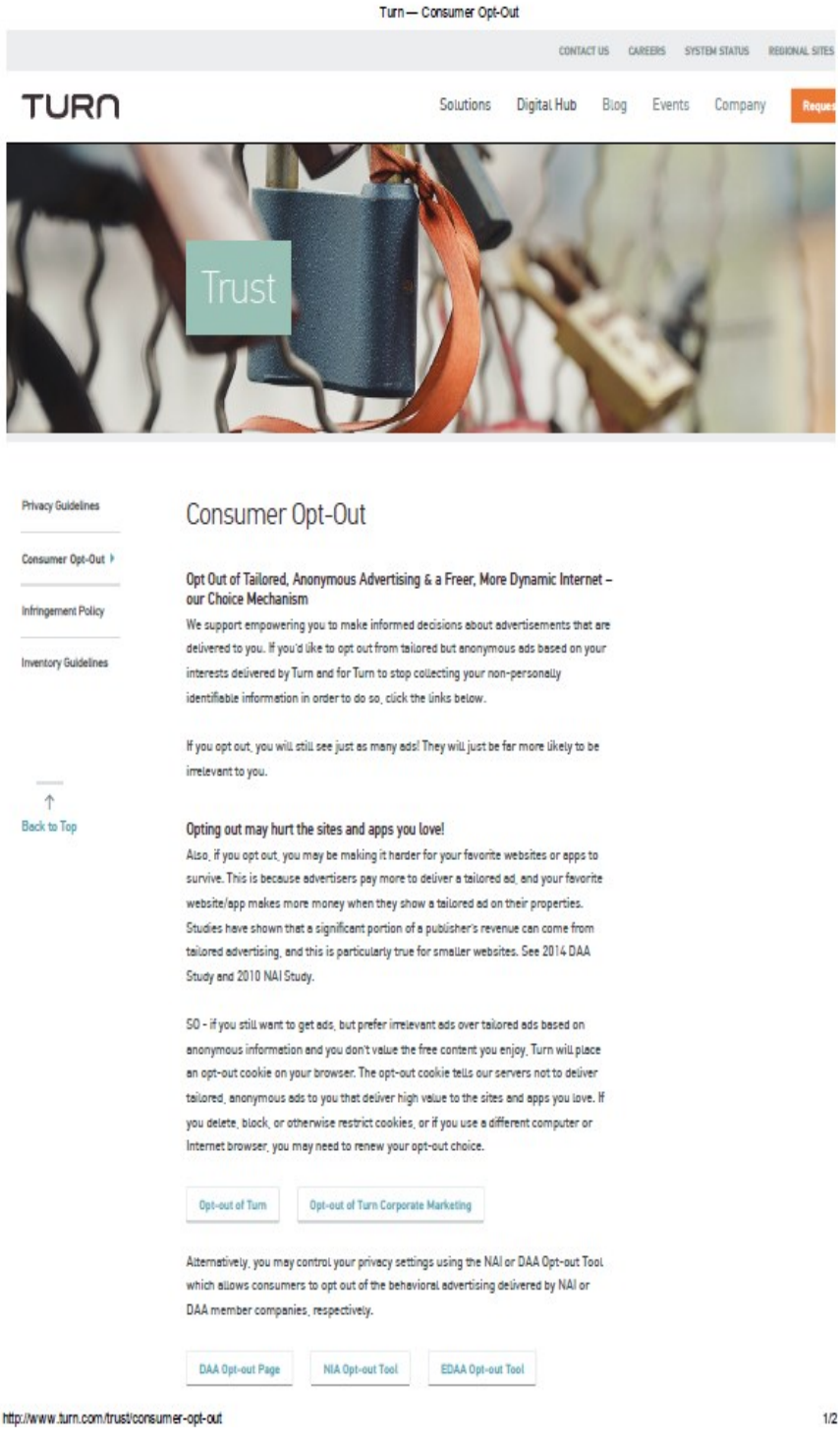

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## Consumer Opt-Out

**Opt Out of Tailored, Anonymous Advertising & a Freer, More Dynamic Internet – our Choice Mechanism**

We support empowering you to make informed decisions about advertisements that are delivered to you. If you'd like to opt out from tailored but anonymous ads based on your interests delivered by Turn and for Turn to stop collecting your non-personally identifiable information in order to do so, click the links below.

If you opt out, you will still see just as many ads! They will just be far more likely to be irrelevant to you.

**Opting out may hurt the sites and apps you love!**

Also, if you opt out, you may be making it harder for your favorite websites or apps to survive. This is because advertisers pay more to deliver a tailored ad, and your favorite website/app makes more money when they show a tailored ad on their properties. Studies have shown that a significant portion of a publisher's revenue can come from tailored advertising, and this is particularly true for smaller websites. See 2014 DAA Study and 2010 NAI Study.

SO - if you still want to get ads, but prefer irrelevant ads over tailored ads based on anonymous information and you don't value the free content you enjoy, Turn will place an opt-out cookie on your browser. The opt-out cookie tells our servers not to deliver tailored, anonymous ads to you that deliver high value to the sites and apps you love. If you delete, block, or otherwise restrict cookies, or if you use a different computer or Internet browser, you may need to renew your opt-out choice.

Opt-out of Turn | Opt-out of Turn Corporate Marketing

Alternatively, you may control your privacy settings using the NAI or DAA Opt-out Tool which allows consumers to opt out of the behavioral advertising delivered by NAI or DAA member companies, respectively.

DAA Opt-out Page | NAI Opt-out Tool | EDAA Opt-out Tool

http://www.turn.com/trust/consumer-opt-out 1/2

Turn — Consumer Opt-Out

Deleting your PII | We do not collect PII via our technology. If you'd like us to update, correct, delete, or deactivate any PII that you may have provided to us on the Site, please send your request to us at privacy@turn.com and we will process your request within a reasonable period of time after receipt. See Privacy Policy.


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## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent Turn Inc., is a Delaware corporation with its principal office or place of business at 901 Marshall Street, Ste. 200, Redwood City, CA 94063.

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

## ORDER

### Definitions

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

A. "Clear[ly] and Conspicuous[ly]" means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented.

2. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.

3. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

4. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

5. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must

appear in each language in which the representation that requires the disclosure appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Computer" or "Device" means any desktop or laptop computer, handheld device, telephone, tablet, or other product or device, through which consumers access the Internet.

C. "Covered Information" means information from or about an individual consumer, Computer, or Device, including, but not limited to, (a) an email address or other online contact information, such as a user name; (b) a persistent identifier, such as a unique ID held in an HTTP cookie, an Internet Protocol ("IP") address, a Device Advertising Identifier, a mobile device ID, a MAC address, processor serial number, or Verizon Wireless's X-UIDH header; (c) browsing history or other data about websites and applications that a device has accessed; (d) precise geolocation data of an individual or mobile device, including GPS-based, WiFi-based, or cell-based location information; or (e) an authentication credential such as a login ID or password.

D. "Device Advertising Identifier" means a persistent identifier created by a Mobile Operating System to uniquely identify a device user for purposes of

advertising, such as the iOS Identifier for Advertisers or Google advertising ID.

E. "Mobile Operating System" means an operating system designed to run a mobile device such as a smartphone or tablet. A web browser shall not be considered a Mobile Operating System.

F. "Respondent" means Turn Inc., a corporation, and its successors and assigns.

G. "Targeted Advertising" means the practice of using data about a user's interests in order to deliver online advertising targeted to the user's interests. Contextual advertising targeted to the content of a particular webpage or application shall not be considered Targeted Advertising for the purposes of this Order.

H. "Verizon Wireless's X-UIDH headers" means the unique HTTP headers appended to web requests from Verizon Wireless customers that were observable by all servers receiving web requests from Verizon Wireless.

## Provisions

### I. Prohibition Against Misrepresentations about Privacy of Covered Information

**IT IS ORDERED** that Respondent, and Respondent's officers, agents, 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 the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, must not misrepresent, in any manner, expressly or by implication:

A. The extent to which Respondent collects, uses, discloses, retains, or shares Covered Information; and

B. The extent to which consumers can limit, control, or prevent Respondent's collection, use, disclosure, retention, or sharing of Covered Information.

## II. Required Disclosure and Opt-Out Mechanism

**IT IS FURTHER ORDERED** that, for so long as Respondent engages in Targeted Advertising, Respondent, directly or through any entity, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service on websites and in mobile applications other than Respondent's, shall, within 30 days after the date of service of this order:

A. Place a Clear and Conspicuous hyperlink on the homepage of the Turn website that states "Consumer Opt Out of Targeted Advertising." When selected, the hyperlink shall take consumers directly to the mechanism required by Part II.B of the order;

B. On the webpage linked from the hyperlink described in II.A, provide a Clear and Conspicuous disclosure that explains what information is collected and used for Targeted Advertising, accompanied by a Clear and Conspicuous mechanism that enables users to opt out of such Targeted Advertising; and

C. Describe the technologies and methods used for Targeted Advertising on its website.

## III. Requirement to Honor Consumer Controls

**IT IS FURTHER ORDERED** that Respondent, whether acting directly or indirectly, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, must honor a signal it receives that indicates the activation of a Mobile Operating System control to opt out of or otherwise control or limit Targeted Advertising when:

A. Respondent knows or reasonably should know that it is receiving such a signal; and

B. Respondent knows or reasonably should know that such signal indicates the activation of a Mobile Operating System control to opt out of or otherwise control or limit Targeted Advertising.

## IV. Acknowledgments of the Order

**IT IS FURTHER ORDERED** that Respondent obtains acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 10 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives having managerial responsibilities for conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reporting. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

## V. Compliance Reporting and Notices

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (5) provide a copy of each Acknowledgments of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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: In re Turn Inc., FTC File No. 1523099.

## VI. Recordkeeping

**IT IS FURTHER ORDERED** that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints or inquiries, whether received directly or indirectly, such as through a third party, concerning: (1) any collection of Covered Information by Respondent; (2) the use, disclosure, or sharing of such Covered Information by Respondent; or (3) opt-out practices or any other mechanism to limit or prevent such collection of Covered Information or the use, disclosure, or sharing of Covered Information collected by Respondent, as well as any responses to such complaints or inquiries;

D. A copy of each publicly disseminated representation by Respondent that describes the extent to which Respondent collects, uses, discloses, retains, or shares Covered Information, including any representation

concerning a change in any website or other service controlled by Respondent that relates Respondent's collection, use, disclosure, retention, or sharing of Covered Information; and

E. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

## VII. Compliance Monitoring

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying;

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present; and

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VIII. Order Effective Dates

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on April 6, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision. 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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

# ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

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

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 again will 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 Turn, a digital advertising company that enables commercial brands and ad agencies to engage in targeted advertising, which is the practice of tracking a consumer's activities or characteristics to deliver ads tailored to the consumer's interests. The FTC complaint alleges that Turn violated Section 5(a) of the FTC Act by falsely representing to consumers the extent to which consumers could restrict the company's tracking of their online activities and the extent to which Turn's opt-out applied to mobile app advertising.

Specifically, the complaint alleges that until at least April 2015, Turn's privacy policy misrepresented that consumers could prevent Turn's tracking by blocking or otherwise limiting cookies. Contrary to representations that consumers could opt out of tracking by instructing their browser to "stop accepting cookies," Turn tracked consumers by using and synchronizing the Verizon X-UIDH header, a unique identifier appended to the internet traffic of more than 100 million consumers on the Verizon Wireless data network. Even if a consumer deleted cookies or reset their device advertising identifier (*e.g.*, Apple's IDFA or Google's advertising ID), Turn would be able to recognize the user by cross-referencing the unique X-UIDH header associated with an individual consumer's device. In fact, if a Verizon Wireless user deleted their cookies, Turn would attempt to set a new cookie containing the same unique identifier as the cookie the user had deleted, thereby maintaining the linkage between the

consumer's browser or device and an identifier associated with behavioral, demographic, or tracking data.

In addition, the complaint alleges that Turn's privacy policy misrepresented that its opt-out mechanism would be effective in blocking targeted advertising on both mobile websites and in mobile apps. Contrary to Turn's representations, Turn's opt-out applied only to mobile browsers, and was not effective in blocking ads in mobile applications.

The proposed consent order contains provisions designed to prevent Turn from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Turn from misrepresenting (1) the extent to which it collects, uses, discloses, retains, or shares Covered Information; and (2) the extent to which users may limit, control, or prevent Turn's collection, use, disclosure, retention, or sharing of covered information. Part II of the proposed order requires Turn, within thirty days following service of the order, to place a clear and conspicuous hyperlink on the Turn website homepage that states "Consumer Opt Out of Targeted Advertising." The hyperlink must take consumers to a clear and conspicuous disclosure that explains what information Turn collects and uses for targeted advertising, and provides an effective opt-out mechanism that allows consumers to prevent Turn from collecting or using consumers' information. In addition, Turn's website must describe to consumers the technologies and methods it uses for targeted advertising. Part III of the proposed order requires Turn to honor mobile operating system control signal (*e.g.*, Apple's IDFA or Google's advertising ID) to opt out of or otherwise control or limit targeted advertising, where it knows or reasonably should know that it is receiving such a signal.

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

the FTC information or subsequent compliance reports, as requested. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

**IN THE MATTER OF**

# ISPRING WATER SYSTEMS, LLC

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

*Docket No. C-4611; File No. 172 3033*
*Complaint, April 6, 2017 – Decision, April 6, 2017*

This consent order addresses iSpring Water Systems, LLC's marketing, sale, and distribution of water filtration systems and associated parts and accessories with claims that the products are of U.S.-origin. The complaint alleges that respondent represented that all of its products are "Built in USA," when in fact, in many instances, respondent's products are wholly imported or have significant inputs to its products sourced from overseas. The consent order prohibits iSpring from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

*Participants*

For the *Commission*: *Julia Solomon Ensor.*

For the *Respondent*: *Pearl Cai, Vice President, pro se.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that iSpring Water Systems, LLC, a limited liability company ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent iSpring Water Systems, LLC ("iSpring"), also doing business as 123filter.com, is a Georgia limited liability company with its principal office or place of business at 3020 Trotters Parkway, Alpharetta, GA 30004.

2. Respondent advertises, labels, offers for sale, and distributes products to consumers, including, but not limited to, water filtration systems and parts. Respondent advertises these products primarily online, including, but not limited to, on its own website 123filter.com, and through third-party websites including, but not limited to, amazon.com, overstock.com, sears.com, and homedepot.com. Respondent offers for sale, sells, and distributes its products throughout the United States.

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 to be disseminated advertisements and promotional materials for its products, including, but not necessarily limited to, the attached Exhibits A-C. These materials contain the following statements, among others:

a. "Built in USA Legendary brand of water filter" (Exhibit A, 123filter.com web advertisement);

b. "Built in USA" (Exhibit B, search result demonstrating instances phrase occurs on 123filter.com website);

c. "Built in USA" (Exhibit C, amazon.com, sears.com, walmart.com, and purwaterfilter.org product listings).

5. In numerous instances, including, but not limited to, the promotional materials shown in Exhibits A-C, Respondent has represented, expressly or by implication, that its products, including, but not limited to, water filtration systems and parts, are all or virtually all made in the United States.

6. In fact, in many instances, Respondent's products are wholly imported. In other instances, Respondent sources significant inputs to its products from overseas.

7. Therefore, Respondent's express or implied representations that its products are made in the United States deceive consumers.

## COUNT I (False or Unsubstantiated Representation)

8. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of its products, Respondent has represented, directly or indirectly, expressly or by implication, that such products, including, but not limited to, water filtration systems and parts, are all or virtually all made in the United States.

9. In fact, in many instances, Respondent's products are wholly imported. In other instances, Respondent sources significant inputs to its products overseas. Therefore, the representation set forth in Paragraph 8 is false or misleading, or was not substantiated at the time the representation was made.

## VIOLATION OF SECTION 5

10. 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.

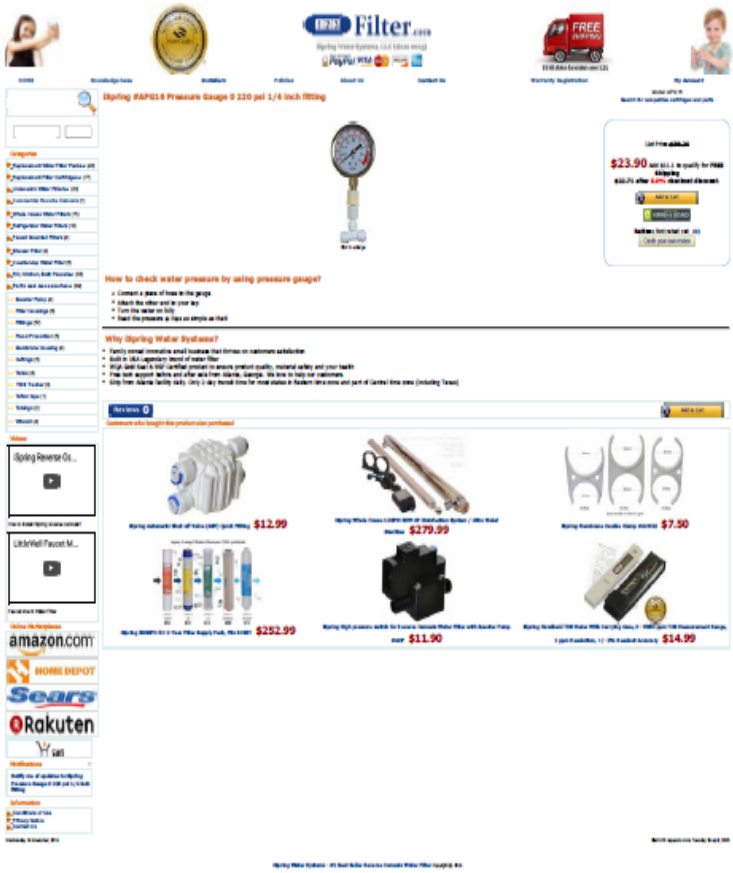
**THEREFORE**, the Federal Trade Commission, this sixth day of April, 2017, has issued this Complaint against Respondent.

By the Commission.

Complaint

# Exhibit A

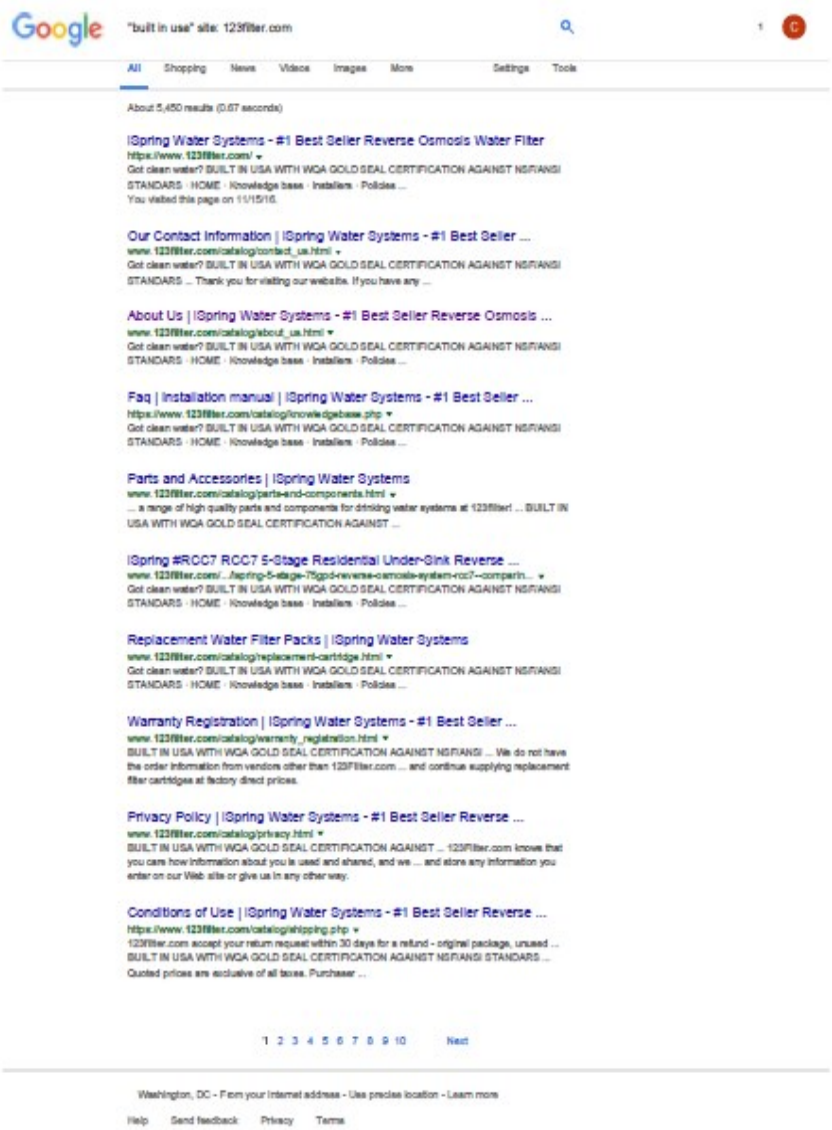
iSpring #APG16 Pressure Gauge 0 220 psi 1/4 inch fitting | iSpring Wate... http://www.123filter.com/catalog/ispring-123filter-pressure-gauge-0-220...



Complaint

## Exhibit B





Complaint

# Exhibit C


Complaint

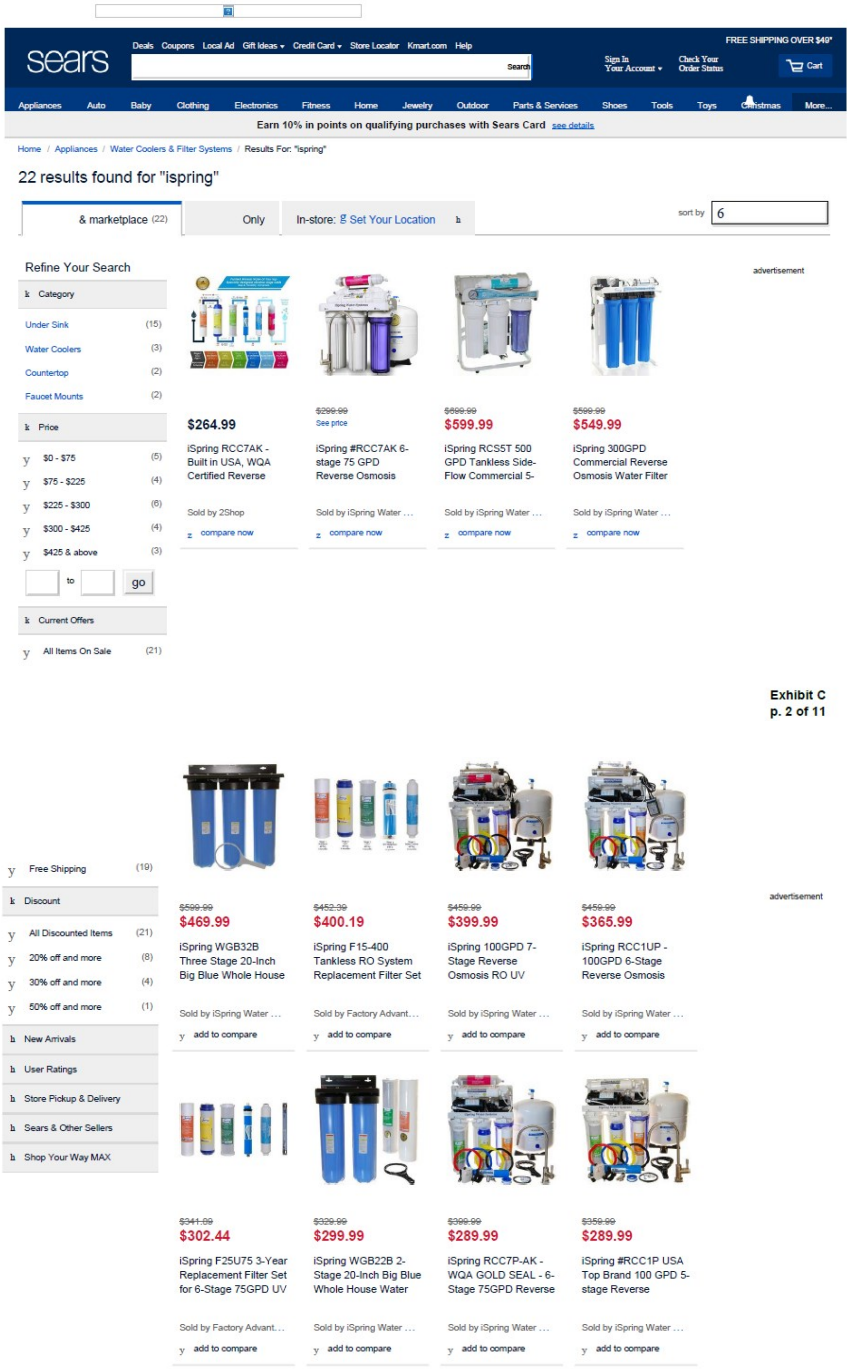



**Exhibit C**
**p. 2 of 11**

**Exhibit C**
**p. 3 of 11**

Complaint

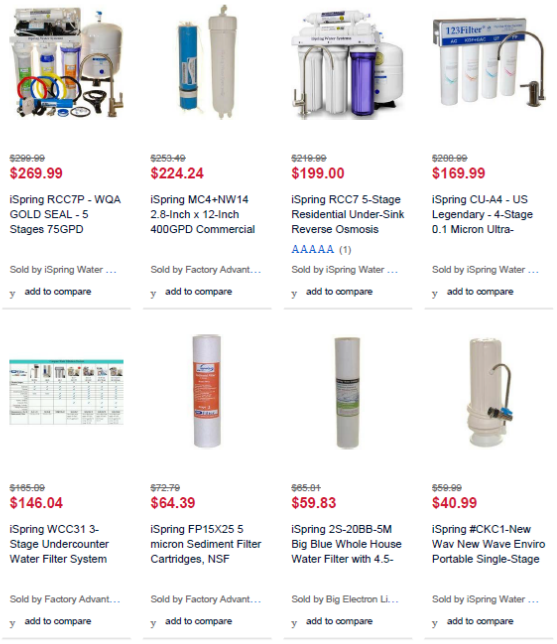
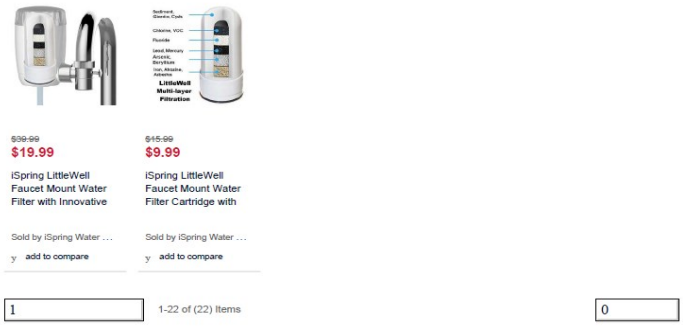



**Exhibit C**
**p. 4 of 11**



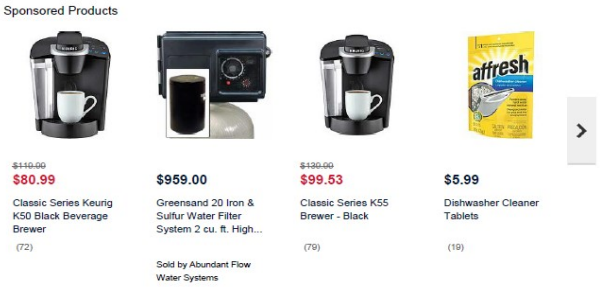
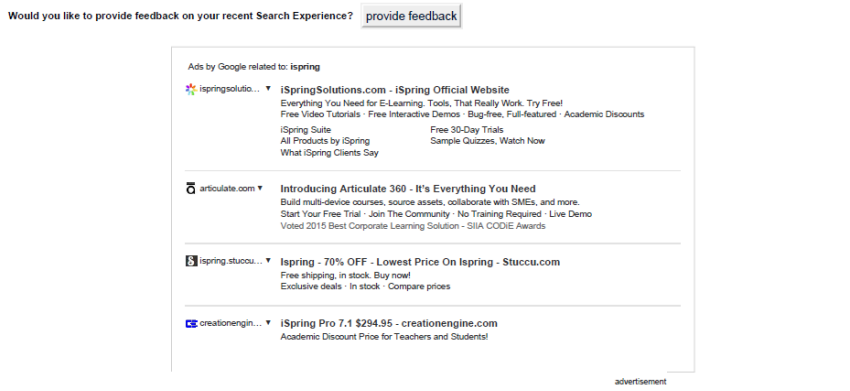




**Exhibit C**
**p. 5 of 11**

Complaint



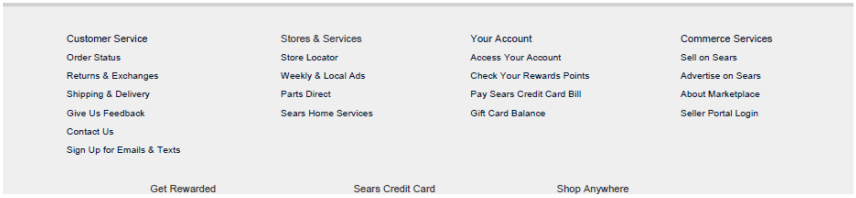




**Exhibit C**
**p. 6 of 11**

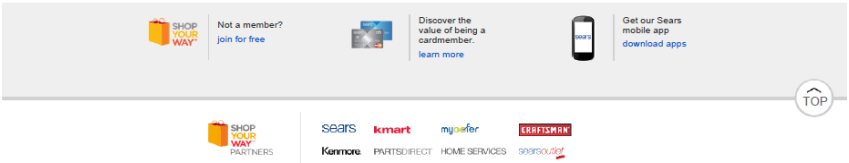
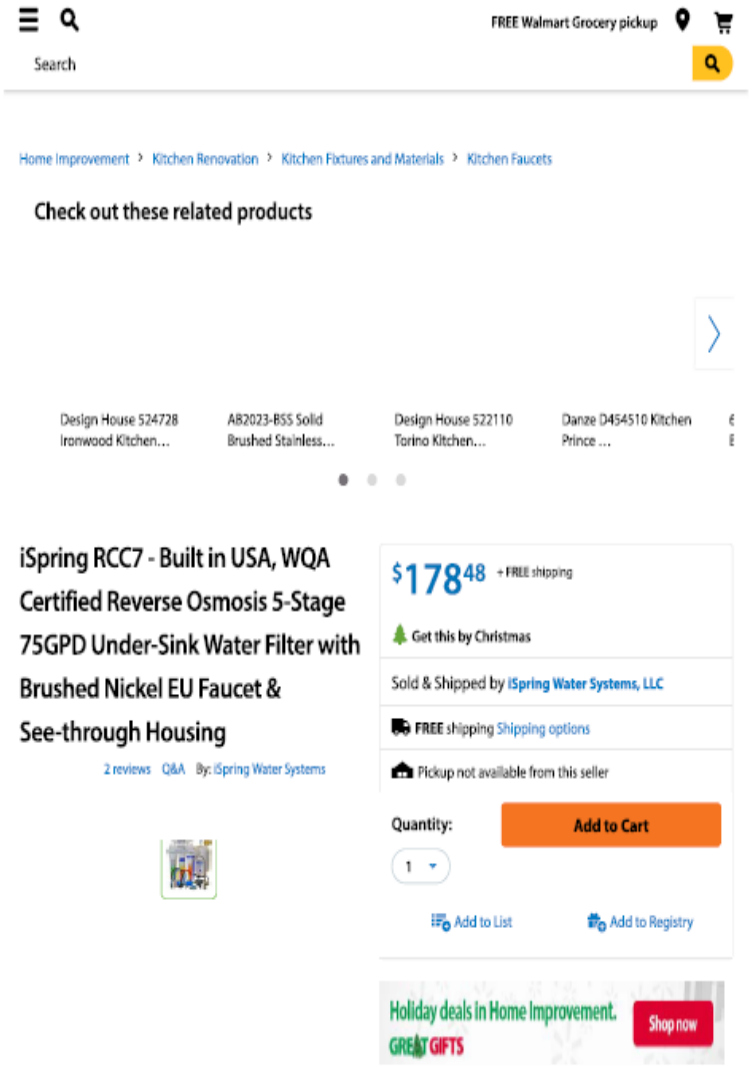



**Exhibit C**
**p. 7 of 11**

Complaint




FREE Walmart Grocery pickup
Search
Home Improvement › Kitchen Renovation › Kitchen Fixtures and Materials › Kitchen Faucets
Check out these related products
Design House 524728 Ironwood Kitchen...
AB2023-BSS Solid Brushed Stainless...
Design House 522110 Torino Kitchen...
Danze D454510 Kitchen Prince ...
iSpring RCC7 - Built in USA, WQA Certified Reverse Osmosis 5-Stage 75GPD Under-Sink Water Filter with Brushed Nickel EU Faucet & See-through Housing
2 reviews Q&A By: iSpring Water Systems
$178 48 + FREE shipping
Get this by Christmas
Sold & Shipped by iSpring Water Systems, LLC
FREE shipping Shipping options
Pickup not available from this seller
Quantity:
Add to Cart
Add to List
Add to Registry
Holiday deals in Home Improvement.
GREAT GIFTS
Shop now

iSpring RCC7 - Built in USA, WQA Certified Reverse Osmosis 5-Stage... http://purwaterfilters.org/product/ispring-rcc7-built-in-usa-wqa-certified-...

Complaint






Exhibit C
p. 10 of 11

iSpring RCC7 - Built in USA, WQA Certified Reverse Osmosis 5-Stage... http://purwaterfilters.org/product/ispring-rcc7-built-in-usa-wqa-certified-...

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comment 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

### Findings

1. Respondent is a Georgia limited liability company with its principal office or place of business at 3020 Trotters Parkway, Alpharetta, GA 30004.

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

## ORDER

### Definitions

For purposes of this Order, the following definitions apply:

A. "Clear(ly) and conspicuous(ly)" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Made in the United States" shall mean any representation, express or implied, that a product or service, or a specified component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," or "produced" in the United States, or any other U.S.-origin claim.

C. "Respondent" means iSpring Water Systems, LLC, also doing business as 123filter.com, and their successors and assigns.

## Provisions

### I.
### PROHIBITED MISREPRESENTATIONS

**IT IS ORDERED** that Respondent, and Respondent's officers, agents, 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 the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any water

filtration system or associated parts and accessories, or any other product or service, must not make any representation, expressly or by implication, that a product or service is Made in the United States unless:

A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or

B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

## II.
## SUBSTANTIATION

**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 product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service 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.
## ACKNOWLEDGMENTS OF THE ORDER

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

## IV.
## COMPLIANCE REPORTS AND NOTICES

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order

obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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: In re iSpring Water Systems, LLC.

## V.
## RECORDKEEPING

**IT IS FURTHER ORDERED** that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement or other marketing material making a representation subject to this Order; and

F. For 5 years from the date of the last dissemination of any representation covered by this Order:

1. All materials that were relied upon in making the representation; and

2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls 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.
## COMPLIANCE MONITORING

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VII.
## ORDER EFFECTIVE DATES

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on

April 6, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years; and

B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

*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 Provision 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 iSpring Water Systems, LLC. ("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 water filtration systems and associated parts and accessories with claims that the products are of U.S.-origin. According to the FTC's complaint, respondent represented that all of its products are "Built in USA." In fact, in many instances, respondent's products are wholly imported. In other instances, respondent sources significant inputs to its products from overseas.

The complaint alleges that respondent's claims that its products are "Built in USA" were false or misleading, or not substantiated at the time the representations were made. 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 prohibits iSpring from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

Part II prohibits respondent from making any "Made in the USA" or other country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Parts III through VI are reporting and compliance provisions. Part III requires respondent to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an

acknowledgement from each such person that they have received a copy of the order. Part IV requires the filing of compliance reports within one year after the order becomes final and within 14 days of any change in respondent that would affect compliance with the order. Part V requires respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part VI requires respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondent's personnel.

Finally, Part VII 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**

# SPYCHATTER, INC.

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

*Docket No. C-4614; File No. 162 3251*
*Complaint, April 12, 2017 – Decision, April 12, 2017*

This consent order addresses SpyChatter, Inc.'s representations made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The complaint alleges that SpyChatter falsely represented that it was a participant in the APEC CBPR system when, in fact, it never sought or obtained certification. The consent order prohibits SpyChatter from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR system.

*Participants*

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Alec Harshey, Law Offices of Alec Harshey.*

## COMPLAINT

The Federal Trade Commission ("Commission" or "FTC"), having reason to believe that SpyChatter, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent SpyChatter, Inc. is a California corporation with its principal office or place of business at 601 South Figueroa, Suite 4050, Los Angeles, CA 90017.

2. Respondent markets the SpyChatter app. This app is designed to enable private messaging.

3. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, http://www.spychatter.net/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system.

5. In fact, Respondent has not been certified to participate in the APEC CBPR system.

## APEC & the Cross-Border Privacy Rules

6. The APEC CBPR system is a self-regulatory initiative designed to facilitate the protection of consumer data transferred across the APEC region. The CBPR system requires participants to abide by the APEC Privacy Framework's nine information privacy principles: preventing harm, notice, collection limitation, use, choice, integrity, security safeguards, access and correction, and accountability. In the United States, the FTC enforces the CBPR system.

7. Companies that seek to participate in the CBPR system must undergo a review by an APEC-recognized accountability agent to establish compliance with the CBPR program requirements. Companies undergo annual reviews to retain their status as certified CBPR participants. The names of certified companies are posted on a website, www.cbprs.org.

## Violations of Section 5 of the FTC Act

8. Respondent has disseminated or caused to be disseminated privacy policies and statements on http://www.spychatter.net/privacy-policy/, including, but not limited to, the following statements:

> All the information you provide may be transferred or accessed by entities around the world as described in this Privacy Policy. . . Please note that personal information, including the information

> provided regarding individuals who reside in a member state of the European Economic Area (EEA) and Switzerland is controlled by the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules System. [sic] Learn more at http://www.export.gov/safeharbor/index.asp.
> SpyChatter abides by the APEC CBPR system, which provide [sic] a framework for organizations to ensure protection of personal information transferred among participating APEC economies.

9. Through the means described in Paragraph 8, Respondent represented, directly or indirectly, expressly or by implication, that it is certified to participate in the APEC CBPR system.

10. In fact, Respondent is not and never has been certified to participate in the APEC CBPR system. Therefore, the representation set forth in Paragraph 9 is false or misleading.

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

**THEREFORE**, the Federal Trade Commission, this twelfth day of April, 2017, has issued this complaint against Respondent.

By the Commission.

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by

the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent SpyChatter has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comment 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 Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

## Findings

1. Respondent SpyChatter, Inc. is a California corporation with its principal office or place of business at 601 South Figueroa, Suite 4050, Los Angeles, CA 90017.

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

## ORDER

### Definitions

For purposes of this Order, the following definitions apply:

A. "Respondent" means SpyChatter, Inc., a corporation, and its successors and assigns.

B. "APEC CBPR" means the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules ("CBPR") system.

### Provisions

### I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

**IT IS ORDERED** that Respondent and its officers, agents, 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 the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including APEC CBPR.

### II. Acknowledgments of the Order

**IT IS FURTHER ORDERED** that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC

managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reporting. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

## III. Compliance Report and Notices

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that

Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *SpyChatter, Inc.*, FTC File No. 1623251.

## IV. Recordkeeping

**IT IS FURTHER ORDERED** that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for 5 (five) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each unique advertisement, promotional material, or other marketing material making any representation subject to this Order, and all materials that were relied upon in making the representation.

## V. Compliance Monitoring

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory

process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VI. Order Effective Dates

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on April 12, 2037, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) 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 Provision 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 Provision. If such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order as to Respondent will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to SpyChatter, Inc. ("SpyChatter").

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 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false representations that SpyChatter made to consumers concerning its participation in the Asia-Pacific Economic Cooperation ("APEC") Cross Border Privacy Rules ("CBPR") system. The APEC CBPR system is a voluntary, enforceable mechanism that certifies a company's compliance with the principles in the CBPR and facilitates privacy-respecting transfers of data amongst APEC member economies. The APEC CBPR system is based on nine data privacy principles: preventing harm, notice, collection limitation, use choice, integrity, security safeguards, access and correction, and accountability. Companies that seek to participate in the APEC CBPR system must undergo a review by an APEC-recognized Accountability Agent, which certifies companies that meet the standards.

Companies under the FTC's jurisdiction are eligible to apply for APEC CBPR certification. The names of certified companies are posted on a public-facing website, www.cbprs.org. Companies must re-apply annually in order to retain their status as current participants in the APEC CBPR system. A company that falsely claims APEC CBPR participation may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

SpyChatter is an app that is designed to enable private messaging. According to the Commission's complaint, SpyChatter has set forth on its website, http://www.spychatter.net/privacy-

policy/, privacy policies and statements about its practices, including statements related to its participation in the APEC CBPR system.

The Commission's complaint alleges that SpyChatter falsely represented that it was a participant in the APEC CBPR system when, in fact, it never sought or obtained certification.

Part I of the proposed order prohibits SpyChatter from making misrepresentations about its participation in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including, but not limited to, the APEC CBPR system.

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

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

Complaint

**IN THE MATTER OF**

# BLOCK DIVISION, INC.

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

*Docket No. C-4613; File No. 172 3052*
*Complaint, April 12, 2017 – Decision, April 12, 2017*

This consent order addresses Block Division, Inc.'s marketing, sale, and distribution of pulley blocks and other products with claims that the products are of U.S.-origin. The complaint alleges that respondent's claims that its products are "Made in USA" were false or misleading, or not substantiated at the time the representations were made, which is in violation of Section 5(a) of the FTC Act. The consent order prohibits Block Division, Inc. from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

*Participants*

For the *Commission*: *Julia Solomon Ensor.*

For the *Respondent*: *Staci Pirnar, Bellinger & Suberg, LLP.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Block Division, Inc., a corporation ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Block Division, Inc. ("Block Division") is a Texas corporation with its principal place of business at 618 Front St., Wichita Falls, TX 76301.

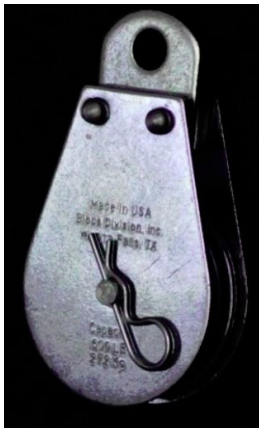
2. Respondent advertises, labels, offers for sale, and distributes products to consumers, including, but not limited to, pulley blocks. Respondent advertises these products on its

website, in stores, at trade shows, through social media, and through flyers and pamphlets. Respondent offers for sale, sells, and distributes its products throughout the United States.

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.

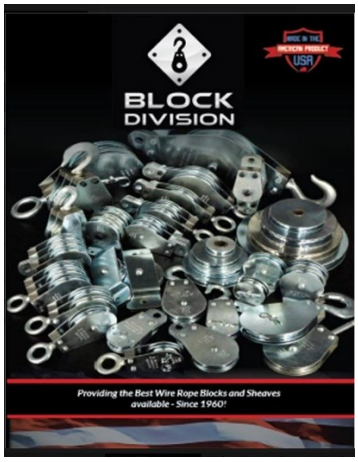
4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for its products. These materials contain the following statements, among others:

a. "Made in USA"




(Product photograph; Facebook ad); and

b. "Made in the USA American Product"




(Block Division catalogue).

5. In numerous instances, including, but not limited to, in the promotional materials referenced in Paragraph 4, Respondent has represented, expressly or by implication, that its pulley blocks and other products are all or virtually all made in the United States.

6. In fact, Respondent's pulley blocks and other products incorporate significant imported parts essential to the function of Respondent's products. Among other things, for a period of several years, Respondent's pulleys incorporated imported steel plates that entered the United States from overseas already stamped "Made in USA."

7. Therefore, Respondent's claims that its products are made in the United States deceive consumers.

**COUNT I (False or Unsubstantiated Representation)**

8. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of its products, Respondent has represented, directly or indirectly, expressly or by implication, that such products, including the parts used to make such products, are all or virtually all made in the United States.

9. In fact, in many instances, Respondent's products include significant imported parts, and those parts are essential to the function of Respondent's pulley blocks. Therefore, the representation set forth in Paragraph 8 is false or misleading, or was not substantiated at the time the representation was made.

**VIOLATION OF SECTION 5**

10. 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 twelfth day of April, 2017, has issued this Complaint against Respondent.

By the Commission.

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments, pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

### Findings

1. Respondent is a Texas corporation with its principal place of business at 618 Front St., Wichita Falls, TX 76301.

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

## ORDER

### Definitions

For purposes of this Order, the following definitions apply:

A. "Clear(ly) and conspicuous(ly)" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable (i.e., must be presented and visible alongside any claim).

5. On a product label, the disclosure must be presented on the same display panel as the claim being qualified.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Made in the United States" shall mean any representation, express or implied, that a product or service, or a specified component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," or "produced" in the United States, or any other U.S.-origin claim.

C. "Respondent" means Block Division, Inc.

## Provisions

## I.
## PROHIBITED MISREPRESENTATIONS

**IT IS ORDERED** that Respondent, and Respondent's officers, agents, 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 the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any pulley blocks, or any other product or service, must not make any representation, expressly or by implication, that a product or service is Made in the United States unless:

A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or

B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

## II.
## SUBSTANTIATION

**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 product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service 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.
## ACKNOWLEDGMENTS OF THE ORDER

**IT IS FURTHER ORDERED** that Respondent obtains acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, and directors; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

## IV.
## COMPLIANCE REPORTS AND NOTICES

**IT IS FURTHER ORDERED** that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order

obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must 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: In re Block Division, Inc.

## V.
## RECORDKEEPING

**IT IS FURTHER ORDERED** that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and, if related to the subject matter of this Order, the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement or other marketing material making a representation subject to this Order; and

F. For 5 years from the date of the last dissemination of any representation covered by this Order:

1. All materials that were relied upon in making the representation; and

2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls 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.
## COMPLIANCE MONITORING

**IT IS FURTHER ORDERED** that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

## VII.
## ORDER EFFECTIVE DATES

**IT IS FURTHER ORDERED** that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on

April 12, 2037, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years; and

B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

*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 Provision 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 Block Division, 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.

Analysis to Aid Public Comment

This matter involves respondent's marketing, sale, and distribution of pulley blocks and other products with claims that the products are of U.S.-origin. According to the FTC's complaint, respondent represented that its products are "Made in USA." In fact, respondent's products incorporate significant imported parts, including imported steel pulley plates that entered the United States from overseas already stamped "Made in USA."

The complaint alleges that respondent's claims that its products are "Made in USA" were false or misleading, or not substantiated at the time the representations were made. 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 prohibits Block Division, Inc. from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

Part II prohibits respondent from making any "Made in USA" or other country-of-origin claim about a product or service unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Parts III through VI are reporting and compliance provisions. Part III requires respondent to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part IV requires the filing of compliance reports within one year after the order becomes final and within 10 days of any change in respondent that would affect compliance

with the order. Part V requires respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part VI requires respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview respondent's personnel.

Finally, Part VII 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**

# DAVITA INC.;
# RV MANAGEMENT CORP.;
# RENAL VENTURES PARTNERS, LLC;
# RENAL VENTURES LIMITED, LLC;
# AND
# RENAL VENTURES MANAGEMENT, LLC

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

*Docket No. C-4616; File No. 151 0204*
*Complaint, May 19, 2017 – Decision, May 19, 2017*

This consent order addresses the $358 million acquisition by DaVita, Inc. of certain assets of Renal Ventures Management, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the provision of outpatient dialysis services in seven markets. The consent order requires DaVita to divest seven dialysis clinics in seven markets across the United States.

*Participants*

For the *Commission*: *Lisa D. DeMarchi Sleigh* and *Sarah Wohl.*

For the *Respondents*: *Joel Grosberg* and *Greg Heltzer, McDermott Will & Emery; Allen P. Grunes, The Konkkurrenz Group.*

## 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 believe that the Respondent DaVita, Inc. ("DaVita"), a company subject to the jurisdiction of the Commission, has entered into an agreement to acquire all of the equity interest of Renal Ventures Management, LLC from Renal Ventures Limited, LLC, which is owned by RV Management Corp. and Renal Ventures Partners,

LLC (together, "Renal Ventures"), a company 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. DEFINITIONS

1. "Dialysis" means the filtering of a person's blood, inside or outside of the body, to replicate the functions of the kidney.

2. "ESRD" means end stage renal disease, a chronic disease characterized by a near total loss of function of the kidneys, which in healthy people remove toxins and excess fluid from the blood.

3. "Outpatient dialysis services" means all procedures and services related to administering chronic dialysis treatment.

## II. RESPONDENTS

4. Respondent DaVita 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 2000 16th Street, Denver, Colorado 80202. Respondent DaVita, among other things, is engaged in the provision and sale of outpatient dialysis services.

5. Respondent Renal Ventures Partners, LLC ("RV Partners") is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office located at 1626 Cole Boulevard, Lakewood, Colorado 80401.

6. Respondent RV Management Corp. ("RV Corp") 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 1626 Cole Boulevard, Lakewood, Colorado 80401.

7. Respondent Renal Ventures Limited, LLC ("RVL") is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office located at 1626 Cole Boulevard, Lakewood, Colorado 80401. RV Corp. and RV Partners own all of the issued and outstanding equity interests of RVL. RVL owns all of the issued and outstanding equity interests of Renal Ventures Management, LLC.

8. Respondent Renal Ventures Management, LLC ("RV Management") is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office located at 1626 Cole Boulevard, Lakewood, Colorado 80401. RV Management, among other things, is engaged in the provision and sale of outpatient dialysis services as Renal Ventures.

9. Each Respondent is, and at all times herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## III. THE PROPOSED ACQUISITION

10. Pursuant to a Membership Interest Purchase Agreement between DaVita and Renal Ventures dated August 17, 2015, including subsequent amendments ("Agreement"), DaVita will acquire all of the issued and outstanding equity interests in Renal Ventures in a transaction valued at approximately $358 million (the "Acquisition").

## IV. THE RELEVANT MARKET

11. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of outpatient dialysis services. Most ESRD patients receive dialysis treatment three times per week in sessions lasting between three and five hours, while some patients receive treatment at home so they visit the clinic less frequently. ESRD is fatal if not treated with dialysis. The only alternative to dialysis treatment for patients suffering from ESRD is a kidney transplant.

However, the wait time for donor kidneys, during which ESRD patients must receive dialysis treatment, can exceed three years. Additionally, many ESRD patients are not viable transplant candidates. As a result, many ESRD patients have no alternative to dialysis treatment.

12. The distance ESRD patients will or can travel to receive dialysis treatments defines the outer boundaries of the relevant geographic markets for the provision of outpatient dialysis services. Because ESRD patients often suffer from multiple health problems and may require assistance traveling to and from the dialysis clinic, these patients will not or cannot travel long distances to receive dialysis treatment. As a general rule, ESRD patients travel no more than thirty miles or thirty minutes to receive dialysis treatment, although travel times and distances vary depending on geographic barriers, travel patterns, and whether an area is urban, suburban, or rural.

13. For the purposes of this Complaint, the seven geographic markets within which to assess the competitive effects of the proposed merger are in the following metropolitan statistical areas ("MSAs") or particular geographic areas contained within them: (1) Denton and Frisco, Texas in the Dallas-Fort Worth-Arlington MSA; (2) Brick, Clifton, Somerville, and Succasunna, New Jersey in the New York-Newark-Jersey City, NY-NJ-PA MSA; and (3) Trenton, NJ in the Trenton, NJ MSA.

## V. THE STRUCTURE OF THE MARKET

14. The market for the provision of outpatient dialysis services is highly concentrated in the seven local areas identified in Paragraph 13. The proposed Acquisition would further increase concentration levels, resulting in a merger to monopoly in one market, and reducing the number of providers from three to two in six markets.

15. DaVita and Renal Ventures directly and substantially compete in the relevant markets.

## VI. ENTRY CONDITIONS

16. The most significant barrier to entry into the relevant markets is engaging a nephrologist with an established referral base to serve as the clinic's medical director. By law, each dialysis clinic must have a nephrologist medical director. The medical director is also essential to the competitiveness of the clinic because he or she is the clinic's primary source of referrals. The lack of unaffiliated nephrologists with an established referral stream is a significant barrier to entry into the relevant geographic markets identified in Paragraph 13. Additionally, other things being equal, an area must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry. The absence of these attributes is an additional impediment to entry into each of the relevant geographic markets.

17. New entry into the relevant markets sufficient to deter or counteract the anticompetitive effects described in Paragraph 18 is unlikely to occur, and would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

## VII. EFFECTS OF THE ACQUISITION

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

a. eliminating actual, direct, and substantial competition between DaVita and Renal Ventures in the market for the provision of outpatient dialysis services;

b. increasing the ability of the merged entity unilaterally to raise prices for outpatient dialysis services; and

c. reducing incentives to improve service or quality in the relevant market.

## VIII. VIOLATIONS CHARGED

19. The Agreement described in Paragraph 10 constitutes a violation of Section 5 of the FTC 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 FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this nineteenth day of May, 2017, issues its Complaint against said Respondents.

By the Commission.

## DECISION AND ORDER
**[Public Record Version]**

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by DaVita Inc. of Renal Ventures Management, LLC from Renal Ventures Limited, LLC, which is owned by RV Management Corp. and Renal Ventures Partners, LLC (collectively "Respondents"), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid

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

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

1. DaVita Inc. is a Delaware corporation, with its office and principal place of business located at 2000 16th Street, Denver, CO 80202.

2. Respondent Renal Ventures Management, 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 corporate head office located at 1626 Cole Boulevard, Suite 100, Lakewood, Colorado 80401.

3. Respondent Renal Ventures Limited, 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 corporate head office located at 1626 Cole Boulevard, Suite 100, Lakewood, Colorado 80401.

4. Respondent Renal Ventures Partners, 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 corporate head office located at

1626 Cole Boulevard, Suite 100, Lakewood, Colorado 80401.

5. Respondent RV Management Corp. is a Delaware corporation, with its office and principal place of business located at 1626 Cole Boulevard, Suite 100, Lakewood, Colorado 80401.

6. 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, the following definitions shall apply:

A. "DaVita" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, DaVita will include Renal Ventures Management.

B. "Renal Ventures" means RV Management Corp. and Renal Ventures Partners, LLC, their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups, and affiliates controlled by RV Management Corp. and Renal Ventures Partners, LLC, including Renal Ventures Limited, LLC and Renal Ventures Management, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, RV Management Corp., Renal Ventures Partners, LLC, and Renal Ventures Limited, LLC will remain independent of DaVita.

C. "Renal Ventures Limited" means Renal Ventures Limited, LLC, the limited liability company that, before the Acquisition, owned Renal Ventures Management.

D. "Renal Ventures Management" means Renal Ventures Management, LLC, the limited liability company that, before the Acquisition, owned and operated the Renal Ventures Clinics.

E. "Respondents" means DaVita and Renal Ventures.

F. "Commission" means the Federal Trade Commission.

G. "Acquirer(s) means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

H. "Acquisition" means DaVita's acquisition of Respondent Renal Ventures Management.

I. "Acquisition Date" means the date on which the Acquisition is consummated.

J. "DaVita Joint Venture Equity Interests" means the joint venture equity interest owned by DaVita in (1) DaVita Denton Dialysis, located at 3305 Unicorn Lake Blvd., Denton, TX 76210-0102; and (2) DaVita Lawrenceville Dialysis, located at 1840 Princeton Avenue, Lawrenceville, NJ 08648.

K. "Brick, NJ Area" means the area in and around Brick, NJ, consisting of the zip codes and areas described in Appendix B to this Order.

L. "Clifton, NJ Area" means the area in and around Clifton, NJ, consisting of zip codes and areas described in Appendix B to this Order.

M. "Clinic" means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

N. "Clinic's Physician Contracts" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.

O. "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, policies and procedures, processes, or other trade secrets.

P. "Contract Services" means services performed pursuant to any Clinic's Physician Contract.

Q. "DaVita Clinics" or "DaVita Clinic" means any one, or all of following:

1. DaVita Frisco Dialysis, located at 6116 Sports Village Road, Frisco, TX 75033;

2. DaVita Hackettstown Dialysis, located at 657 Willow Grove St., 1st Floor West Wing, Suite 202, Hackettstown, NJ 07840; and

3. DaVita Joint Venture Equity Interests.

R. "DaVita Clinic Assets" and "Renal Ventures Clinic Assets" mean the following assets Relating To the Operation Of A DaVita Clinic or the Operation of a Renal Ventures Clinic, respectively:

1. all rights under the Clinic's Physician Contracts;

2. leases for the Real Property of the Clinics;

3. consumable or disposable inventory consistent with the ordinary course of business at the Clinics including, but not limited to, janitorial, office, medical supplies, dialysis supplies, and pharmaceuticals including, but not limited to, erythropoietin;

4. all rights, title, and interest in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since June 1, 2016, including, but not limited to, all equipment, furnishings, fixtures, improvements, and appurtenances, other than items that have been discarded or replaced in the Ordinary Course of Business;

5. all books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of A DaVita Clinic and the Operation of A Renal Ventures Clinic located on the premises of the DaVita Clinic or the Renal Ventures Clinic or in the possession of a regional manager (or the equivalent) or other executive specifically overseeing or responsible for such Clinic (or copies thereof where Respondents have a legal obligation to maintain the original document) including, but not limited to:

a. documents containing information Relating To patients (to the extent transferable under

applicable law), including, but not limited to, medical records,

b. financial records,

c. personnel files and information Relating To Designated Employees,

d. physician lists and other records of the clinic's dealings with physicians,

e. maintenance records,

f. documents Relating To DaVita Policies and Procedures and Renal Ventures Policies and Procedures,

g. documents Relating To quality control,

h. documents Relating To Payors,

i. documents Relating To suppliers,

j. documents Relating To the Clinics that are also related to the Operation Of Clinics other than the DaVita Clinics or the Renal Ventures Clinics, *provided, however,* if such documents are located other than on the premises of the DaVita Clinics or the Renal Ventures Clinics, Respondents may divest a copy of the document with the portions not Relating To the DaVita Clinics or the Renal Ventures Clinics redacted, and

k. copies of contracts with Payors and Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Respondents to make such disclosure.

6. Respondents' Medicare and Medicaid provider numbers, to the extent transferable;

7. all permits and licenses, to the extent transferable;

8. DaVita Policies and Procedures and Renal Ventures Policies and Procedures, if such Policies and Procedures are used exclusively in the DaVita Clinics or Renal Ventures Clinics, respectively;

9. Intangible Property relating exclusively to the Operation Of A DaVita Clinic or the Operation of a Renal Ventures Clinic; and

10. Any other assets that are used in, or necessary for, the Operation Of A Clinic.

*Provided, however,* that "assets Relating To the Operation Of A DaVita Clinic or the Operation of a Renal Ventures Clinic" does not include Excluded Assets.

S. "DaVita Medical Protocols" means medical protocols promulgated by DaVita, whether in hard copy or electronic copy, that have been in effect at a DaVita Clinic at any time since January 1, 2016*, provided, however*, " DaVita Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by DaVita.

T. "DaVita Policies and Procedures" means the dialysis policies and procedures manual promulgated by DaVita, whether in hard copy or electronic copy, that have been in effect at a DaVita Clinic, at any time since January 1, 2016.

U. "Denton, TX Area" means the area in and around Denton, TX, consisting of the zip codes and areas described in Appendix B to this Order.

V. "Designated Employee" means (1) an Employee Of A DaVita Clinic, (2) an Employee Of A Renal Ventures Clinic, and (3) any of the additional DaVita, Renal

Ventures Management, or Renal Ventures Limited employees or persons who occupy the job descriptions listed in Non-Public Appendix C to this Order.

W. "Divestiture Trustee" means the person appointed to act as Trustee by the Commission pursuant to Paragraph II.A or Paragraph V of this Order.

X. "Employee Of A DaVita Clinic" and "Employee Of The DaVita Clinic" mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, dietician, or social worker) who is employed by DaVita, by an Acquirer, or by another manager or owner of such DaVita Clinic, and who has worked part-time or full-time on the premises of such DaVita Clinic at any time since January 1, 2016**,** regardless of whether the individual has also worked on the premises of any other Clinic.

Y. "Employee Of A Renal Ventures Clinic" and "Employee Of The Renal Ventures Clinic" mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, dietician, or social worker) who is employed by Renal Ventures Management or Renal Ventures Limited, by an Acquirer, or by another manager or owner of such Renal Ventures Clinic, and who has worked part-time or full-time on the premises of such Renal Ventures Clinic at any time since January 1, 2016, regardless of whether the individual has also worked on the premises of any other Clinic.

Z. "Excluded Assets" means:

1. all cash, cash equivalents, and short term investments of cash;

2. accounts receivable;

3. income tax refunds and tax deposits due to Respondents;

4. unbilled costs and fees, and bad debt recovery claims against any Payor including Medicare, arising before a Clinic is divested to an Acquirer;

5. rights to the names "DaVita" and "Renal Ventures" and any variation of those names (unless otherwise licensed to an Acquirer pursuant to the Order) and other copyrights, trademarks, trade names, service marks, and logos Relating To the "DaVita" and "Renal Ventures" names;

6. insurance policies and all claims thereunder;

7. prepaid expenses;

8. minute books (other than governing body minute books of a Clinic), tax returns, and other corporate books and records;

9. any inter-company balances due to or from Respondents or their affiliates;

10. all 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 A Clinic;

12. telecommunication systems equipment and applications, and information systems equipment including, but not limited to, computer hardware not physically located at a DaVita Clinic or Renal Ventures Clinic but shared with the DaVita Clinic or Renal Ventures Clinic, respectively, through local and/or wide area networking systems;

13. computer hardware used in the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic that is (a) not located at the Clinic,

and (b) not otherwise to be divested pursuant to a Remedial Agreement;

14. all DaVita or Renal Ventures proprietary software;

15. e-mail addresses with the DaVita or Renal Ventures domain names;

16. all Supplier or provider numbers issued to Respondents by a Supplier or Payor with respect to any DaVita Clinic or Renal Ventures Clinic, except for Respondents' Medicare and Medicaid provider numbers for each DaVita Clinic or Renal Ventures Clinic;

17. rights under agreements with Payors that do not relate exclusively to the DaVita Clinics or Renal Ventures Clinics, or that are not assignable even if Respondents approve such assignment;

18. rights under agreements with Suppliers that do not relate exclusively to the DaVita Clinics or Renal Ventures Clinics, or that are not assignable even if Respondents approve such assignment;

19. office equipment and furniture that (a) is not, in the Ordinary Course of Business, physically located at the DaVita Clinic or Renal Ventures Clinic, (b) is shared with Clinics other than the DaVita Clinic or Renal Ventures Clinic, and (c) is not necessary to the Operation Of The DaVita Clinic or Operation Of The Renal Ventures Clinic;

20. Licensed Intangible Property;

21. DaVita Medical Protocols and Renal Ventures Medical Protocols, subject to the licensing provisions in this Order;

22. Contracts to which Respondents or their affiliates (other than the DaVita Clinics or Renal Ventures Clinics) are a party and are not otherwise included

in the DaVita Clinic Assets or Renal Ventures Clinic Assets; and

23. strategic planning documents that:

    a. relate to the Operation Of A Clinic other than a DaVita Clinic or a Renal Ventures Clinic, and

    b. are not located on the premises of a DaVita Clinic or Renal Ventures Clinic.

AA. "Frisco, TX Area" means the area in and around Frisco, TX, consisting of the zip codes and areas described in Appendix B to this Order.

BB. "Governmental Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

CC. "Hackettstown, NJ Area" means the area in and around Hackettstown, NJ, consisting of the zip codes and areas described in Appendix B to this Order.

DD. "Intangible Property" means intangible property Relating To the Operation Of A DaVita Clinic or Renal Ventures Clinic including, but not limited to, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property. For purposes of this Order, Intangible Property does not include DaVita Medical Protocols, Renal Ventures Medical Protocols, DaVita Policies and Procedures, and Renal Ventures Policies and Procedures.

EE. "Lawrenceville, NJ Area" means the area in and around Lawrenceville, NJ, consisting of the zip codes and areas described in Appendix B to this Order.

FF. "Licensed Intangible Property" means intangible property licensed to Respondents from a third party Relating To the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic including, but not limited to, software, computer programs (including, but not limited to, electronic medical record systems), 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 Respondents. ("Licensed Intangible Property" does not mean modifications and improvements to Intangible Property that are not licensed to Respondents.)

GG. "Operation Of A Clinic," "Operation Of A DaVita Clinic," and "Operation Of A Renal Ventures Clinic" mean all activities Relating To the business of a Clinic, a DaVita Clinic, or a Renal Ventures Clinic, respectively, including, but not limited to:

1. attracting patients to such Clinic for dialysis services, providing dialysis services to patients of such Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of such Clinic;

3. maintaining the equipment on the premises of such Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;

4. purchasing supplies and equipment for such Clinic;

5. negotiating leases for the premises of such Clinic;

6. providing counseling and support services to patients receiving products or services from such Clinic;

7. contracting for the services of medical directors for such Clinic;

8. dealing with Payors, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and

9. dealing with Governmental Approvals Relating To such Clinic or that otherwise regulate the Clinic.

HH. "Ordinary Course of Business" means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of A Clinic that is consistent with past practices of such Person in the Operation Of A Clinic, including, but not limited to past practice with respect to amount, timing, and frequency.

II. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

JJ. "PDA" means PDA-GMF HOLDCO, LLC, a partnership between Physicians Dialysis and GMF Capital LLC. Physicians Dialysis is a Florida-based healthcare provider focused on the dialysis industry. GMF Capital LLC is a real estate and healthcare private equity firm with offices in Zurich and New York City.

KK. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

LL. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

MM. "Real Property" means the real property on which, or in which, the DaVita Clinic or Renal Ventures Clinic is located, including real property used for parking and for other functions Relating To the Operation Of A DaVita Clinic or Relating To the Operation Of A Renal Ventures Clinic.

NN. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively or primarily to.

OO. "Remedial Agreement" means the following:

1. The DaVita-PDA Divestiture Agreement, and

2. any agreement between a Respondent and an Acquirer, including all amendments, exhibits, attachments, and schedules thereto, Relating To the DaVita Clinics or DaVita Clinic Assets or the Renal Ventures Clinics or the Renal Ventures Clinic Assets, that has been approved by the Commission to accomplish the requirements of this Order.

PP. "Renal Ventures Clinic" or "Renal Ventures Clinics" means any one, or all of the following:

1. Renal Center of Passaic, LLC, located at 10 Clifton Boulevard, Suite 1, Clifton, NJ 07011;

2. Renal Center of Brick, LLC, located at 150 Brick Boulevard, Brick, NJ 08723; and

3. Renal Center of Somerville, LLC, located at 1 Route 206 North, Somerville, NJ 08876.

QQ. "Renal Ventures Medical Protocols" means medical protocols promulgated by Renal Ventures Management or Renal Ventures Limited, whether in hard copy or electronic copy, that have been in effect at a Renal Ventures Clinic at any time since January 1, 2016, *provided, however*, "Renal Ventures Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by Renal Ventures.

RR. "Renal Ventures Policies and Procedures" means the dialysis policies and procedures manual promulgated by Renal Ventures Management or Renal Ventures Limited, whether in hard copy or electronic copy, that have been in effect at a Renal Ventures Clinic, at any time since January 1, 2016.

SS. "DaVita-PDA Divestiture Agreement" means the following agreements, attached as Non-Public Appendix A to this Order including, but not limited to, the Amended and Restated Asset Purchase Agreement dated February 27, 2017, by and among DaVita and PDA, and all attachments and exhibits, thereto, and the Transition Services Agreement, which is an exhibit to the Asset Purchase Agreement, by and between DaVita and PDA, and all attachments and exhibits, thereto.

TT. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

UU. "Somerville, NJ Area" means the area in and around Somerville, NJ, consisting of the zip codes and areas described in Appendix B to this Order.

VV. "Supplier" means any Person that has sold to Respondents any goods or services, other than Physician services, for use in a DaVita Clinic or Renal Ventures Clinic.

WW. "Time of Divestiture" means the date upon which the DaVita Clinics, the DaVita Clinic Assets, the Renal Ventures Clinics, and Renal Ventures Clinic Assets are divested to an Acquirer pursuant to this Order.

## II.

**IT IS FURTHER ORDERED** that:

A. DaVita shall, within ten (10) days after the Acquisition Date, divest to PDA, absolutely, and in good faith, pursuant to and in accordance with the DaVita-PDA Divestiture Agreements, the DaVita Clinics, all the DaVita Clinic Assets, the Renal Ventures Clinics, and all the Renal Ventures Clinic Assets, as on-going businesses. Any failure by Respondents to comply with a Remedial Agreement shall constitute a failure to comply with this Order. The Remedial 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 an Acquirer, or any obligations of Respondents, under the Remedial Agreements.

*Provided, however*, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that PDA is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondents shall immediately notify PDA 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 DaVita-PDA Divestiture Agreement; and (2) Respondents shall, within six (6) months of the date Respondents receive notice of such determination from the Commission, divest the DaVita Clinic Assets and the Renal Ventures Clinic Assets, as applicable,

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 that receives the prior approval of the Commission.

*Provided further, however*, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondents, or appoint a 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.

B. DaVita shall not acquire Respondent Renal Ventures Management until it has obtained for all the DaVita Clinics and Renal Ventures Clinics:

1. all approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for Real Property of each DaVita Clinic and each Renal Ventures Clinic;

2. all approvals for the assignment to the Acquirer of the DaVita Clinics' Physician Contracts and the Renal Ventures Clinics' Physician Contracts; and

3. all Governmental Approvals.

C. With respect to DaVita's Medical Protocols, DaVita shall:

1. Grant to Acquirer, absolutely, and in good faith, a worldwide, royalty-free, license (without the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means) for the use of the DaVita Medical Protocols at any dialysis clinic owned by Acquirer, for a

period of six (6) months from the Acquisition Date;

2. If any Acquirer requests in writing to DaVita within six (6) months of the Time of Divestiture that DaVita extend the license for the DaVita Medical Protocols to that Acquirer, DaVita shall, within five (5) business days of such request, grant to that Acquirer a perpetual, worldwide, royalty-free, license (without the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means), for the use of DaVita's Medical Protocols *provided, however*, that any time after six (6) months from the Time of Divestiture, if the Acquirer is sold, or if any of the Acquirer's clinics are sold, the Acquirer may transfer or sublicense the DaVita Medical Protocols as part of such transaction or transactions; and

3. DaVita shall create no disincentive for any Acquirer to make such a request for a license extension for DaVita's Medical Protocols, and shall not enter into any agreement or understanding with any Acquirer that the Acquirer not make such a request.

D. With respect to the Renal Ventures Medical Protocols, DaVita shall grant to the Acquirer royalty-free, worldwide non-exclusive licenses for the use, without any limitation, of the Renal Ventures Medical Protocols (including the right to transfer or sublicense, exclusively or nonexclusively, to others by any means).

E. With respect to Renal Ventures Policies and Procedures and the DaVita Policies and Procedures <u>not used exclusively</u> at Renal Ventures Clinics or DaVita Clinics, respectively, DaVita shall grant to the Acquirer a royalty-free, perpetual, worldwide, non-exclusive, non-transferable (unless PDA is sold or any PDA Clinic is sold) and non-sublicensable license to

use, without any limitation, such Policies and Procedures.

F. With respect to Intangible Property not exclusively Relating To the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic, DaVita shall grant to the Acquirer a royalty-free, perpetual, worldwide, non-exclusive, non-transferable (unless PDA is sold or any PDA Clinic is sold) and non-sublicensable, license to use, without any limitation, all Intangible Property.

G. Respondents shall:

1. Place no restrictions on the use by any Acquirer of any of the DaVita Clinic Assets or Renal Ventures Clinic Assets to be divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the DaVita Clinic Assets or Renal Ventures Clinic Assets to be divested to such Acquirer including, but not limited to, seeking or requesting the imposition of Governmental Approvals or other governmental restrictions on the Acquirer's business operations Relating To such Clinics.

2. Assign to the Acquirer all of the Clinic's Physician Contracts for the DaVita Clinics and Renal Ventures Clinics. *Provided, however*, that (1) if the Acquirer enters into a Clinic Physician Contract for a DaVita Clinic or a Renal Ventures Clinic before such Clinics are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Remedial Agreement, then Respondents shall not be required to make the assignment for such Clinics as required by this Paragraph.

3. With respect to all contracts included in DaVita Clinic Assets and Renal Ventures Clinic Assets other than Clinic's Physician Contracts, at the

Acquirer's option and at the Time of Divestiture of each DaVita Clinic and Renal Ventures Clinic:

a. if such contract can be assigned without third party approval, assign Respondents' rights under the contract to the Acquirer; and

b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:

i. such third party approval and in assigning the contract to the Acquirer, or

ii. a new contract.

H. Respondents shall:

1. at the Time of Divestiture of each DaVita Clinic and Renal Ventures Clinic, provide to the Acquirer of such Clinic contact information about Payors and Suppliers for the Clinic, and

2. not object to the sharing of Payor and Supplier contract terms Relating To the DaVita Clinics and the Renal Ventures Clinics: (a) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (b) if the Acquirer enters into a confidentiality agreement with Respondents not to disclose the information to any third party.

I. Respondents shall:

1. If requested by an Acquirer, facilitate interviews between each Designated Employee and the Acquirer, and shall not discourage such employees from participating in such interviews;

2. not interfere in employment negotiations between each Designated Employee and an Acquirer;

3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated Employee from being employed by an Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with an Acquirer;

4. cooperate with an Acquirer of a DaVita Clinic or a Renal Ventures Clinic in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts such offer of employment from an Acquirer;

5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated Employee from being employed by an Acquirer;

6. eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to an Acquirer any information Relating To the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic; and

7. pay, for the benefit of any Designated Employee who accepts employment with an Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Respondents shall comply with the terms of this Paragraph II.I. from the time Respondents sign the Agreement Containing Consent Order until sixty (60) days after the Time of Divestiture of each DaVita Clinic and each Renal Ventures Clinic for the employees who are Designated Employees.

*Provided, however,* that if, at any time after the Time of Divestiture, the Acquirer of the DaVita Clinic Assets and the Renal Ventures Clinic Assets gives Respondents an unsolicited list of employees to whom the Acquirer does not intend to offer employment, then

such employees may be hired by DaVita as full-time employees without violating this Paragraph II.I.

*Provided further, however*, that no earlier than fifteen (15) days after the Time of Divestiture, Respondents may submit a written request to the Acquirer identifying those employees to whom DaVita wishes to offer full-time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then DaVita may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire such employees, or (ii) chooses to defer a hiring decision, then Respondents shall continue to comply with the terms of this Paragraph II.I, with regard to such employees.

J. For a period of two (2) years following the Time of Divestiture of each DaVita Clinic and each Renal Ventures Clinic, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any employees who are employed by any Acquirer to terminate their employment relationship with such Acquirer, unless that employment relationship has already been terminated by the Acquirer; *provided, however*, DaVita may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at any of an Acquirer's employees; *provided, further, however,* DaVita may hire employees who apply for employment with DaVita, as long as such employees were not solicited by DaVita in violation of this Paragraph.

K. With respect to each Physician who has provided services to a DaVita Clinic or Renal Ventures Clinic pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time of Divestiture of the Clinic ("Contract Physician"):

1. Respondents shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the DaVita Clinics and Renal Ventures Clinics acquired by the Acquirer, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the DaVita Clinics and the Renal Ventures Clinics any information Relating To the Operation Of A DaVita Clinic or Relating To the Operation Of A Renal Ventures Clinic; and

2. For a period of three (3) years following the Time of Divestiture of each DaVita Clinic and Renal Ventures Clinic, DaVita shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in the area listed in Appendix B of this Order that corresponds to such DaVita Clinic or Renal Ventures Clinic at which the Contract Physician provided Contract Services. *PROVIDED, HOWEVER*, if the Contract Physician, or the Contract Physician's practice group, or other members of the Contract Physician's practice group were providing services to a Clinic, other than at any of the DaVita Clinics or the Renal Ventures Clinics, pursuant to a contract with Respondents in effect as of June 1, 2016, then DaVita may contract with such Contract Physicians, or the Contract Physician's practice group, or other members of the Contract Physician's practice group for services to be provided to that particular Clinic.

L. Respondents shall:

1. not disclose Confidential Business Information relating exclusively to any of the DaVita Clinics or Renal Ventures Clinics to any Person other than the Acquirer of such Clinic; and

2. after the Time of Divestiture of such Clinic:

   a. shall not use Confidential Business Information relating exclusively to any of the DaVita Clinics or the Renal Ventures Clinics for any purpose other than complying with the terms of this Order, with any law, or purposes of billing and collections, quality incentive program performance management, patient outcomes, peer review and physician credentialing activities, or responding to any inquiry or action from a third party required by law; and

   b. shall destroy all records of Confidential Business Information relating exclusively to any of the DaVita Clinics and Renal Ventures Clinics, except to the extent that: (i) Respondents are required by law to retain such information, and (ii) DaVita's and Renal Ventures' inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of DaVita or Renal Ventures, respectively.

M. At the Time of Divestiture of each DaVita Clinic and Renal Ventures Clinic, Respondents shall provide the Acquirer of the Clinic with manuals, instructions, and specifications (other than Medical Protocols and Policies and Procedures that are otherwise referred to in this Order) sufficient for the Acquirer to access and use any information:

1. divested to the Acquirer pursuant to this Order, or

2. in the possession of the Acquirer, and previously used by Respondents in the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic.

N. For two (2) years following the Time of Divestiture of each DaVita Clinic and each Renal Ventures Clinic, DaVita shall not solicit the business of any patient who received any goods or services from such Clinic between July 1, 2016, and the date of such divestiture, *provided, however,* DaVita may (1) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (2) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any DaVita employee.

O. Respondents shall convey to the Acquirer of the DaVita Clinics and Renal Ventures Clinics the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of A DaVita Clinic or the Operation Of A Renal Ventures Clinic by the Acquirer, and if the Acquirer is unable, using commercially reasonable efforts, to obtain equivalent rights from other third parties on commercially reasonable terms and conditions.

P. Respondents shall do nothing to prevent or discourage Suppliers that, prior to the Time of Divestiture of any DaVita Clinic or any Renal Ventures Clinic, supplied goods and services for use in any such Clinic from continuing to supply goods and services for use in such Clinic. Additionally, Respondents shall use reasonable best efforts to assist the Acquirer in entering agreements with existing or new Suppliers if agreements cannot be assigned to the Acquirer.

Q. Respondents shall not terminate any transition services agreement that is a part of any Remedial Agreement before the end of the term approved by the Commission without prior approval of the Commission.

R. The purpose of Paragraph II of this Order is to ensure the continuation of the DaVita Clinics and the Renal Ventures Clinics as, or as part of, an ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the Acquisition, to ensure that the DaVita Clinics and the Renal Ventures Clinics are operated independently of, and in competition with, Respondents' clinics, and to remedy the lessening of competition alleged in the Commission's Complaint.

## III.

**IT IS FURTHER ORDERED** that:

A. For a period of ten (10) years from the date this Order is issued, DaVita shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

1. acquire any assets of or financial interest in any Clinic located in the Brick, NJ Area, Clifton, NJ Area, Denton, TX Area, Frisco, TX Area, Hackettstown, NJ Area, Lawrenceville, NJ Area, and Somerville, NJ Area; or

2. enter into any contract to participate in the management or Operation Of A Clinic located in the areas listed in Paragraph III.A.1., above, except to the extent that the contract relates exclusively to:

   a. off-site lab services or social worker support materials; or

   b. billing services, collection services, bookkeeping services, accounting services,

supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively "Such Services"), where appropriate firewalls and confidentiality agreements are implemented to prevent Confidential Business Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by DaVita or any Clinic other than the Clinic to which Such Services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, Relating To the proposed transaction (hereinafter referred to as "the Notification). *Provided, however,* (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from DaVita and not from any other party to the transaction. DaVita 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), DaVita shall not consummate the transaction until thirty 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.

## IV.

**IT IS FURTHER ORDERED** that:

A. Richard Shermer of R. Shermer & Co. shall be appointed Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order.

B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, attached as Appendix D and Non-Public Appendix E (Compensation) to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his 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 DaVita, which consent shall not be unreasonably withheld. If DaVita 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 DaVita of the identity of any proposed Monitor, DaVita 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, DaVita 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 DaVita's compliance with the terms of this Order, and the Remedial Agreements in a manner consistent with the purposes of this Order.

D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and the Remedial 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 Respondents expeditiously comply with all obligations and perform all responsibilities as required by this Order, and the Remedial Agreements;

   b. Monitoring any transition services agreements;

   c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirers, except as allowed in this Order.

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 Respondents' compliance with the provisions of this Order, and the Remedial Agreements.

4. Subject to any demonstrated legally recognized privilege, the 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 Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, and the Remedial Agreements. Respondents shall

cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, and the Remedial Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of DaVita on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of DaVita, 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. DaVita 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. DaVita 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 DaVita, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order, and the Remedial 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 Respondents of their obligations under this Order, and the Remedial Agreements.

9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement Relating To 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 IV.

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, and the Remedial Agreements.

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Trustee pursuant to Paragraph V of this Order.

## V.

**IT IS FURTHER ORDERED** that:

A. If DaVita has not divested, absolutely and in good faith and with the Commission's prior approval all of the DaVita Clinic Assets and the Renal Ventures Clinic Assets pursuant to Paragraph II of this Order, the Commission may appoint a Divestiture Trustee ("Trustee") to divest any of the DaVita Clinic Assets and the Renal Ventures Clinic Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II 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, DaVita 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 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 Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by DaVita to comply with this Order.

B. The Commission shall select the Trustee, subject to the consent of DaVita, which consent shall not be unreasonably withheld. The Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If DaVita has not opposed, in writing, including the reasons for opposing, the selection of any proposed Trustee within ten (10) days after receipt of notice by the staff of the Commission to DaVita of the identity of any proposed Trustee, DaVita shall be deemed to have consented to the selection of the proposed Trustee.

C. Within ten (10) days after the appointment of a Trustee, DaVita shall execute an 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.

D. If a Trustee is appointed by the Commission or a court pursuant to this Order, DaVita 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 DaVita Clinic Assets and the Renal Ventures Clinic Assets that have not been divested pursuant to Paragraph II of this Order.

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 a divestiture plan 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 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. DaVita shall develop such financial or other information as the Trustee may request and shall cooperate with the Trustee. DaVita shall take no action to interfere with or impede the Trustee's

accomplishment of the divestiture. Any delays in divestiture caused by DaVita 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 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 DaVita's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner that receives the prior approval of the Commission and to an Acquirer or Acquirers that receive the prior approval of the Commission, as required by this Order; *provided, however*, 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 DaVita from among those approved by the Commission; *provided, further, however*, that DaVita 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 DaVita, 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 DaVita, 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 paid at the direction of DaVita, 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. DaVita 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 DaVita and to the Commission every sixty (60) days concerning the Trustee's efforts to accomplish the divestiture.

9. DaVita 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.

E. 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 V.

F. 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.

G. The Trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.

## VI.

**IT IS FURTHER ORDERED** that:

A. From the date Respondents sign the Consent Agreement until the Time of Divestiture, Respondents shall:

1. Maintain each of the DaVita Clinics, the DaVita Clinic Assets, the Renal Ventures Clinics, and the Renal Ventures Clinic Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents sign the Consent Agreement;

2. Take such actions that are consistent with the past practices of Respondents Renal Ventures Management and Renal Ventures Limited in connection with each Renal Ventures Clinic and all the Renal Ventures Clinic Assets, and that are taken in the Ordinary Course of Business and in the normal day-to-day operations of the Renal Ventures Clinics;

3. Keep available the services of the current officers, employees, and agents of Respondents Renal Ventures Management and Renal Ventures Limited; and maintain the relations and goodwill with suppliers, Payors, physicians, landlords,

patients, employees, agents, and others having business relations with the Renal Ventures Clinics and the Renal Ventures Clinic Assets;

4. Preserve the DaVita Clinics, the DaVita Clinic Assets, the Renal Ventures Clinics, and the Renal Ventures Clinic Assets as ongoing businesses 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 DaVita Clinics, the DaVita Clinic Assets, the Renal Ventures Clinics, and the Renal Ventures Clinic Assets would be diminished; and

5. Not object to sharing with the Acquirer the Payor and Supplier contract terms Relating To the DaVita Clinics, the DaVita Clinic Assets, the Renal Ventures Clinics, and the Renal Ventures Clinic Assets: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondents not to disclose the information to any third party.

B. The purposes of this Paragraph VI are to: (1) preserve the DaVita Clinics and the Renal Ventures Clinics as viable, competitive, and ongoing businesses until the Time of Divestiture, (2) prevent interim harm to competition pending the relevant divestitures and other relief, and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

## VII.

**IT IS FURTHER ORDERED** that:

A. Beginning thirty (30) days after the date this Order is issued, and every sixty (60) days thereafter until Respondent DaVita has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., II.F., II.G.,

II.H., II.I., and II.M. of this Order, DaVita 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, and the Remedial Agreement. DaVita shall submit at the same time a copy of these reports to the Monitor.

B. Beginning twelve (12) months after the date this Order is issued, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, DaVita 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, and the Remedial Agreements including, but not limited to, an explanation of DaVita's use of Confidential Business Information pursuant to Paragraph II.L. of this Order. DaVita shall submit at the same time a copy of these reports to the Monitor, if the Monitor is still monitoring pursuant to this Order.

## VIII.

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

A. Any proposed dissolution of DaVita,

B. Any proposed acquisition, merger or consolidation of DaVita**,** or

C. Any other change in DaVita 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 DaVita.

## IX.

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

reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

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

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

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on May 19, 2027.

By the Commission.

**Non-Public Appendix A**
**Divestiture Agreement**

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

## APPENDIX B

## AREA DEFINITIONS

- Five digit numbers refer to zip codes.
- Geographic areas bounded by roads include all properties abutting the referenced road (*i.e.*, properties on both sides of the road).
- Zip codes or other areas fully surrounded by areas included in the area definition shall be considered part of the area definition.
- Area definitions are based on maps submitted to the Commission staff by DaVita.

| | **Divested Clinics (Medicare Provider Numbers)** | **Corresponding Area Definition** |
|---|---|---|
| 1 | RVM Brick | The area in and/or near Brick, New Jersey, consisting of: 07731,the portion of 08527 that lies to the south and east of Aldrich Road, Bennetts Mills Road, and West Veterans Highway, the portion of 08533 that lies to the east of Hawkin Road and to the south of West Veterans Highway, 08701, 08720, 08723, 08724, 08732, the portion of 08733 that lies to the east of Hawkin Road and Route 539, 08735, 08738, 08742, 08751, 08753, 08755, 08757, and the portion of 08759 that lies to the east of Route 539 and north of Route 530. |
| 2 | RVM Clifton | The area in and/or near Clifton, New Jersey, consisting of: 07011, 07012, 07013, 07014, 07055, 07424, 07501, 07503, 07504, 07505, 07513, 07514, and 07524. |

| | | |
|---|---|---|
| 3 | DVA Hackettstown | The area in and/or near Hackettstown, New Jersey, consisting of: 07821, 07825, 07828, 07836, 07838, 07840, 07847, 07850, 07852, 07853, 07856, 07857, 07863, 07865, 07876, 07874, and 07930. |
| 4 | DVA Lawrenceville | The area in and/or near Lawrence Township, New Jersey, consisting of: 08608, 08609, 08610, 08611, 08618, 08619, the portion of 08620 that lies to the west of Interstate 95, 08628, 08629, 08638, 08648, 08690, and the portion of 08691 that lies to the west of Interstate 95. |
| 5 | RVM Somerville | The area in and/or near Somerville, New Jersey, consisting of: 07059, the portion of 07920 that lies to the south of Interstate 78, 07921, 08805, 08807, 08812, 08835, 08836, 08844, 08846, 08853, 08854, 08869, the portion of 08873 that lies north of Amwell Road and west of Demott Lane, 08876, and 08880. |
| 6 | DVA Denton | The area in and/or near Denton, Texas, consisting of: 75065, 76201, 76205, 76207, 76208, 76209, 76210, 76226, 76227, the portion of 76249 that lies within Denton County, 76258, the portion of 76259 that lies within Denton County, and the portion of 76266 the lies within Denton County. |
| 7 | DVA Frisco | The area in and/or near Frisco, Texas, consisting of: 75009, 75033, 75034, 75035, 75068, 75078, 76227, and 76258. |

## Non-Public Appendix C
## Designated Employees and Job Descriptions

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

## Appendix D
## Monitor Agreement

## Non-Public Appendix E
## Monitor Compensation

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

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from DaVita, Inc. ("DaVita"). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from DaVita's purchase of Renal Ventures Management, LLC from Renal Ventures Limited, LLC, which is owned by RV Management Corp. and Renal Ventures Partners, LLC (together, "Renal Ventures"). Under the terms of the Consent Agreement, DaVita is required to divest seven dialysis clinics in seven markets across the United States.

The 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make final the Decision and Order ("Order").

Analysis to Aid Public Comment

## The Transaction

Pursuant to an agreement dated August 17, 2015, DaVita proposes to acquire all issued and outstanding equity interests in Renal Ventures in a transaction valued at approximately $358 million. 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 substantially lessening competition for the provision of outpatient dialysis services in seven markets.

## The Respondents

Headquartered in Denver, Colorado, DaVita is the second-largest provider of outpatient dialysis services in the United States. DaVita operates or manages 2,251 outpatient dialysis clinics in forty-six states and the District of Columbia at which approximately 180,000 end stage renal disease ("ESRD") patients receive treatment. In 2015, DaVita's revenues were approximately $13.8 billion.

Renal Ventures, headquartered in Lakewood, Colorado, is a privately held company and the seventh-largest provider of outpatient dialysis services in the United States. Renal Ventures operates thirty-six dialysis centers, providing dialysis services to approximately 2,300 patients in six states. In 2015, Renal Ventures' revenues were approximately $161 million.

## The Relevant Product and Structure of the Markets

Outpatient dialysis services is the relevant product market in which to assess the effects of the proposed transaction. For patients suffering from ESRD, dialysis treatments are a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood. Kidney transplantation is the only alternative to dialysis for ESRD patients. However, the wait-time for donor kidneys—during which ESRD patients must receive dialysis treatments—can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, ESRD patients have no alternative to dialysis treatments. Unless hospitalized, ESRD

patients must obtain dialysis treatments from outpatient dialysis clinics.

Because most ESRD patients receive outpatient dialysis treatment three times per week in sessions lasting between three and five hours, the relevant geographic markets are local and limited by the travel distance from patients' homes. ESRD patients are often very ill and suffer from multiple health problems, making travel further than thirty miles or thirty minutes very difficult. As a result, competition among dialysis clinics occurs at a local level, corresponding to metropolitan areas or subsets thereof. The exact contours of each market vary depending on traffic patterns, local geography, and the patients' proximity to the nearest center.

**Competitive Effects of the Acquisition**

Each of the seven geographic markets identified in the Complaint is highly concentrated. In each of the affected markets, the proposed acquisition would cause the number of providers to drop from three to two or cause a merger to monopoly, and the post-acquisition HHI levels to exceed 5,000, and in the three-to-two provider markets, changes in their HHIs greater than 200. The high post-acquisition concentration levels, along with the elimination of the head-to-head competition between DaVita and Renal Ventures, suggest the proposed combination likely would result in higher prices for outpatient dialysis services in each geographic market. In addition, market participants compete for patients on a number of quality measures—including quality of facilities, wait times, operating hours, and location. The proposed combination likely also would result in diminished service and quality for patients in each market.

**Entry**

Entry into the outpatient dialysis services markets identified in the Commission's Complaint is not likely to occur in a timely manner at a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction. By law, each dialysis clinic must have a nephrologist medical director, and most dialysis clinics have long-term (seven to ten year) contracts

with nephrologist medical directors that also include non-competes. As a practical matter, medical directors also serve as the primary source of referrals and are essential to a clinic's success. The relative shortage and lack of available nephrologists, particularly those with an established referral stream, is a significant barrier to entry into each of the relevant markets. These obstacles make entry in the affected markets more challenging and less likely to avert the anticompetitive effects of the transaction.

**The Consent Agreement**

The Consent Agreement remedies the proposed acquisition's anticompetitive effects in seven markets where both DaVita and Renal Ventures operate dialysis clinics by requiring DaVita to divest seven outpatient dialysis clinics to PDA-GMF Holdco LLP, a joint venture between Physicians Dialysis and GMF Capital LLC ("PDA"). Physicians Dialysis has been in business since 1990 and currently operates several outpatient dialysis clinics. The Commission is satisfied that PDA is a qualified acquirer of the divested assets.

As part of the divestitures, DaVita is required to obtain the agreement of the medical director affiliated with each divested clinic to continue providing physician services after the transfer of ownership to the buyer. Similarly, the Consent Agreement requires DaVita to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to the buyer. These provisions ensure that the buyer will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to help ensure the continued competitiveness of the divested clinics. First, the Consent Agreement provides the buyer with the opportunity to interview and hire employees affiliated with the divested clinics and prevents DaVita from offering these employees incentives to decline the buyer's offer of employment. This helps ensure the buyer has access to patient care and supervisory staff familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents DaVita from contracting with the medical directors affiliated

with the divested clinics for three years, to prevent DaVita from potentially limiting the competitiveness of the divested clinics. Third, to ensure continuity of patient care and records as the buyer implements its quality care, billing, and supply systems, the Consent Agreement requires DaVita to provide transition services for a period up to twenty-four months. Firewalls and confidentiality agreements will prevent the exchange of competitively sensitive information. Fourth, the Consent Agreement requires DaVita to provide the buyer with a license to Renal Ventures' policies, procedures, and medical protocols, as well as the option to obtain and use DaVita's medical protocols, policies, and procedures, to help with continuity of care for the divested clinics' patients.

The Consent Agreement requires DaVita to provide notice to the Commission prior to any acquisitions of dialysis clinics in the markets addressed by the Consent Agreement to ensure that subsequent acquisitions do not adversely impact competition in those markets or undermine the remedial goals of the proposed order. Finally, the Consent Agreement allows the Commission to appoint a monitor to oversee DaVita's compliance with the Consent Agreement.

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**

# AMERICAN GUILD OF ORGANISTS

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

*Docket No. C-4617; File No. 151 0159*
*Complaint, May 26, 2017 – Decision, May 26, 2017*

This consent order addresses American Guild of Organists's Code of Ethics that restrains AGO members from freely seeking or accepting work, and recommends that its members use standard fees and approaches to determine compensation for members' services. The complaint alleges that the AGO, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act by adopting and maintaining provisions in its Code of Ethics that restrain AGO members from freely seeking or accepting work, and by recommending that its members use standard fees and approaches to determine compensation for members' services. The consent order requires the AGO to cease and desist from restraining competition among its members, including by restricting members' freedom to seek or accept work, or by restraining price competition among members.

*Participants*

For the *Commission*: *Karen A. Mills.*

For the *Respondent*: *Claudia Higgins, Kaye Scholer, LLP.*

## COMPLAINT

The Federal Trade Commission ("Commission"), 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, having reason to believe that the American Guild of Organists, Inc. ("Respondent" or "AGO"), a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

## I. NATURE OF THE CASE

1. This case challenges the actions of a professional association of organists and choral conductors that have the purpose and effect of restraining competition among its members. The association directs its members not to seek contracts and business relationships where doing so would displace an existing service provider. And the association urges its members to forgo price competition, and instead to seek the terms of compensation specified by the association.

## II. RESPONDENT

2. Respondent American Guild of Organists was originally chartered as a corporation by the New York State Educational Department and the University of the State of New York in 1896, and is organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 475 Riverside Drive, Suite 1260, New York, NY 10115.

3. Respondent is a national association of organists and choral conductors with approximately 15,000 members organized in more than 300 chapters throughout the United States and abroad.

4. Many of Respondent's members provide organ performance, choral conducting, or teaching services for a fee. Except to the extent that competition has been restrained as alleged herein, many of Respondent's members have been and are now in competition among themselves and with other organists and choral conductors.

## III. JURISDICTION

5. Respondent conducts business for the pecuniary benefit of its members and is therefore a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. The acts and practices of Respondent, including the acts and practices alleged herein, are in or affecting commerce as

"commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

## IV. AGO'S CONDUCT IN RESTRAINT OF TRADE

### A. AGO RESTRICTIONS ON COMPETITION

7. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by:

a. Restricting members' freedom to seek or to accept positions and engagements; and

b. Developing, adopting, issuing, publishing, recommending, and promoting the use by its members of standard fees and approaches to determine compensation for members' services.

8. Respondent maintains a Code of Ethics applicable to the commercial activities of its members. The Code of Ethics is considered to be binding upon all voting members in good standing.

9. Specifically, Respondent's Code of Ethics adopted on October 23, 1933, as revised through October 4, 2014, requires:

> "RULE 1. Members shall promote good working relationships within the American Guild of Organists and shall respect the employment of colleagues. Members shall address differences between themselves and other members by following the procedures outlined in the Discipline."
>
> "RULE 2. Members shall not seek or appear to be seeking employment for themselves, a student, or a colleague, in a position held by someone else . . . ."
>
> "RULE 3. Members shall obtain the approval of the incumbent musician before accepting an engagement for a wedding, funeral, or other

> service requested by a third party. In such cases, the incumbent should receive his/her customary fee, and the third party is expected to provide it. It is the responsibility of the guest member to inform the third party of this rule."
>
> "The Discipline" refers to the AGO's enforcement regime for the association's Code of Ethics and other standards of conduct. An "incumbent musician" is a musician member who has a contract or other arrangement with a school, church, or other venue.

10. Respondent has developed, adopted, issued, published, recommended, and promoted a schedule of compensation to be used by members to determine or secure compensation for their services. Respondent's schedule specifies fees for various types of services (*e.g.*, performance at weddings, funerals, religious ceremonies) and for various time commitments (*e.g.*, full time, half time) and experience levels. Respondent's schedule also specifies standard mileage charges and rates for travel to and from locations where services are provided.

11. Respondent's schedule of compensation identifies one U.S. city as a basing point and specifies adjustment factors to accommodate regional differences in the cost of living. Respondent's Chapters use Respondent's schedule to develop regionally-applicable schedules of compensation.

12. Respondent generally updates its schedule of compensation annually.

## B. AGO EXHORTS MEMBERS TO REFRAIN FROM COMPETING

13. Respondent has provided its members with interpretations of and answers to questions about its Code of Ethics. For example, regarding Rule 2, Respondent published the following interpretation and advice:

> "Question: Can a member circulate a written announcement to prospective religious institution

employers having incumbent employees stating that s/he is looking for employment?

Answer: No."

14. Regarding Rule 3, Respondent advised its members not to offer their services to a prospective customer without permission from an incumbent organist, and to inform prospective customers that the customer must pay a fee to both organists, even though only one would provide services.

15. Respondent developed and published model contract provisions that are consistent with the Code of Ethics and with the schedule of compensation.

## C. AGO's ENFORCEMENT REGIME

16. Respondent has adopted a Code of Professional Standards to guide members in fulfilling their obligations. The section of the Code of Professional Standards entitled "Respect for Colleagues" states, "Members address differences with other members of the American Guild of Organists by following the procedures outlined in the Discipline."

17. Respondent's Discipline, most recently amended on January 23, 2015, prescribes that "[t]he *Discipline* is to be used when an individual member of the AGO or an AGO Chapter Executive Committee wishes to file a complaint [with the AGO] against another Member for a violation of the *Code of Ethics,"* and specifies that remedies may include censure, written reprimand, requiring a letter of apology, requiring payment of compensation to another member for lost income, and expulsion from membership.

## V. VIOLATION CHARGED

18. The purpose, effect, tendency, or capacity of the combination, agreement, acts, and practices alleged in Paragraphs 7 through 17 has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among organists and choral directors, and by

depriving consumers and others of the benefits of free and open competition among organists and choral directors.

19. The combination, agreement, acts, and practices alleged in Paragraphs 7 through 17 constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested herein.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-sixth day of May, 2017, issues 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 American Guild of Organists ("Respondent" or "AGO") and Respondent 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 with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Respondent 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 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 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 public comments received pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, 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 ("Order"):

1. Respondent American Guild of Organists is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 475 Riverside Drive, Suite 1260, New York, NY 10115.

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

## ORDER

### I.

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

A. "Respondent" or "AGO" means the American Guild of Organists, its directors, boards, officers, employees, Leaders, agents, representatives, councils, committees, foundations, divisions, Chapters, successors, and assigns.

B. "Antitrust Compliance Officer" means a person appointed under Paragraph IV.A. of this Order.

C. "Antitrust Counsel" means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States.

D. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*

E. "Certification" means the document attached to this Order as Appendix B.

F. "Chapter" means any regional or district association of organists that is recognized by the AGO as a chapter.

G. "Code of Ethics" means a statement setting forth the principles, values, standards, or rules of behavior that guide the conduct of an organization and its members.

H. "FTC Settlement Statement" means the statement attached to this Order as Appendix A.

I. "Leaders" means the AGO's National Council, National and Regional Officers, Councillors, Conveners, and Chapter Deans.

J. "Member" means a member of the AGO, including but not limited to, voting members, non-voting members, general members, independent members, certificated members, national subscribing members, national honorary members, Chapter members, and any other classes or sub-classes of members.

K. "Notification Date" means the date on which Respondent makes the notification required by Paragraph III.A.3. of this Order.

L. "Organization Documents" means any documents relating to the governance, management, or direction of the relevant organization, including, but not limited to, bylaws, operating procedures, Chapter Management Handbooks, Chapter Operating

Procedures, Codes of Ethics, Codes of Professional Standards, grievance procedures, compensation guides or fee schedules, model contract provisions, policy statements, interpretations, commentaries, guidelines, and brochures.

M. "Regulating" means (1) adopting, maintaining, recommending, or encouraging that Members follow any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

## II.

**IT IS FURTHER ORDERED** that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition for the provision of services provided by Members;

B. Regulating, restricting, restraining, impeding, declaring unethical or unprofessional or interfering with, by any means, the efforts of any Member to seek or accept a position or engagement to provide services of an organist or choral conductor;

C. Regulating, restricting, restraining, impeding, declaring unethical or unprofessional or interfering with, by any means, the efforts of any Member to provide services of an organist or choral conductor, including, but not limited to, encouraging, urging, or requiring that Members obtain the approval of an incumbent organist or choral conductor before accepting an engagement to provide services of an

organist or choral conductor for a wedding, funeral, or any other engagement requested by a third party;

D. Creating, issuing, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list, guide, or schedule of compensation or fees, standard approach, or model contract, for Members to use when determining or securing compensation for their services, including but not limited to compensation or fee reports, guidelines, or suggested or recommended fees; and

E. Accepting as a Chapter, or maintaining a relationship with any Chapter, that the AGO knows engages in conduct prohibited by Paragraphs II.A., II.B., II.C., or II.D.

## III.

**IT IS FURTHER ORDERED** that:

A. No later than sixty (60) days from the date this Order is issued, Respondent shall:

1. Post and maintain for five years on the Guild Document's page of the AGO's website, together with a link from Respondent's home or menu page that is entitled "Antitrust Compliance," the following items:

   a. An announcement that states "The AGO agreed to change its Code of Ethics, and will not adopt or encourage its Members to follow or enforce any Code of Ethics provision relating to limitations on competition by organists or choral conductors to provide services, including price competition, that does not comply with the FTC Decision and Order."

   b. The FTC Settlement Statement; and

c. A link to the Federal Trade Commission's website that contains the press release issued by the Commission in this matter; and

2. Distribute electronically or by other means a copy of the FTC Settlement Statement to its Leaders, Chapters, Members, and employees; and

3. Notify each Chapter that, as a condition of continued recognition by the AGO, such Chapter must execute and return a Certification to Respondent no later than one hundred eighty (180) days from the date Respondent notifies such Chapter.

B. No later than sixty (60) days from the date this Order is issued Respondent shall:

1. Remove from the AGO's Organization Documents and the AGO's website any statement or document that is inconsistent with Paragraph II of this Order, and

2. Publish on the AGO's website any revisions of the AGO's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement.

C. Respondent shall publish, in the font that is customarily used for feature articles:

1. Any revisions of the AGO's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement in the next available edition of the "The American Organist" magazine; and

2. The FTC Settlement Statement in the edition of the "The American Organist" magazine, or any successor publication, on or as close as possible to the first and second anniversary dates of first publication of the FTC Settlement Statement.

D. For a period of five (5) years after this Order is issued, distribute electronically or by other means, a copy of the FTC Settlement Statement to each:

1. New Chapter no later than thirty (30) days after the date the organization becomes a Chapter;

2. New Member no later than sixty (60) days after the date of commencement of the membership; and

3. Member who receives a membership renewal notice at the time the Member receives such notice.

E. Respondent shall:

1. Immediately terminate the recognition of any Chapter that fails to provide an executed Certification no later than one hundred eighty (180) days from the Notification Date and shall not permit the terminated Chapter to claim itself as a Chapter of the American Guild of Organists until such time as the Chapter provides an executed Certification; and

2. Terminate for a period of one (1) year, no later than one hundred twenty (120) days after Respondent learns or obtains information that would lead a reasonable person to conclude that the Chapter has, following the date this Order is issued, engaged in any practice prohibited by Paragraphs II.A., II.B., II.C., or II.D of this Order; unless, prior to the expiration of the one hundred twenty (120) day period, said Chapter informs Respondent in a verified written statement that the Chapter has eliminated and will not reengage in such practice, and Respondent has no reasonable grounds to believe otherwise.

F. Respondent shall include a copy of the FTC Settlement Statement, electronically or by other means, with the next dues statement sent to each Member after the date this Order is issued.

G. Respondent shall maintain and make available to Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any:

1. Action against any Member or Chapter taken in connection with the activities covered by Paragraph II of this Order, including but not limited to enforcement, advisory opinions, advice or interpretations rendered; and

2. Complaint(s) received from any person relating to Respondent's failure to comply with this Order.

## IV.

**IT IS FURTHER ORDERED** that Respondent shall design, maintain, and operate an antitrust compliance program to assure compliance with this Order and the Antitrust Laws:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall appoint and retain an Antitrust Compliance Officer for the duration of this Order to supervise Respondent's antitrust compliance program.

B. For a period of three (3) years from the date this Order is issued, the Antitrust Compliance Officer shall be the Executive Director of Respondent after which a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, or a Leader of Respondent.

C. For a period of five (5) years from the date this Order is issued, Respondent shall provide annual training to its Leaders and employees concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct.

D. Respondent shall implement policies and procedures to:

1. Enable persons to ask questions about, and report violations of, this Order and the Antitrust Laws, confidentially and without fear of retaliation of any kind; and

2. Discipline Leaders, Members, and employees for failure to comply fully with this Order.

E. For a period of five (5) years from the date this Order is issued, Respondent shall:

1. Conduct an in-person presentation at each National or Regional meeting of the AGO that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and

2. Provide an antitrust compliance guide to Chapters to use at each meeting of such Chapters that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws.

**V.**

**IT IS FURTHER ORDERED** that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than (i) ninety (90) days after the date this Order is issued, (ii) one hundred eighty (180) days after the date this Order is issued; and

B. No later than one (1) year after the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission staff may request.

## VI.

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

A. Dissolution of Respondent;

B. Acquisition, merger, or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

## VII.

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

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 its expense; and

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

## VIII.

**IT IS FURTHER ORDERED** that this Order shall terminate on May 26, 2037.

By the Commission.

# Appendix A

Appendix A

(Letterhead of the AGO)

**FTC Settlement Statement**

Dear Member:

As you may know, the Federal Trade Commission (FTC) has conducted an investigation concerning certain provisions in the American Guild of Organists (AGO) Code of Ethics and other documents. The investigation focused on:

- A Code of Ethics provision that prohibits members from applying for a position held by someone else unless there has been a public announcement of a vacancy for that position;
- A Code of Ethics provision that requires a member engaged for a wedding, funeral, or other service to (1) obtain the approval of the incumbent musician before accepting, and (2) tell the party requesting the service to pay the incumbent his/her customary fee; and
- The AGO's publication of (1) lists and schedules of compensation and fees for its members to use, (2) standard methods and formulas for Chapters to provide to members for calculating compensation and fees, and (3) other model contract provisions.

The FTC has alleged that these practices violate the Federal Trade Commission Act because they unnecessarily restrict members of the AGO from competing with one another, restrict price competition, and deprive consumers of the benefit of competition.

To end the investigation expeditiously and to avoid disruption to its core functions, the AGO has voluntarily agreed to a Consent Agreement and entry of a final Decision and Order by the FTC. In doing so, however, the AGO has not admitted any law violation.

In general, the FTC's Order prohibits the AGO from:

- maintaining bylaws, a code of ethics, operational policies, or membership requirements that restrict its members from competing with one another for positions or for engagements for weddings, funerals, or other services, or competing in any other way, including on price;
- interfering with members' efforts to provide services and to compete on price;

- publishing documents such as fee schedules and model contracts for members to use when determining or securing compensation for their services.

The Order also requires the AGO to establish an antitrust compliance program.

The AGO is in the process of revising its Code of Ethics and other documents and publications to comply fully with these requirements and is implementing a robust antitrust compliance program to ensure its leaders, members and Chapters do so as well.

In addition, some of the AGO Chapters currently have operational documents that contain provisions similar to those prohibited by the FTC's Order. The Order requires that the AGO may not accept or maintain a relationship with a Chapter that does not abide by the Order's provisions. Each Chapter will therefore need to review its code of ethics, operational policies and procedures, membership requirements, and documents relating to fees, compensation, or model contracts, and remove all prohibited provisions. Each Chapter will need to certify to the AGO that it has done so before a deadline set in the Order or the AGO will remove it as a Chapter.

When the FTC Order has been finalized, it will be distributed to Chapters and will be available on the AGO website. Click here to see a copy of the FTC's Order. It is also available on the Federal Trade Commission website at www.FTC.gov.

Sincerely yours,

James E. Thomashower
Executive Director

Michael Bedford
President

# Appendix B

Appendix B

**Certification**

_____

Name of Chapter recognized by the American Guild of Organists

As a condition of being affiliated with the American Guild of Organists (AGO), the chapter named above (Chapter) makes the following representations to the AGO:

1. No Restrictions On Competing For Positions Or Engagement: As of the date this Certification is executed, the Chapter does not maintain in its rules, regulations, code of ethics, policies, procedures, newsletters or website any type of rule, interpretation, ethical ruling, guideline or recommendation that would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Chapter from competing for positions or engagements. Examples of the types of provisions that restrict competition include any of the following:

- Restricting a member from seeking or appearing to seek for the member, a student, or a colleague, a position occupied by another person.

- Restricting members seeking or appearing to seek a position for the member, a student, or a colleague from doing so without official and public declaration and announcement of a vacancy.

- Restricting members from accepting engagements to provide services as an organist or choral director unless they obtain approval of an incumbent.

2. No Restrictions On Competing On Price-Related Terms: As of the date this Certification is executed, the Chapter does not maintain in its rules, regulations, code of ethics, policies, procedures, newsletters or website any type of rule, interpretation, ethical ruling, guideline or recommendation which would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Guild from competing on price-related terms. Examples of the types of provisions that restrict competing on price-related terms include any of the following:

- Restricting price competition by members or encouraging members to restrict price competition.

Decision and Order

- Restricting members' compensation or fee arrangements or communications with third parties, or advising members what to communicate with each other or to third parties about compensation or fees, including compensation or fees for special services such as weddings or funerals.

- Adopting, publishing, or advising about compensation, fee lists, schedules, guidelines, or standard approaches to determining compensation or fees.

- Publishing a model contract or model contract provisions for members to use when determining compensation for their services.

On behalf of the Chapter named above, the undersigned officer certifies that all of the foregoing representations are accurate as of the date listed below:

Officer's Signature_____

Print Officer's Name_____

Officer's Title_____

Date_____

# ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from the American Guild of Organists (hereinafter "the AGO"). The Commission's complaint ("Complaint") alleges that the AGO, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by adopting and maintaining provisions in its Code of Ethics that restrain AGO members from freely seeking or accepting work, and by recommending that its members use standard fees and approaches to determine compensation for members' services. This likely raised prices for consumers seeking to employ organists for special occasions, as well as the organizations that employed organists.

The proposed Consent Agreement requires the AGO to cease and desist from restraining competition among its members, including by restricting members' freedom to seek or accept work, or by restraining price competition among members.

The Commission anticipates that accepting the proposed order, subject to final approval, contained in the Consent Agreement, will resolve the competitive issues described in the Complaint. The proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order ("the Proposed Order").

This Analysis to Aid Public Comment seeks to invite and facilitate public comment. It does not constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way modify their terms.

Analysis to Aid Public Comment

The Consent Agreement is for settlement purposes only and does not constitute an admission by the AGO that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

## I. The Complaint

The Complaint makes the following allegations.

### A. The Respondent and the Provisions at Issue

The AGO is a non-profit trade association. The AGO has approximately 15,000 members organized in more than 300 chapters throughout the United States and abroad. The AGO membership includes organists and choral conductors. The AGO's members provide services as organists and choral conductors for a fee.

The AGO maintains a Code of Ethics applicable to the commercial activities of its members. The Code of Ethics states in part that,

> "Members shall not seek or appear to be seeking employment for themselves, a student, or a colleague, in a position held by someone else . . ." and
>
> "Members shall obtain the approval of the incumbent musician before accepting an engagement for a wedding, funeral, or other service requested by a third party. In such cases, the incumbent should receive his/her customary fee, and the third party is expected to provide it. It is the responsibility of the guest member to inform the third party of this rule."

The AGO adopted standardized documents relating to compensation, including fee schedules, a salary guide, worksheets for calculating work performed, and model contract provisions for members to (hereinafter "compensation guidelines"). The fee schedules cover the fees to be charged for such work as rehearsals, performing as a substitute, weddings, funerals,

rehearsals, contracting additional musicians, mileage reimbursement, and cancelled services, and include a formula for its chapters and members to use for geographic adjustment of the compensation baselines.

### B. The Anticompetitive Conduct

The FTC investigated the provisions of the AGO's Code of Ethics and compensation guidelines that allegedly restrained competition and harmed consumers, and which had generated consumer and organist complaints. The Complaint alleges that the AGO violated Section 5 of the Federal Trade Commission Act by agreeing to restrain competition among organists and choral conductors. The AGO's adoption and enforcement of the Code of Ethics and compensation guidelines represent agreements among competitors not to compete. The Code of Ethics limits the freedom of organists and choral directors to seek or accept positions and engagements. The compensation guidelines limit price competition and impose additional costs on consumers. For consumers who wanted to employ an organist of their choice for a wedding, funeral, or other occasion, the AGO's Code of Ethics included a provision that had the effect of requiring some consumers to pay for the services of two organists – the organist they chose and hired, and the incumbent organist of the venue location even though only the first organist performed. The provisions and enforcement of the AGO's Code of Ethics, as well as its compensation guidelines, likely increased prices for consumers and those that employed organists as choral directors or in permanent organist positions.

The AGO adopted the Code of Ethics, educates members about the Code of Ethics, exhorts its members to follow the Code of Ethics, and enforces the Code of Ethics. The AGO may expel a member that fails to abide by the Code of Ethics.

The AGO instructs its chapters to use AGO's compensation schedules and formulas to develop regionally applicable compensation schedules. AGO chapters used the AGO compensation schedules and formulas to develop and publicize regionally applicable compensation schedules. AGO members used the compensation schedules to determine what to charge for their services.

Analysis to Aid Public Comment

The purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of the AGO has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among organists and choral directors.

## II. The Proposed Order

The Proposed Order has the following substantive provisions.

Paragraph II of the Proposed Order requires the AGO to cease and desist from restraining or declaring unethical, interfering with, or advising against price competition by members, and from creating or recommending lists, guidelines, or model contract provisions for its members to use to determine fees or compensation. It also requires the AGO to cease and desist from restricting members freedom to seek or accept positions or engagements. Paragraph II also prohibits the AGO from accepting as a chapter or maintaining a relationship with any chapter that the AGO knows engages in conduct prohibited by the Proposed Order.

Paragraph III of the Proposed Order requires the AGO to remove from its organization documents and website any statement inconsistent with the Proposed Order, including the challenged Code of Ethics restrictions. The AGO must publicize to its members, new members, leaders, employees, and the public the changes the AGO must make to the Code of Ethics, and a statement describing the Consent Agreement. Paragraph III also requires the AGO to terminate recognition of chapters that fail to certify Compliance with the Proposed Order, and chapters that the AGO learns have engaged in any prohibited practice, if such chapters do not commit to ending such practices.

Paragraph IV of the Proposed Order requires the AGO to design, maintain, and operate an antitrust compliance program. Paragraphs V-VII contain standard reporting, notification, and cooperation requirements.

The Proposed Order will expire in 20 years; the Proposed Order limits certain provisions to a period of five years.

Complaint

**IN THE MATTER OF**

# EMERSON ELECTRIC CO.
**AND**
# PENTAIR PLC

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

*Docket No. C-4615; File No. 161 0221*
*Complaint, April 27, 2017 – Decision, June 12, 2017*

This consent order addresses the $3.15 billion acquisition by Emerson Electric Co. of certain assets of Pentair plc. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the United States market for switchboxes. The consent order requires Emerson to divest Pentair's switchbox manufacturer subsidiary, Westlock Controls Corporation, to Crane Co. no later than ten days after the Acquisition is consummated.

*Participants*

For the *Commission*: *Ryan F. Harsch* and *Jonathan W. Platt.*

For the *Respondents*: *Ronan Harty* and *Michael N. Sohn, Davis Polk; Greg Neppl* and *Alan Rutenberg, Foley Lardner.*

## 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 believe that Respondent Emerson Electric Co. ("Emerson"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the equity interests of certain subsidiaries from Respondent Pentair plc ("Pentair"); 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, 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 Emerson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its offices and principal place of business located at 8000 West Florissant Avenue, St. Louis, Missouri 63136.

2.Respondent Pentair is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland, with its principal executive offices located at 43 London Wall, London, EC2M 5TF, United Kingdom. Its United States address for service of process is: Pentair plc, c/o Flow Control US Holding Corporation, 5500 Wayzata Blvd., Suite 800, Golden Valley, Minnesota 55416-1251.

3.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 company 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

4.Pursuant to a Share Purchase Agreement, dated as of August 18, 2016, Emerson proposed to acquire the equity interests of certain subsidiaries of Pentair that are engaged in the valves and controls business in exchange for cash considerations of approximately $3.15 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## III. THE RELEVANT MARKETS

5.For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the development, manufacturing, marketing, distribution, and sale of switchboxes. Switchboxes monitor and control isolation valves, which control the flow of liquids or gases through pipes in numerous industrial applications, including the oil and gas, chemical, petrochemical, and power industries. A switchbox is an integral component of an "automated" isolation valve, enabling

the valve to open and close automatically without manual intervention. Switchboxes detect the position of a valve, that is, whether the valve is open or closed, and communicate the valve position via a visual display and/or digital signals. Switchboxes perform a unique and essential function to the efficient and safe operation of industrial plants and facilities for which there are no practical alternatives.

6.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 the relevant line of commerce.

## IV. STRUCTURE OF THE MARKET

7.Emerson and Pentair are the two largest manufacturers of switchboxes, with a combined market share of approximately 60% in the United States. Other manufacturers of switchboxes have significantly lower market shares than Emerson or Pentair, and most have very small market shares. The Acquisition would substantially increase concentration in the already concentrated U.S. switchbox market.

## V. EFFECTS OF THE ACQUISITION

8.The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

9.Emerson and Pentair are each other's closest competitor in the design, development, manufacture, marketing, distribution, and sale of switchboxes. Emerson and Pentair sell the most widely used brands of switchboxes in the United States, TopWorx, and Westlock, respectively. Because switchboxes perform a critical safety function, brand reputation and product reliability are important to purchasers of switchboxes. TopWorx and Westlock are the two most highly regarded brands of switchboxes in the United States, and, for many customers, the only acceptable brands of switchboxes. The Acquisition would eliminate direct competition between Emerson and Pentair in the market for switchboxes, likely increasing prices and reducing innovation.

## VI. ENTRY CONDITIONS

10.Entry into the market for switchboxes would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Among other reasons, the substantial time and investment required to develop switchboxes with the requisite brand acceptance and reputation for reliability demanded by customers, which face significant costs and potential risks associated with switching suppliers, would limit or delay effective entry.

## VII. VIOLATIONS CHARGED

11.The Share Purchase Agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

12.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, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-seventh day of April, 2017, issues its Complaint against said Respondents.

By the Commission.

## ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Emerson Electric Co. ("Emerson") of the equity interests of certain subsidiaries (defined herein as "Pentair Valves & Controls Subsidiaries") and related assets from their ultimate parent entity Pentair plc ("Pentair") (Emerson and Pentair hereinafter collectively referred to as "Respondents"), and

Respondents having been furnished thereafter with a copy of a draft of the 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 the 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 Emerson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal executive offices located at 8000 West Florissant Avenue, St. Louis, Missouri 63136.

2. Respondent Pentair is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland with its principal executive offices located at 43 London Wall, London, EC2M 5TF, United Kingdom, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets,

as follows: General Counsel, Pentair plc, c/o Flow Control US Holding Corporation, 5500 Wayzata Blvd., Suite 800, Golden Valley, Minnesota 55416-1251.

3. The Commission has jurisdiction over the subject matter of this proceeding and over 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. "Emerson" means: Emerson Electric Co.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Emerson Electric Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Emerson shall include the Pentair Valves & Controls Subsidiaries.

B. "Pentair" means: Pentair plc; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Pentair plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondents" means Emerson and Pentair, individually and collectively.

E. "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

2. Final Decision and Order following its issuance and service by the Commission in this matter.

F. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

G. "Orders" means the Decision and Order and this Order to Maintain Assets.

H. "Westlock Business(es)" means the Business of Westlock and the Business associated with each of the Westlock Products to the extent such Businesses are owned by, controlled by, managed by, or licensed to, the Respondents.

## 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 Westlock Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Westlock Business, to minimize any risk of loss of competitive potential for the Westlock Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Westlock Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Westlock Assets (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability,

marketability, or competitiveness of the Westlock Business.

B. Until Respondents fully transfer and deliver each of the respective Westlock Assets to an Acquirer, Respondents shall maintain the operations of the Westlock Business 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 full economic viability, marketability, and competitiveness of the Westlock Business and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; Standards and Certification Organizations; employees; and others having business relations with the Westlock Business. Respondents' responsibilities shall include, but are not limited to, the following:

a. providing the Business related to each Westlock Product 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 that Business;

b. continuing, at least at their scheduled pace, any additional expenditures for each of the Businesses related to each Westlock Product authorized prior to the date the Consent Agreement was signed by the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;

c. providing such resources as may be necessary to respond to competition against each of the Westlock Products and/or to prevent any diminution in sales of each of the Westlock Products during and after the Acquisition process

and prior to the complete transfer and delivery of the Westlock Assets to an Acquirer;

d. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Westlock Products that were marketed or sold by Respondents prior to the date the Respondents entered the Acquisition Agreement, at the related High Volume Accounts;

e. making available for use by the Westlock Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Westlock Assets; and

f. providing such support services (*e.g.*, handling of accounts receivable, accounts payable, internal and external auditing functions, tax, legal, treasury, payroll, benefits administration, information technology systems and support, and human resources management) to the Westlock Business as were being provided to such Westlock Business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until the Closing Date, Respondents shall maintain a work force that is (i) at least as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Westlock Business's last fiscal year.

D. Until the Closing Date, Respondents shall not transfer any Westlock Core Employee out of the Westlock Business, reduce the responsibilities related to the Westlock Business of any Westlock Core Employee, or terminate the employment of any Westlock Core Employee other than for cause.

E. Until the Closing Date, provide all Westlock Core Employees with reasonable financial incentives to continue in their positions and to research, Develop,

manufacture and/or market the Westlock Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Business related to each Westlock Product(s) and to ensure successful execution of the pre-Acquisition plans for that Westlock Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s) has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law); and

1. for a period of one (1) year from the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Westlock Product ("Westlock Employee") to terminate his or her employment relationship with the Acquirer; or (ii) hire any Westlock Employee;

*provided, however*, a Respondent may hire any former Westlock Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

*provided further, however,* that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Westlock Core Employees in connection with the Acquisition;

*provided further*, *however*, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Westlock Employees; or (ii) hire a Westlock Employee who contacts a Respondent on his or her own initiative without any direct or

indirect solicitation or encouragement from that Respondent.

F. Prior to the Closing Date, for the purposes of ensuring an orderly marketing and distribution transition, Respondents shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Westlock Products by the Acquirer is not delayed or impaired by the Respondents;

2. designate employees of Respondents knowledgeable about the marketing, distribution, and sale related to each of the Westlock Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer of the Westlock Business;

3. maintain and manage inventory levels of the Westlock Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to manufacture, market, distribute, and sell the Westlock Products;

5. allow the Acquirer access at reasonable business hours to all Confidential Business Information related to the Westlock Products 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 Divestiture Products that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;

6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the

inventory levels (weeks of supply) in the possession of each customer (*i.e.*, retailer, wholesaler, or distributor) by model or series on a regular basis and in a timely manner;

7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer by model or series on a regular basis and in a timely manner; and

8. establish projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.

G. Pending divestiture of the Westlock Assets, Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information related to the Westlock Business other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to the Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed); and

3. institute procedures and requirements to ensure that Respondents' 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.

H. 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, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

I. Each Respondent 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. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgment program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

J. Each Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, 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.

K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Westlock Business through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Westlock Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Westlock Assets except for ordinary wear and tear.

## III.

**IT IS FURTHER ORDERED** that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("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 Monitor, subject to the consent of Respondent Emerson, which consent shall not be unreasonably withheld. If Respondent Emerson 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 Emerson of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondent Emerson 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 each Respondent's compliance with the relevant

requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If a Monitor is appointed, each 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until the latter of:

   a. the date of completion by Respondents of all Westlock Assets and the transfer of the Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property in a manner that fully satisfies the requirements of this Order;

   b. the Acquirer has obtained all the Product Approvals and Certifications, with respect to each Westlock Switch Box Product;

   c. the Acquirer is able to perform all of the accounts receivable, accounts payable, internal and external auditing functions, tax, legal, treasury, payroll, benefits administration, information technologies, and human resources management of Westlock that had, prior to the Closing Date, been performed by entities within Respondent Pentair or Respondent

Emerson outside of Westlock Controls Corporation

*provided, however,* that, with respect to each Divestiture Product, the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to 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 Monitor shall have full and complete access to each 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 that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent Emerson, 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 Emerson, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Each Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether

or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Each Respondent shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.

I. 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.

J. 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.

K. 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.

L. 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 Orders.

M. The 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 (30) days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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. Each Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Each Respondent shall include in its reports, among other things that are required from time to time, a detailed description of its 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 of the Westlock Assets and Westlock Business, (ii) the maintenance of the Westlock Business, and (iii) transitional services being provided by the relevant Respondent to the Acquirer; and

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 on the same timing as, the reports required to be submitted by Respondents pursuant the Decision and Order.

## V.

**IT IS FURTHER ORDERED** that each Respondent 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 each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that 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 that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

## VII.

**IT IS FURTHER ORDERED** that Respondent Pentair's obligations under this Order to Maintain Assets shall terminate on the date on which all of the following have occurred:

A. Respondent Emerson has acquired over fifty (50) percent of the voting securities or equity interests of each of the Pentair Valves & Controls Subsidiaries;

B. the Westlock Assets are completely owned and controlled either by Respondent Emerson or an Acquirer;

C. with respect to any Westlock Product or related Product Intellectual Property or Manufacturing Technology, that is owned or controlled by Respondent Pentair prior to the Acquisition, Respondent Pentair has:

1. transferred all rights and assets that were owned or controlled by Respondent Pentair prior to the Acquisition and necessary to effect the related divestitures to either Respondent Emerson or the Acquirer;

2. transferred or otherwise provided all rights, assets or other resources that were owned or controlled by Respondent Pentair prior to the Acquisition and necessary for Respondent Emerson to provide the services and assistance to the Acquirer described in Paragraph II.F. of the Decision and Order to Respondent Emerson; and

3. secured all consents and waivers from all Third Parties that are necessary to divest the Westlock Assets to an Acquirer or certified that the Acquirer has executed all such agreements directly with each of the relevant Third Parties;

D. with respect to any Product Licensed Intellectual Property, Respondent Pentair has granted or otherwise

provided the rights to use such intellectual property either directly to the Acquirer, or to Emerson for the purposes of providing such rights to the Acquirer; and

E. Respondent Pentair certifies to the Commission that all of the above-described acquisitions and transfers have occurred and all of the above-described consents and waivers from Third Parties have been provided to the Acquirer.

## VIII.

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate as to Respondent Emerson 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 Closing Date; or

C. the day after the all of the Product Intellectual Property has been provided to the Acquirer and the Manufacturing Technology related to each Westlock Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the Product Intellectual Property and Manufacturing Technology are complete; or

D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

## DECISION AND ORDER
## [Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Emerson Electric Co. ("Emerson") of the equity interests of certain subsidiaries (defined herein as "Pentair Valves & Controls Subsidiaries") and related assets from their ultimate parent entity Pentair plc ("Pentair") (Emerson and Pentair hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of the 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 the 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"):

1. Respondent Emerson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal executive offices located at 8000 West Florissant Avenue, St. Louis, Missouri 63136.

2. Respondent Pentair is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland with its principal executive offices located at 43 London Wall, London, EC2M 5TF, United Kingdom, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: General Counsel, Pentair plc, c/o Flow Control US Holding Corporation, 5500 Wayzata Blvd., Suite 800, Golden Valley, Minnesota 55416-1251.

3. The Commission has jurisdiction over the subject matter of this proceeding and over 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. "Emerson" means: Emerson Electric Co.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Emerson Electric Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Emerson shall include the Pentair Valves & Controls Subsidiaries.

B. "Pentair" means: Pentair plc; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by

Pentair plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondents" means Emerson and Pentair, individually and collectively.

E. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

F. "Acquisition" means Respondent Emerson's acquisition of the Pentair Valves & Controls Subsidiaries pursuant to the Acquisition Agreement.

G. "Acquisition Agreement" means the *Share Purchase Agreement* dated as of August 18, 2016, by and between Emerson Electric Co. and Pentair Plc that was submitted by Emerson to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.

H. "Acquisition Date" means the earlier of the following dates: (i) the date on which Respondent Emerson acquires fifty percent (50%) or more of the voting securities or other equity interests of any of the Pentair Valves & Controls Subsidiaries; or (ii) the date on

which Respondent Emerson acquires any of the assets related to such subsidiaries.

I. "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 Westlock Product.

J. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement, and sale of a product.

K. "Closing Date" means the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Westlock Assets to an Acquirer pursuant to this Order.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Westlock Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to a Respondent's general business strategies or practices that does not discuss with particularity the Westlock Products;

2. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Westlock Products or that is exclusively related to Retained Product(s); and

3. 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.

M. "Copyrights" means rights to all original works of authorship of any kind directly related to a Westlock Product and any registrations and applications for registrations thereof within the United States of America.

N. "Crane" means Crane Co., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 100 First Stamford Place, Stamford, Connecticut 06902.

O. "Development" means all research and development activities, including, without limitation the following: design (including, without limitation, customized design for a particular customer(s)); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; mechanical properties testing; performance testing; safety testing; conducting experiments for the purpose of obtaining or achieving any and all Product Approvals and Certifications. "Develop" means to engage in Development.

P. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "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.

Q. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

R. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued

by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.

S. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, government department, or government commission; or any judicial or regulatory authority of any government.

T. "High Volume Account(s)" means any retailer, wholesaler, or distributor whose annual or projected annual purchase amounts, in units or in dollars, of a Westlock Product in the United States of America from a Respondent, was or was forecasted (prior to the contemplation of the Acquisition and subsequent divestiture) to be among the top twenty (20) highest such purchase amounts of that Respondent's total sales of that Westlock Product to 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; (iv) for forecasts of purchases of the Westlock Product, the quarter immediately following the Closing Date.

U. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

V. "Manufacturing Employees" means all employees of a Respondent whose primary work responsibilities were in the Business of the Westlock Products within the eighteen (18) month period immediately prior to the Closing Date and have directly participated in any of the following: (i) defining the commercial manufacturing process, (ii) confirming that the

manufacturing process is capable of reproducible commercial manufacturing, (iii) formulating the manufacturing process performance qualification protocol, (iv) controlling the manufacturing process to assure performance product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality products, (vi) managing the operation of the manufacturing process, or (vii) managing the technological transfer of the manufacturing process to a different facility, of the Manufacturing Technology of a Westlock Product (unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance).

W. "Manufacturing Equipment" means all fixtures, equipment (including, without limitation, technical equipment and computers), and machinery that is being used or has been used at the Westlock Production Facility at any time since the Respondents entered into the Acquisition Agreement, in the research, Development, or manufacture of a Westlock Product and that is suitable for use in the research, Development, or manufacture of a Westlock Product as of the Closing Date.

X. "Manufacturing Technology" means all technology, trade secrets, know-how, designs, ideas, concepts and proprietary information (whether patented, patentable, or otherwise) used within the five (5) year period immediately prior to the Closing Date by Respondent Pentair (or its predecessor(s) in ownership of Westlock Controls Corporation) to manufacture each Westlock Product, including, but not limited to, the following:

1. all product specifications, product designs and design protocols, including without limitation, the exact combination, design, array and identity and specifications of all components that achieve a

particular set of application and end-use characteristics in a final Westlock Product;

2. manufacturing processes, analytical methods, flow diagrams and other related manuals and drawings;

3. standard operating procedures;

4. quality assurance and control procedures;

5. control history;

6. research and Development records;

7. annual product reviews;

8. supplier lists;

9. labeling and product manuals;

10. manuals and technical information provided to employees, customers, distributors, suppliers, agents, licensees, including, without limitation, manufacturing, equipment and engineering manuals and drawings;

11. repair and performance records related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

12. records related to the protective workplace safety standards related to the Manufacturing Equipment for the two (2) year period immediately preceding the Closing Date;

13. audits of manufacturing methods for the Westlock Products conducted by any Agency, end-use customer, or any Standards and Certification Organization; and

14. all other information related to the manufacturing process.

Y. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of each Westlock Product in the United States of America as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, vendor/distributor 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 to be provided to distributors and/or end-use customer (*e.g.* specification sheets, installation instructions, and technical specifications), Website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to each Westlock Product.

Z. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

AA. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

BB. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

CC. "Orders" means this Decision and Order and the related Order to Maintain Assets.

DD. "Patent(s)" means all patents and 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.

EE. "Pentair Valves & Controls Subsidiaries" means the following entities (listed with the respective country location of their principal executive offices), individually and collectively: Flow Control Holding GmbH & Co. KG (Germany); Flow Control Holding Verwaltungs GmbH (Germany); Flow Control US Holding Corporation (United States - Minnesota), a subsidiary of which is Westlock Controls Corporation; Flow Control Technologies SA (French Republic); Generale de Robinetterie Industrielle et de Systemes de Surete (GRISS) S.A. (French Republic); Pentair Brazil Holding S.a.r.l. (Luxembourg); Pentair Flow Control AG (Swiss Confederation); Pentair Flow Control Holdings Ltd. (Isle of Man); Pentair Flow Control International Holdings C, LLC (United States – Minnesota); Pentair Flow Control Pacific Pty. Limited (Australia); Pentair Holding III (Denmark) ApS (Denmark); Pentair Middle East Holdings, LLC (United States - Minnesota); Pentair Sales Ireland Ltd. (Ireland); Pentair SSC Australia Pty Limited (Australia); Pentair Valves & Controls Africa (PTY) LTD (South Africa); Pentair Valves & Controls Argentina S.A. (Argentina); Pentair Valves & Controls Brasil Ltda. (Brazil); Pentair Valves & Controls Canada, Inc. (Canada); Pentair Valves & Controls Czech s.r.o. (Czech Republic); Pentair Valves & Controls Hungary Ltd. (Hungary); Pentair Valves & Controls Japan Co., Ltd. (Japan); Pentair Valves & Controls Netherlands B.V. (Netherlands); Pentair Valves & Controls Peru S.A. (Peru); Pentair Valves & Controls Polska Sp.z.o.o. (Poland); Pentair Valves & Controls Singapore Pte Ltd. (Singapore); Pentair Valves & Controls South Africa (Proprietary) Limited

(South Africa); Pentair Valves & Controls (Thailand) Ltd. (Thailand); PT Pentair Indonesia (Indonesia); Sempell GmbH (Germany); Taiwan Valve Co., Ltd. (Taiwan); and Westlock Equipamentos de Controle Ltda. (Brazil).

FF. "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.

GG. "Product Approval(s) and Certification(s)" means any approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies or Standards and Certification Organizations related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a product within the United States of America that have been adopted or required as of the Closing Date by any of the following:

1. applicable Agencies (*e.g.,* the ATEX directives of the European Union);

2. applicable Standards and Certification Organizations;

3. direct purchasers of the Westlock Products;

4. end-users of the Westlock Products, including, without limitation, any Governmental Entity of the United States of America; and

5. engineering and procurement firms and valve automation centers.

HH. "Product Contracts" means all contracts or agreements between a Respondent and a Third party:

1. that make specific reference to a Westlock Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, that Westlock Product from a Respondent;

2. pursuant to which a Respondent had or has as of the Closing Date the ability to independently purchase the raw materials, inputs or component(s), or had planned to purchase the raw materials, inputs, or component(s) from any Third Party, for use in connection with the manufacture of a Westlock Product;

3. pursuant to which a Third Party manufactures or plans to manufacture a Westlock Product in order to provide it to a Respondent;

4. pursuant to which a Third Party markets, sells or distributes a Westlock Product;

5. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the assembly or packaging of a Westlock Product;

6. pursuant to which a Third Party provides the Manufacturing Technology related to a Westlock Product to a Respondent;

7. pursuant to which a Third Party is licensed by a Respondent to use the Manufacturing Technology related to the Westlock Product;

8. constituting confidentiality agreements related to a Westlock Product;

9. involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Westlock Product;

10. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Westlock Product to a Respondent including, but not limited to, consultation arrangements; and/or

11. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Westlock Product or Westlock's Business;

12. pursuant to which a Respondent leases building(s) or equipment related to the Business of Westlock;

13. pursuant to which a Respondent licenses Software related to the Business of Westlock;

*provided, however*, that where any such contract or agreement also relates to a Retained Product(s), a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the Westlock Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

II. "Product Employee Information" means the following, for each Westlock Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Westlock Core Employee (including former employees who were employed by a Respondent within ninety (90) days of the execution date of any Remedial Agreement); and

2. with respect to each such employee, the following information:

   a. direct contact information for the employee, including telephone number;

b. the date of hire and effective service date;

c. job title or position held;

d. a specific description of the employee's responsibilities related to the relevant Westlock Product; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

e. the base salary or current wages;

f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

g. employment status (*i.e.,* active or on leave or disability; full-time or part-time);

h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

JJ. "Product Intellectual Property" means all of the following intellectual property related to any Westlock Product (other than Product Licensed Intellectual Property) that is owned, licensed, held, or controlled by a Respondent (including, without limitation, all such intellectual property held by Pentair Flow Control AG) as of the Closing Date:

1. Patents;

2. Copyrights;

3. Software;

4. Trademarks;

5. Trade Dress;

6. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and

7. 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, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

*provided, however,* that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Emerson", "Pentair", or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof (other than the corporate name and corporate trade dress of Westlock); or general registered images or symbols by which Emerson or Pentair can be identified or defined (other than those solely related to Westlock).

KK. "Product Licensed Intellectual Property" means all of the following intellectual property related to a Westlock Product that is owned, licensed, held, or controlled by a Respondent as of the Closing Date, as follows:

1. Patents that are related to a Westlock Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product; and

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 United States of America to limit the use or disclosure thereof, that are related to a Westlock Product and that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product.

LL. "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.

MM. "Quality and Safety Reports" means:

1. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy related to a Westlock Product;

2. summary of product complaints from distributors related to a Westlock Product;

3. summary of product complaints from end-use customers related to a Westlock Product;

4. product recall reports filed with any Agency or any Standards and Certification Organization related to a Westlock Product, and all reports, studies, and other documents related to such recalls;

5. investigation reports and other documents related to any out-of-specification results found in a Westlock Product;

6. reports related to a Westlock Product from any consultant or outside contractor engaged to

investigate or perform testing for the purposes of resolving any product or process issues;

7. reports of vendors of the inputs used to produce a Westlock Product that relate to the specifications and testing of the production of a Westlock Product;

8. analytical methods development records related to a Westlock Product; and

9. manufacturing records related to a Westlock Product.

NN. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent 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 and a Third Party to effect the assignment of assets or rights of that Respondent related to a Westlock 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 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 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 and a Third Party to effect the assignment of assets or rights of that Respondent related to a Westlock 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.

OO. "Research and Development Employees" means all salaried employees of a Respondent whose primary work responsibilities were in the Business of the Westlock Products within the eighteen (18) month period immediately prior to the Closing Date and who have directly participated in the research or Development of a Westlock Product (unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) including, without limitation, engineers involved in new product development, hardware design, mechanical design, software design and Product Approvals and Certifications.

PP. "Research and Development Reports" means all research and Development records relating to the Westlock Products including, but not limited to:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how related to the Westlock Products;

2. all correspondence to Westlock from Agencies and Standards and Certification Organizations relating to applications for Product Approvals and Certifications submitted by Westlock;

3. all correspondence from Westlock to Agencies and Standards and Certification Organizations relating to applications for Product Approvals and Certifications submitted by Westlock;

4. annual and periodic reports related to the above-described Product Approvals and Certifications;

5. product labeling or documents to be provided to end-use customers that are approved by Agencies or Standards and Certification Organizations; and

6. product usage, installation instructions, and technical specifications.

QQ. "Retained Product(s)" means any product(s) other than a Westlock Product.

RR. "Sales and Marketing Employees" means all employees of a Respondent whose primary work responsibilities were in the Business of the Westlock Products within the eighteen (18) month period immediately prior to the Closing Date and who directly have participated in the sales or marketing of the Westlock Products directly to distributors or end-use customers, including, without limitation, the regional sales managers.

SS. "Software" means computer programs related to the Business of Westlock, including all software implementations of algorithms, models, and

methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; provided however, that "Software" does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than user preference settings).

TT. "Standards and Certification Organization(s)" means any non-governmental Person that provides audits and certifications of management systems and/or manufacturing processes or product assessments and certifications related to the Westlock Products (*e.g.*, American National Standards Institute, National Fire Protection Association, International Electrotechnical Commission ("IEC"), Intertek Testing & Certification Limited, National Electrical Manufacturers Association, Sira Certification Service, and Underwriters Laboratories)

UU. "Switch Box Product(s)" means a valve position monitor, that is, a device that detects and indicates the position of a valve (such as whether the valve is open, completely closed, or some position there between) and communicates this position using a visual indicator and/or an electrical or other signal.

VV. "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 a Respondent knowledgeable about the Manufacturing

Technology (and all related intellectual property) related to each of the Westlock Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Westlock Product that are acceptable to the Acquirer to the extent that any such technology is not maintained and fully available at the Westlock Production Facility;

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 Manufacturing Technology (including all related intellectual property) to the Acquirer to the extent that any such technology and information is not maintained and fully available at the Westlock Production Facility; and

4. to the extent the Persons with the relevant knowledge remain employees of a Respondent (*e.g.*, are not hired by the Acquirer), providing, in a timely manner, assistance and advice to enable the Acquirer to:

    a. manufacture the specified Westlock Product in the quality and quantities achieved by a Respondent;

    b. obtain any Product Approvals and Certifications necessary for the Acquirer to manufacture, distribute, market, and sell each Westlock Product in commercial quantities and to meet the requirements of all Product

Approvals and Certifications for such Westlock Product; and

c. receive, integrate, and use all such Manufacturing Technology and all such intellectual property related to each Westlock Product.

WW. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

XX. "Trade Dress" means the current trade dress of a Westlock Product, including but not limited to, packaging and the lettering of the product trade name or brand name.

YY. "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.

ZZ. "United States of America" means the United States of America, and its territories, districts, commonwealths and possessions.

AAA. "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 Westlock Products.

BBB. "Westlock" means Westlock Controls Corporation (which, prior to the Acquisition, was a subsidiary of Respondent Pentair).

CCC. "Westlock Assets" means all rights, title and interest in and to all assets throughout the world related to Business of the Westlock Products, to the extent legally transferable, including the research, Development, manufacture, distribution, marketing and sale of each Westlock Product, including, without limitation:

1. all outstanding capital stock, voting securities and equity ownership interests in Westlock;

2. the Westlock Production Facility;

3. all Product Intellectual Property that is not Product Licensed Intellectual Property;

4. all Product Approvals and Certifications;

5. all Manufacturing Technology;

6. all Marketing Materials;

7. all Quality and Safety Reports;

8. all Research and Development Reports;

9. all Website(s), including, without limitation, www.westlockcontrols.com;

10. the content related exclusively to a Westlock Product that is displayed on any Website that is not dedicated exclusively to the Westlock Product or Westlock's Business;

11. at the option of the Acquirer, all Product Contracts;

12. for each Westlock Product:

    a. a list of all customers for each Westlock Product and a listing of the net sales (in either units or dollars) of that Westlock Product to such customers during the one (1) year period immediately prior to the Closing Date, stated 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 Product on behalf of the High Volume Account and his or her business contact information;

    b. a list either by model/series number containing the following: (i) the net price per model/series of the Closing Date, *i.e.*, the final price per unit charged by the Respondent net of all customer-level discounts, rebates, or promotions; (ii) the net price per unit charged by the Respondent at the end of each quarter during the one (1) year immediately prior to the Closing Date; and (iii) any supply outages by unit during the one (1) year period immediately prior to the Closing Date the result of which caused the Respondent to make a financial payment to the customer or to incur a penalty for a failure to supply; and

    c. backorders as of the Closing Date;

13. for each Westlock Product, a list of all suppliers;

14. to the extent available, a list of each Westlock Product that has had any finished product determined to be out-of-specification during the three (3) year period immediately preceding the Closing Date, and, for each such Westlock Product: (i) a description of the deficiencies; (ii) the corrective actions taken to remediate the

deficiencies in the Westlock Product; and (iii) to the extent known by Respondent Pentair, the employees (whether current or former) responsible for taking such corrective actions;

15. at the option of the Acquirer, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process, and finished goods related to the Westlock Products, *except* inventory in existence and owned by Pentair Flow Control AG as of the Closing Date;

16. the quantity and delivery terms in all unfilled customer purchase orders for each Westlock Product as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date, *except* any unfilled customer purchase orders (i) relating to inventory in existence and owned by Pentair Flow Control AG as of the Closing Date or (ii) which will be filled on behalf of the Acquirer pursuant to the Transition Services Agreement;

17. at the option of the Acquirer, the right to fill any or all unfilled customer purchase orders for each Westlock Product as of the Closing Date *except* any unfilled customer purchase orders (i) relating to inventory in existence and owned by Pentair Flow Control AG as of the Closing Date or (ii) which will be filled on behalf of the Acquirer pursuant to the Transition Services Agreement; and

18. all of a Respondent's books, records, and files directly related to the foregoing;

*provided, however*, that "Westlock Assets" shall not include: (i) documents relating to a Respondent's general business strategies or practices relating to the conduct of its Business outside of the Westlock Products, where such documents do not discuss with particularity a Westlock Product; (ii) information that

is exclusively related to the Retained Products; and (iii) all Product Licensed Intellectual Property;

*provided further*, *however*, that in cases in which documents or other materials included in the Westlock Assets contain information: (i) that relates both to a Westlock Product and to Retained Products or Businesses of Respondent Pentair and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Westlock Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

DDD. "Westlock Core Employees" means the Sales and Marketing Employees, the Research and Development Employees, and the Manufacturing Employees related to each Westlock Product.

EEE. "Westlock Divestiture Agreement(s)" means the following:

1. *Amended and Restated Asset and Share Purchase Agreement* by and between Emerson Electric Co. and Crane Co. dated as of April 12, 2017;

2. *Transition Services Agreement* by between Emerson Electric Co. and Crane Co. in the form attached as Exhibit C to the *Asset and Share Purchase Agreement* to be executed on or before

the Closing Date ("Transition Services Agreement");

3. *Intellectual Property Assignment Agreement* by and between Pentair Flow control AG ("Assignor") and Crane Co. ("Assignee") in the form attached as Exhibit D to the *Asset and Share Purchase Agreement* to be executed on or before the Closing Date;

4. all amendments, exhibits, attachments, and schedules attached to and submitted to the Commission with the foregoing listed agreements.

The Westlock Divestiture Agreements are contained in Non-Public Appendix II.A. The Westlock Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

FFF. "Westlock Product(s)" means all product lines and products researched, Developed, in Development, marketed or sold within the five (5) year period immediately preceding the Closing Date by Westlock, including, without limitation, all of the following:

1. Switch Boxes, including the following:

   a. Position Monitors: AccuTrak™ product line models/series: 1040, 2004, 1145, 9358, and 9044 (for rotary valve types, weatherproof classification, NEMA and IEC standards);

   b. Position Monitors: AccuTrak™ product line models/series: 1100, 3200, 3500, and 8500 (for rotary valve types, weatherproof classification, IEC standards);

   c. Position Monitors: AccuTrak™ product line models/series: 2007, 5050, 9479, 360, and 366

(for rotary valve types, explosion proof classification, National Electrical Code ("NEC") standards);

d. Position Monitors: AccuTrak™ product line models/series: 2200 and 2600 (for rotary valves, explosion proof classification, ATEX/IEC standards);

e. Position Monitor: AccuTrak™ product line model/series 2800 MOD3 (for linear valves, explosion proof classification, ATEX/IEC standards);

f. Position Monitor: AccuTrak™ product line models/series: 3000, 3300, and 8300 (for rotary valves, intrinsically safe classification, ATEX/IEC standards);

g. Position Monitor: AccuTrak™ product line models/series: 3400 and 8400 (for rotary valve types, encapsulation and increased safety classification, ATEX/IEC standards);

h. Position Monitor: AccuTrak™ product line model 3479 MOD3;

i. Position Monitor: AccuTrak™ product line models/series: 5004 and 5044 (for rotary valve types, intrinsically safe classification, NEC standards);

j. Position Monitor: AccuTrak™ product line model 9468 (for rotary valve types, non-incendive classification, NEC standards);

k. Beacon Visual Position Indicator (AccuTrak™ product line); and

l. AVID® (Automated Valve Interface Device) products, including all products in the ZR, ZR

Plus, PlantNet, SmartCal, and EaziCal product lines; and

2. limit switches and sensors, including the following: AccuTrak Silver Bullet Position Sensor – ATEX/IEC (for linear valve types, explosion proof classification, ATEX/IEC standards); AccuTrak Silver Bullet Position Sensor – NEC (for linear valve types, explosion proof classification, NEC standards); and all other limit switches and sensors researched, Developed, marketed or sold by Westlock (for rotary valves, general purpose classification);

3. valve control monitors, including the following: Beacon Visual Position Indicator (AccuTrak product line); and all valve control monitors in the Quantum product line (including the following models/series: 2200, 2600, 2800 MOD3, 3200, 3800, 8800, 3600, 8600; 3700; 8700; 711; 722; 811; 764; 784; 864; 765; 789; 865; 777; 877; 360; and 366);

4. valve network solutions, including, the following in the Intellis product line: Intellis Network Control Monitors-ATEX/IEC (for rotary valve types, explosion proof/intrinsically safe/weatherproof classifications, ATEX/IEC standards) and Intellis Network Control Monitors-NEC; (for rotary valve types, explosion proof/intrinsically safe/weatherproof classifications, NEC standards);

5. position transmitters, including the following: Westlock product line CS Position Transmitter; and all position transmitters in the Digital EPIC product line;

6. positioners, including all positioners in the Westlock and ICoT product lines;

7. SIL (Safety Integrity Levels) products and solutions;

8. wireless solutions, including, but not limited to, the Wireless Valve Monitoring System in the AccuTrak product line;

9. sanitary valve position and control monitors, including the following: position monitors in the AccuTrak product line models/series: AccuTrak 9881 and AccuTrak 9881-NEC; and sanitary control monitors in the Pharma II product line models/series: Pharma II 99P2/76P2/77P2 – NEC; Pharma II 99P2/76P2/77P2-IEC;

10. solenoid valves, including all solenoid valves in the Falcon product line;

11. all other products in the following Westlock product lines: AccuTrak, Digital EPIC, Falcon, ICoT, Intellis, Pharma II, and Quantum.

GGG. "Westlock Product License" means a perpetual, non-exclusive, fully paid-up, and royalty-free license(s) under a Remedial Agreement with rights to sublicense to all Product Licensed Intellectual Property and all Manufacturing Technology related to general manufacturing know-how that was owned, licensed, held, or controlled by a Respondent:

1. to research and Develop each Westlock Product(s) for marketing, distribution, or sale within the United States of America;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell each Westlock Product(s) within the United States of America;

3. to import or export each Westlock Product(s) to or from the United States of America to the extent related to the marketing, distribution, or sale of the

Westlock Products in the United States of America; and

4. to have the Westlock Product(s) made anywhere in the world for distribution or sale within, or import into the United States of America;

*provided, however*, that for any Product Licensed Intellectual Property or Manufacturing Technology 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.

HHH. "Westlock Production Facility" means all assets comprising the facility located at 280 North Midland Ave, Saddle Brook, New Jersey 07663, including, without limitation, all of the following: real estate; buildings; warehouses; structures; Manufacturing Equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies associated with the facility; and other tangible property, owned, leased or operated on or behalf of Pentair and located at the address above.

III. "Westlock Releasee(s)" means the following Persons:

1. the Acquirer;

2. any Person controlled by or under common control with the Acquirer;

3. licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of such Acquirer-affiliated entities.

JJJ. "Westlock Switch Box Product" means any Westlock Product Developed, in Development, marketed or sold within the five (5) year period immediately preceding the Closing Date that is a Switch Box Product.

## II.

**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Westlock Assets and grant the Westlock Product License, absolutely and in good faith, to Crane pursuant to, and in accordance with, the Westlock 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 Crane or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Westlock Assets is incorporated by reference into this Order and made a part hereof;

*provided, however*, that if Respondents have divested the Westlock Assets to Crane prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Crane is not an acceptable purchaser of any of the Westlock Assets, then Respondents shall immediately rescind the transaction with Crane, in whole or in part, as directed by the Commission, and shall divest the Westlock Assets within one hundred eighty (180) days after 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, however,* that if Respondents have divested the Westlock Assets to Crane prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such

modifications to the manner of divestiture of the Westlock Assets to Crane (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

C. 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 Westlock Assets to the Acquirer, and to permit the Acquirer to continue Westlock's Business;

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

D. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information;

2. deliver all Confidential Business Information to the Acquirer:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the

Acquirer and the 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 Westlock's Business that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to the 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, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law; and

6. after the delivery of the Confidential Business Information to the Acquirer and upon the request of the Acquirer, destroy any copies of Confidential Business Information (other than electronic copies of Confidential Business Information created as a result of automatic back-up procedures) within thirty (30) days of such request *except* as otherwise agreed to between the Respondent(s) and the Acquirer or to the extent necessary to comply with applicable Law.

E. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Manufacturing Technology (including all related intellectual property); and

2. all rights to all Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not 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 Manufacturing Technology (including all related intellectual property). Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such 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 Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

F. Respondent Emerson shall designate employees of Respondent Emerson knowledgeable about the accounts receivable, accounts payable, internal and external auditing functions, tax, legal, treasury, payroll, benefits administration, information technology systems and support and human resources management of Westlock to provide services and assistance to the Acquirer, in the transfer and integration of the Business of Westlock into the Acquirer's business and for a time sufficient to enable the Acquirer to integrate and perform these functions

independently of Respondent Emerson. Such services and assistance shall be provided by Respondent Emerson to the Acquirer at no greater than Direct Cost.

G. Respondents shall require, as a condition of continued employment post-divestiture of the Westlock Assets, that each employee that has had responsibilities related to the marketing or sales of the Westlock 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 perform the same or similar functions as the Westlock Products, in each case 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 Westlock Products as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

H. Not later than thirty (30) days after the Closing Date, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Westlock Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Each Respondent 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. Each Respondent shall provide a copy of the notification to the relevant Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the

Commission affirming the implementation of, and compliance with, the acknowledgement program. Each Respondent shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

I. Respondents shall:

1. for a period of twelve (12) months after the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Westlock Core Employees. Each of these periods is hereinafter referred to as the "Westlock 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 the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Westlock Core Employees. Failure by that Respondent to provide the Product Employee Information for any Westlock Core Employee within the time provided herein shall extend the Westlock Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide, or providing to Westlock Core Employees the opportunity to enter into employment contracts during the Westlock Core Employee Access Period, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

3. during the Westlock Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer of the Westlock Core Employees and remove any impediments within the control of a Respondent that may deter these employees from accepting employment with that Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Westlock Product or other contracts with a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer. In addition, a Respondent shall not make any counteroffer to any Westlock Core Employee who has received a written offer of employment from the Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit a Respondent from continuing to employ any Westlock Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer to that employee;

4. until the Closing Date, provide all Westlock Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, market and/or sell the Westlock Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of Westlock's Business and to ensure successful execution of the pre-Acquisition plans for the Westlock Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s) for the divestiture of the Westlock Assets 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 a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Westlock Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Westlock Product ("Westlock Product Employee") to terminate his or her employment relationship with the Acquirer; or (ii) hire any Westlock Product Employee;

*provided, however*, a Respondent may hire any former Westlock Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

*provided further*, *however*, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Westlock Product Employees; or (ii) hire a Westlock Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

J. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Manufacturing Technology related to each Westlock Product to the Acquirer:

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses associated with that Westlock 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 Westlock Product;

d. ensure the assets related to each Westlock Product are provided to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval and Certification processes related to the Business associated with each Westlock Product;

e. ensure the completeness of the transfer and delivery of the Manufacturing Technology; and

2. Respondents shall not sell, transfer, encumber, or otherwise impair the Westlock Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of Westlock's Business.

K. After the Closing Date, Respondents shall not, in the United States of America:

1. use any of the Trademarks related to Westlock Products or any mark confusingly similar to the Trademarks as a trademark, tradename, or service mark *except* as may be necessary to sell stocks of Westlock Products in existence as of the Acquisition Date;

2. attempt to register the Trademarks;

3. attempt to register any mark confusingly similar to the Trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Trademarks; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Trademarks against Third Parties.

L. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against an Acquirer or the Westlock Releasee(s):

1. under any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims any of the following:

   a. a valve position monitor;

   b. a method or device for making, using, or controlling a valve position monitor; or

   c. a method or device for monitoring, indicating, or communicating the position of a valve; or

2. under 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 any of the following:

   a. a valve position monitor;

   b. a method or device for making, using, or controlling a valve position monitor;

   c. a method or device for monitoring, indicating, or communicating the position of a valve;

if such 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 a Westlock Switch Box Product for the purposes of marketing, sale, or offer for sale within the United States of America of such Westlock Switch Box Product(s); or (ii) the import, export, use, supply, distribution, sale,

or offer for sale of the Westlock Switch Box Product(s) into, from, or within the United States of America. Respondents shall also covenant to the Acquirer that as a condition of any assignment or license from Respondents 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 Westlock 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 Westlock Switch Box Product(s) for the purposes of marketing, sale, or offer for sale within the United States of America of such Westlock Switch Box Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Westlock Switch Box Product(s) into, from, or within the United States of America. 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;

M. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents 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 Westlock Switch Box Product(s), if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Westlock Switch Box Product(s) for the purposes of marketing, sale, or offer for sale within the United States of America of such Westlock Switch Box Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Westlock

Switch Box Product(s) into, from, or within the United States of America.

N. For any patent infringement suit filed prior to the Closing Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a 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 Westlock Switch Box Product(s) acquired for the purposes of marketing, sale, or offer for sale within the United States of America of such Westlock Switch Box Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Westlock Switch Box Product(s) into, from, or within the United States of America, 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 Westlock Switch Box 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 Westlock Switch Box Product; and

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 Westlock Switch Box Product.

O. The purpose of the divestiture of the Westlock Assets 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 of Westlock within the United States of America;

2. to create a viable and effective competitor that is independent of Respondent Emerson in the Business of the Switch Box Products within the United States of America; 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 ("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 Monitor, subject to the consent of Respondent Emerson, which consent shall not be unreasonably withheld. If Respondent Emerson 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 Emerson of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondent Emerson 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

each Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed, each 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 each 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 Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until the latter of:

   a. the date of completion by Respondents of all Westlock Assets and the transfer of the Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property in a manner that fully satisfies the requirements of this Order;

   b. the Acquirer has obtained all the Product Approvals and Certifications, with respect to each Westlock Switch Box Product;

   c. the Acquirer is able to perform all of the accounts receivable, accounts payable, internal and external auditing functions, tax, legal, treasury, payroll, benefits administration, information technologies, and human resources management of Westlock that had, prior to the Closing Date, been performed by entities within Respondent Pentair or Respondent

Emerson outside of Westlock Controls Corporation.

*provided, however,* that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to 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 Monitor shall have full and complete access to each 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 that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent Emerson, 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 Emerson, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Each Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent

that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Each Respondent shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by a Respondent of its obligations under the Order;

I. Each Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. 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.

K. 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.

L. 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.

M. 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.

## IV.

**IT IS FURTHER ORDERED** that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Westlock 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 a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the

identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets

that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. 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(s). Any delays in divestiture caused by a 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of

Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

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

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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(s) 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 appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an

Acquirer (other than electronic copies created as a result of automatic back-up procedures) 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 Westlock Products or the assets and Businesses associated with those Westlock Products;

*provided*, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph VII pursuant to an appropriate confidentiality order, agreement, or arrangement;

*provided further*, *however,* that pursuant to this Paragraph VII, a 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:

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 Westlock 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. 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 Westlock Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. 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 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 Date, Respondent Emerson shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred.

B. Within five (5) days of the Closing Date, Respondent Emerson shall submit to the Commission a letter

certifying the date on which that particular divestiture occurred.

C. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent Emerson has (i) divested all Westlock Assets, (ii) fully provided the Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property to an Acquirer in a manner that fully satisfies the requirements of this Order, and (iii) completed its obligations to provide services and assistance to the Acquirer with respect to accounts receivable, accounts payable, internal and external auditing functions, tax, legal, treasury, payroll, benefits administration, information technologies, and human resources management of Westlock, Respondent Emerson 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 these requirements of this Order. Respondent Emerson shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondent Emerson 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 Orders, 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 and (ii) transitional services being provided by Respondent Emerson to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

D. One (1) year after the Order Date, annually for the next four (4) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and

form in which it has complied and is complying with the Order.

## VIII.

**IT IS FURTHER ORDERED** that each Respondent 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 a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that 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 that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

## X.

**IT IS FURTHER ORDERED** that Respondent Pentair's obligations under this Decision and Order, other than (i) the covenant not to sue an Acquirer under certain Patents contained in Paragraph II.L. of this Order and (ii) the provisions regarding employment contained in Paragraph II.I, shall terminate on the date on which all of the following have occurred:

A. Respondent Emerson has acquired over fifty (50) percent of the voting securities or equity interests of each of the Pentair Valves & Controls Subsidiaries;

B. the Westlock Assets are completely owned and controlled either by Respondent Emerson or an Acquirer;

C. with respect to any Westlock Product or related Product Intellectual Property or Manufacturing Technology, that is owned or controlled by Respondent Pentair prior to the Acquisition, Respondent Pentair has:

1. transferred all rights and assets that were owned or controlled by Respondent Pentair prior to the Acquisition and necessary to effect the related divestitures to either Respondent Emerson or the Acquirer;

2. transferred or otherwise provided all rights, assets or other resources that were owned or controlled by Respondent Pentair prior to the Acquisition and necessary for Respondent Emerson to provide the services and assistance to the Acquirer described in Paragraph II.F. to Respondent Emerson; and

3. secured all consents and waivers from all Third Parties that are necessary to divest the Westlock

Assets to an Acquirer or certified that the Acquirer has executed all such agreements directly with each of the relevant Third Parties;

D. with respect to any Product Licensed Intellectual Property, Respondent Pentair has granted or otherwise provided the rights to use such intellectual property either directly to the Acquirer, or to Emerson for the purposes of providing such rights to the Acquirer; and

E. Respondent Pentair certifies to the Commission that all of the above-described acquisitions and transfers have occurred and all of the above-described consents and waivers from Third Parties have been provided to the Acquirer.

## XI.

**IT IS FURTHER ORDERED** that this Order shall terminate on June 12, 2027.

By the Commission.

## NON-PUBLIC APPENDIX I

## ACQUISITION AGREEMENT

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

## NON-PUBLIC APPENDIX II.A

## AGREEMENTS RELATED TO THE DIVESTITURE

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

## 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 Orders ("Consent Agreement") from Emerson Electric Co. ("Emerson") and Pentair plc ("Pentair") (collectively, the "Respondents") that is designed to remedy the anticompetitive effects that would likely result from Emerson's proposed acquisition of Pentair's valves and controls business.

Pursuant to a Share Purchase Agreement, dated as of August 18, 2016, Emerson proposes to acquire the equity interests of certain subsidiaries of Pentair in exchange for cash considerations of approximately $3.15 billion (the "Acquisition"). The proposed Acquisition would combine the two largest suppliers of switchboxes, which are industrial valve control products, 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 substantially lessening competition in the United States market for switchboxes.

The proposed Decision and Order ("Order") requires Emerson to divest Pentair's switchbox manufacturer subsidiary, Westlock Controls Corporation ("Westlock"), to Crane Co. ("Crane") no

later than ten days after the Acquisition is consummated. The divestiture requires Emerson to transfer to Crane all of the facilities, personnel, confidential information, and intellectual property associated with the design, manufacture, and sale of Westlock's products, which will allow Crane to effectively compete in the switchbox market.

The Commission has placed the Consent Agreement 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 Consent Agreement, along with any comments received, and decide whether it should withdraw from the Consent Agreement, modify it, or make the Order final.

## II. THE RESPONDENTS

Emerson, headquartered in St. Louis, Missouri, is a diversified global manufacturing company that provides a variety of products and services for the industrial, commercial, and consumer markets. Through its Automated Solutions segment, Emerson is a leading manufacturer of industrial equipment and instrumentation, including valves, actuators, regulators, and switchboxes, which it sells to customers in, among others, the oil and gas, refining, chemical, and power generation industries.

Pentair, headquartered in London, United Kingdom, with a main U.S. office located in Minneapolis, Minnesota, is a global water, fluid, thermal management, and equipment protection company. The Pentair Valves & Controls business manufactures valves, fittings, actuators, and controls, including switchboxes, for a broad array of industrial markets.

## III. THE RELEVANT MARKETS

The relevant product market at issue in this transaction is switchboxes. Switchboxes are devices that monitor and control isolation (or "on/off") valves, which control the flow of liquids or gases through pipes in industrial applications, including the oil and gas, chemical, petrochemical, and power generation industries. Switchboxes consist of a hard outer case, which often is made of explosion-proof material, containing switches and

other electrical components that detect the position of a valve—that is, whether it is open or closed—and communicate that position via a visual display and/or digital signals to the facility's workers and control room. Switchboxes are ancillary components that are typically bundled together with a valve, an actuator (a device that physically opens and closes a valve), and other control products into an "automated" isolation valve, which can open and close automatically without manual intervention. Because switchboxes perform a unique and essential role in the efficient and safe operation of industrial plants and facilities, there currently are no practical alternatives to switchboxes.

The United States is the relevant geographic market in which to assess the competitive effects of the Acquisition. The United States operates distinctly compared to international markets. Unlike international markets, the domestic market relies heavily on distributors, so competition takes place at both the distributor and customer level. Moreover, customers in the United States have distinct brand preferences for leading switchbox brands. Because switchboxes are frequently used under hazardous conditions in which safety is critical, brand reputation and product reliability are very important to customers. As a result, U.S. customers are unlikely to turn to brands that are not well established in the United States in response to a small but significant non-transitory increase in price.

Pentair's "Westlock" and Emerson's "TopWorx" switchbox businesses are the two largest suppliers of switchboxes in the United States, with a combined market share of approximately 60%. Other than Westlock and TopWorx, there are few suppliers with appreciable market shares. Each of these suppliers has substantially smaller market shares than either Westlock or TopWorx. In addition, there is a fringe of small manufacturers with very small market shares. The switchboxes produced by these smaller suppliers are not widely accepted by customers in the United States. The Acquisition would substantially increase concentration levels in the U.S. switchbox market and would result in a highly concentrated market. Under the *Horizontal Merger Guidelines*, the increase in concentration would presumptively create or enhance market power.

## IV. EFFECTS OF THE ACQUISITION

Absent a divestiture, the proposed Acquisition would likely harm competition in the U.S. switchbox market. Emerson and Pentair are each other's closest competitors in this market, and customers benefit from that competition through lower prices and increased product innovation. TopWorx and Westlock are the most widely used and highly regarded brands of switchboxes in the United States and, for many customers, are the only acceptable brands of switchboxes. By eliminating competition between Emerson and Pentair, the Acquisition likely would produce unilateral effects in the form of higher prices and reduced innovation.

## V. ENTRY

Entry into the U.S. market for switchboxes would not be timely, likely, or sufficient in to deter or counteract the anticompetitive effects of the Acquisition. The competitive strength of TopWorx and Westlock largely reflects their brand reputation for reliability and durability, which could not be quickly replicated by a new entrant. In addition, customers will typically only purchase switchboxes from approved suppliers and are reluctant to consider unproven manufacturers. This is because customers place a premium on safety, and product failure could cause costly and potentially dangerous disruption to critical applications. Any new entrant would need to not only undertake a lengthy and costly process of new product development, but would also need to undergo rigorous vetting, testing, and approval to become viable alternatives for many customers. Given the difficulty in overcoming these obstacles, it is unlikely that a new entrant or existing lower-tier competitor could effectively restore the competition lost through this Acquisition.

## VI. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the competitive concerns raised by the Acquisition by requiring Emerson to divest Pentair's Westlock subsidiary to Crane, a publicly traded manufacturer of highly engineered industrial products, including industrial valves. The proposed divestiture includes everything

needed for Crane to compete effectively in the U.S. market for switchboxes.

Crane, headquartered in Stamford, Connecticut, is a 162-year old company with a long history as a significant competitor in the U.S. industrial valves market, providing it with the industry experience and expertise necessary to replace the competition that would be lost due to the Acquisition. Crane's portfolio of valves complements the switchbox and other valve control products that Westlock manufactures, but Crane does not sell any products that compete with Westlock. Crane has a substantial U.S. infrastructure and customer base, including many of the same customers as Westlock, and pre-existing relationships with many of Westlock's distributors. Crane is thus well positioned to acquire and integrate Westlock and maintain the benefits of competition in this market.

Under the terms of the Order, Emerson must divest all of Westlock's businesses and assets to Crane, including Westlock's manufacturing facility located in Saddle Brook, New Jersey, and all of the confidential information and intellectual property related to Westlock's product portfolio. Emerson must also allow Crane to have access to and hire any Westlock employees who were engaged in the research, development, manufacturing, marketing, or sales of Westlock's products. In order to ensure that the divestiture will succeed, the Order requires the Respondents to enter into a one-year transitional services agreement with Crane for certain functions that Pentair performed for Westlock (such as accounts receivable, tax, legal, payroll, benefits, and other related functions). In order to preserve competition with Emerson, the Order requires Emerson to institute procedures that protect sensitive non-public information regarding Westlock's business from the Emerson business people in competing lines of business. It also restricts Emerson from instituting patent infringement suits against Crane for the Westlock switchbox product lines that are currently being marketed or in development.

The Respondents must complete the divestiture no later than ten days after the consummation of the Acquisition. If the Commission determines that Crane is not an acceptable acquirer, the Order requires the Respondents to unwind the sale and accomplish a divestiture of Westlock to another Commission-

approved acquirer within 180 days of the date the Order becomes final. Further, the Order allows the Commission to appoint a monitor to ensure that the Respondents expeditiously comply with their obligations under the Order and a Divestiture Trustee to accomplish the divestiture should the Respondents fail to comply with their divestiture obligations.

## VII. OPPORTUNITY FOR PUBLIC COMMENT

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

**IN THE MATTER OF**

# CHINA NATIONAL CHEMICAL CORPORATION

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

*Docket No. C-4610; File No. 161 0093*
*Complaint, April 4, 2017 – Decision, June 13, 2017*

This consent order addresses the $43 billion acquisition by China National Chemical Corporation of certain assets of Syngenta AG. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for formulated crop protection products based on paraquat, abamectin, and chlorothalonil in the United States. The consent order requires ChemChina subsidiary ADAMA to divest its paraquat, abamectin, and chlorothalonil crop protection businesses in the United States to American Vanguard Corporation and its affiliate Amvac Chemical Corporation.

*Participants*

For the *Commission*: *Cem Akleman* and *David Morris.*

For the *Respondent*: *Ellen Frye* and *Peter Guryan, Simpson Thacher & Bartlett 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 China National Chemical Corporation ("ChemChina"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Syngenta AG ("Syngenta"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

## I. RESPONDENT

1. Respondent ChemChina is a corporation organized, existing and doing business under, and by virtue of, the laws of the People's Republic of China, with its office and principal place of business located at No. 62 Beisihuanxilu, Haidian District, Beijing 100080, People's Republic of China. ADAMA Agricultural Solutions Ltd. ("ADAMA") is a wholly-owned subsidiary of ChemChina, doing business as ADAMA. ADAMA is a corporation organized, existing and doing business under, and by virtue of, the laws of Israel, with its corporate office and principal place of business located at Golan Street, Airport City 7019900, Israel. ADAMA manufactures, formulates and sells agricultural chemical products in the U.S.

2. Syngenta is a corporation organized, existing and doing business under, and by virtue of, the laws of Switzerland, with its office and principal place of business located at Schwarzwaldallee 215, Basel, Switzerland 4058.

3. Respondent and Syngenta are corporations who, either directly or through owned subsidiaries, are engaged in, among other activities, the manufacture, formulation, and sale of agricultural crop protection chemicals including formulations based on the active ingredients paraquat, abamectin, and chlorothalonil.

4. Respondent and Syngenta 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## II. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger ("Merger Agreement") dated February 2, 2016, ChemChina has agreed to cause China National Agrochemical Corporation Saturn (NL) B.V., an indirect wholly owned subsidiary of ChemChina, to submit a public tender offer for all publicly held registered shares and American Depository Shares of Syngenta at an offer price of $465 per share, for total consideration of up to $43 billion in cash

("Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## III. THE RELEVANT MARKET

6. For purposes of this Complaint, the relevant lines of commerce in which to analyze the Acquisition are formulated crop protection products based on the active ingredients paraquat, abamectin, and chlorothalonil. Formulated crop protection chemicals are based on key active ingredients that are diluted from a concentrated technical grade and formulated by the Respondent, Syngenta, and other chemical companies for application in the fields. Paraquat is an herbicide, which controls weeds and other vegetation. Abamectin is an insecticide, which controls insects and related pests. Chlorothalonil is a fungicide, which controls fungus.

7. Paraquat is a non-selective "burndown" herbicide, which means it does not discriminate between the weeds it controls and crops. It is used to clear fields prior to the growing season. Paraquat does not have the resistance issues of alternatives such as glyphosate and is significantly less expensive than other alternatives.

8. Abamectin is an insecticide used to kill mites, psyllid, and leafminers. It is used primarily in citrus and tree nut crops. Available alternatives to abamectin are either significantly more expensive because they are patent-protected or less effective.

9. Chlorothalonil is a broad-spectrum fungicide used primarily in peanuts and potatoes. Chlorothalonil is particularly effective because, unlike most fungicides, it operates with four modes of action and is critical for resistance management among growers.

10. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the paraquat, abamectin, and chlorothalonil formulated crop protection chemical markets is the United States. The U.S. Environmental Protection Agency requires that manufacturers register both the technical active ingredient and the formulated products for sale in the United States under the Federal

Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et. seq. This registration requirement limits market access to a set of products consistent with U.S. regulatory requirements.

## IV. MARKET STRUCTURE

11. The markets for formulated crop protection products using the active ingredients paraquat, abamectin, and chlorothalonil in the United States are highly concentrated. Syngenta is the market leader in each of the three product markets, while ADAMA is either the largest or the second largest generic supplier. Post-Acquisition, the combined share of the Respondent and Syngenta would be over 60% in formulated crop protection products with the active ingredient paraquat. ADAMA is the generic market leader in formulated crop protection products with the active ingredient abamectin and post-Acquisition, the combined market share would be approximately 80%. ADAMA is the second largest generic supplier of formulated crop protection products with the active ingredient chlorothalonil, and post-Acquisition the combined market share would be over 40%.

## V. EXPANSION AND ENTRY BARRIERS

12. Entry into the relevant markets is not likely to be sufficient to counteract the anticompetitive effects of the Acquisition. New generic crop protection entrants typically forecast and ultimately achieve minimal market penetration while ADAMA, in contrast, has successfully maintained significantly higher market shares for an extended period of time. No new entrant is likely to become as robust a competitor as ADAMA is today for formulated crop protection products based on the active ingredients paraquat, abamectin, and chlorothalonil.

## VI. EFFECTS OF THE ACQUISITION

13. 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, by eliminating actual, direct, and substantial competition between ChemChina and Syngenta in the relevant markets. Specifically, the Acquisition would remove an important competitive constraint

on ADAMA, thereby increasing the likelihood that the merged entity will unilaterally exercise market power in the relevant markets and that customers in the United States would be forced to pay higher prices or accept reduced service for crop protection formulations based on the active ingredients paraquat, abamectin, and chlorothalonil.

## VII. VIOLATIONS CHARGED

14. The allegations contained in Paragraphs 1 through 13 above are hereby incorporated by reference as though fully set forth here.

15. 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.

16. 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.

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this fourth day of April, 2017, issues its complaint against said Respondent.

By the Commission.

## ORDER TO MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Respondents China National Chemical Corporation, ADAMA Agricultural Solutions Ltd., and Makhteshim Agan of North America, Inc., d/b/a

ADAMA (collectively "Respondents") of the outstanding voting shares of Syngenta AG ("Syngenta") 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 ("Consent Agreement") containing consent orders, 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 the following Order to Maintain Assets:

1. Respondent China National Chemical Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the People's Republic of China, with its corporate office and principal place of business located at No. 62 Beisihuanxilu, Haidian District, Beijing 100080, People's Republic of China.

2. Respondent ADAMA Agricultural Solutions Ltd. is a corporation organized, existing and doing business under, and by virtue of, the laws of Israel, with its

corporate office and principal place of business located at Golan Street, Airport City 7019900, Israel.

3. Respondent Makhteshim Agan of North America, Inc. d/b/a ADAMA, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 3120 Highwoods Blvd., Suite 100, Raleigh, North Carolina 27604.

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

## ORDER

### I.

**IT IS HEREBY ORDERED** that, as used in this Order to Maintain Assets, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Maintain Assets is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

A. "ChemChina" means China National Chemical Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by China National Chemical Corporation (including Respondent ADAMA), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, ChemChina shall include Syngenta.

B. "ADAMA" means ADAMA Agricultural Solutions Ltd. and Makhteshim Agan of North America, Inc., their directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups and affiliates in each case controlled by ADAMA Agricultural Solutions

Ltd. and Makhteshim Agan of North America, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means ChemChina and ADAMA, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means (i) Amvac Chemical Corporation or (ii) any other Person that acquires the CP Assets pursuant to this Order.

F. "Acquisition" means the proposed acquisition described in the Transaction Agreement dated as of February 2, 2016, by and between China National Chemical Corporation, China National Agrochemical Corporation, and Syngenta AG relating to a public tender offer of BidCo for all publicly held registered shares and American Depositary Shares of Syngenta.

G. "CP Assets" means the assets identified in Paragraph I.R. of the Decision and Order.

H. "CP Business" means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by ADAMA of all CP Products, including products in development, for crop protection in the United States, prior to the Acquisition.

I. "CP Employee" means any individual (i) employed by ADAMA on a full-time, part-time, or contract basis at any time as of and after the date of the announcement of the Acquisition and (ii) whose job responsibilities predominantly relate or predominantly related to the CP Business.

J. "CP Product(s)" means all of ADAMA's crop protection products, including products in development, in which the sole Active Ingredient used in the formulation or sale of the product is one of the

CP Active Ingredients, including but not limited to, the CP Products listed on Appendix A to this Order to Maintain Assets.

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.

L. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on the transaction to divest any of the CP Assets to an Acquirer.

M. "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.

## II.

**IT IS FURTHER ORDERED** that until Respondents complete the divestiture required by Paragraph II.A. of the Decision and Order, Respondents shall operate the CP Business and CP Assets in the ordinary course of business consistent with past practices as of the date that Respondents announced the Acquisition, including but not limited to:

A. Respondents shall:

1. Maintain (i) the CP Business and CP Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement and (ii) relations and

goodwill with suppliers, customers, landlords, creditors, agents, and others having business relationships with the CP Business and CP Assets;

2. Staff the CP Business and CP Assets with sufficient employees to maintain the viability and competitiveness of the CP Business and CP Assets, including but not limited to, providing each CP 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 CP Assets;

3. Provide the CP Business with sufficient financial and other resources to (i) operate the CP Business and CP Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, and all sales, promotional, and marketing activities in place prior to the Acquisition; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the CP Business in the ordinary course of business and in accordance with past practice and current plans; (iii) 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, or expansion projects; and (iv) maintain the viability, competitiveness, and marketability of the CP Business and CP Assets;

4. Take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the CP Business and CP Assets (other than normal wear and tear), and not sell, transfer, encumber, or otherwise impair the CP Assets (other than in the manner prescribed in the Decision and Order);

5. Comply with Paragraphs II.C., II.D., II.E., and III. of the Decision and Order; and

6. Not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, or marketability of the CP Business or CP Assets would be diminished.

B. The purpose of this Order to Maintain Assets is to (i) preserve the CP Business and CP Assets as a viable, competitive, and ongoing business 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.

**III.**

**IT IS FURTHER ORDERED** that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Duff & Phelps B.V. to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order to Maintain Assets and the Decision and Order (collectively "Orders") and the Divestiture Agreement.

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 the Orders and in consultation with the Commission:

Order to Maintain Assets

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in the Orders 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 the Orders 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 the Orders;

3. The Monitor (i) shall 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 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 concerning Respondents' compliance with the Orders on a schedule as determined by Commission staff.

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 under this Order to Maintain Assets shall terminate when this Order to Maintain Assets terminates, 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 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 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 the Orders.

## IV.

**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 to Maintain Assets and the Decision and Order within thirty (30) days from the date Respondents sign the Consent Agreement (as set forth in the Consent Agreement) and every thirty (30) days thereafter until this Order to Maintain Assets terminates;

*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 VIII. of the Decision and Order.

B. With respect to any divestiture required by Paragraph II.A. of the Decision and Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the CP Assets; (ii) a description of all substantive contacts with a proposed acquirer (if other than Amvac), and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents have completed such divestiture and the date the divestiture was accomplished.

**V.**

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

A. Any proposed dissolution of any Respondent;

B. Any proposed acquisition, merger, or consolidation of any Respondent; or

C. Any other change in any 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 to Maintain Assets.

**VI.**

**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 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 matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate:

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 date that Respondents complete the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however,* that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final.

By the Commission.

## Appendix A

## Specified Products

Abamectin Products
- ABBA 0.15EC
- ABBA 0.15ME (Alternate Brand Names: BORRADA and ABBA 0.15)
- ABBA Ultra Miticide/Insecticide

Chlorothalonil Products
- EQUUS DF
- EQUUS 500ZN
- EQUUS 720 SST

Paraquat Products
- Parazone 3SL
- Parazone 2SL (pending EPA approval)

## DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondents China National Chemical Corporation, ADAMA Agricultural Solutions Ltd., and Makhteshim Agan of North America, Inc., d/b/a ADAMA (collectively "Respondents") of the outstanding voting shares of Syngenta AG ("Syngenta") 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 ("Consent Agreement") containing consent orders, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its complaint and its Order to 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, 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 China National Chemical Corporation is a corporation organized, existing, and doing business

under, and by virtue of, the laws of the People's Republic of China, with its corporate office and principal place of business located at No. 62 Beisihuanxilu, Haidian District, Beijing 100080, People's Republic of China.

2. Respondent ADAMA Agricultural Solutions Ltd. is a corporation organized, existing and doing business under, and by virtue of, the laws of Israel, with its corporate office and principal place of business located at Golan Street, Airport City 7019900, Israel.

3. Respondent Makhteshim Agan of North America, Inc. d/b/a ADAMA, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 3120 Highwoods Blvd., Suite 100, Raleigh, North Carolina 27604.

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

## ORDER

### I.

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

A. "ChemChina" means China National Chemical Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by China National Chemical Corporation (including Respondent ADAMA), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, ChemChina shall include Syngenta.

B. "ADAMA" means ADAMA Agricultural Solutions Ltd. and Makhteshim Agan of North America, Inc., their directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups and affiliates in each case controlled by ADAMA Agricultural Solutions Ltd. and Makhteshim Agan of North Americal, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means ChemChina and ADAMA, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Abamectin" means a mixture of avermectins containing more than 80% avermectin B1a and less than 20% avermectin B1b (CAS#71751-41-2).

F. "Acquirer" means (i) Amvac Chemical Corporation or (ii) any other Person that acquires the CP Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Transaction Agreement dated as of February 2, 2016, by and between China National Chemical Corporation, China National Agrochemical Corporation, and Syngenta AG relating to a public tender offer of BidCo for all publicly held registered shares and American Depositary Shares of Syngenta.

H. "Acquisition Date" means the date the Acquisition is consummated.

I. "Active Ingredient" means the specific molecule or chemical substance that provides the relevant biological activity, such as insecticidal, fungicidal, herbicidal, or other similar activity.

J. "Amvac" means Amvac Chemical Corporation, a corporation organized, existing, and doing business

under and by virtue of the laws of the State of California, with its office and principal place of business located at 4695 MacArthur Court, Suite 1250, Newport Beach, California 92660.

K. "Amvac Acquisition Agreement" means the asset purchase and sale agreement between Makhteshim Agan of North America Inc., Adama Makhteshim Ltd., Adama Agan Ltd., and Amvac Chemical Corporation, dated March 22, 2017, including related ancillary agreements, amendments, schedules, exhibits, and attachments, thereto, that have been approved by the Commission to accomplish the requirements of this Order.

L. "Chlorothalonil" means the chemical compound 2,4,5,6-Tetrachlorobenzene-1,3-dicarbonitrile (CAS#1897-45-6).

M. "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, 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 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.

N. "Consent" means any approval, consent, ratification, waiver, or other authorization.

O. "Cost" means the (i) actual cost of raw materials, direct labor, and administrative expenses, and reasonably allocated operations, production, and factory costs and shared corporate services overhead used to develop, manufacture, and supply the relevant good or service or (ii) the price terms as specified in a Divestiture Agreement with respect to Respondents' obligation to provide products pursuant to Paragraph II.D.1(c).

P. "CP Active Ingredient(s)" means Abamectin, Chlorothalonil, or Paraquat, individually and collectively, as each is identified by its respective unique numerical identifier (CAS#) assigned by the Chemical Abstract Service division of the American Chemical Society.

Q. "CP Assets" means all of Respondents' right, title, and interest in and to all of the following assets and rights, wherever located, relating to the operation of the CP Business:

1. All Governmental Authorizations;

2. All Registration Data;

3. All Specified Trademarks;

4. All Specified Intellectual Property;

5. All Specified Contracts, at the option of the Acquirer;

6. All Specified Inventory, at the option of the Acquirer; and

7. All Records;

*Provided, however,* that the CP Assets need not include ChemChina's right, title, and interest in the Retained Intellectual Property.

R. "CP Business" means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by ADAMA of all CP Products, including products in development, for crop protection in the United States, prior to the Acquisition.

S. "CP Employee" means any individual (i) employed by ADAMA on a full-time, part-time, or contract basis at any time as of and after the date of the announcement of the Acquisition and (ii) whose job responsibilities predominantly relate or predominantly related to the CP Business.

T. "CP License" means:

1. A royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sublicensable license

under the Retained Intellectual Property sufficient for an Acquirer to operate the CP Business in substantially the same manner as ADAMA prior to the Acquisition, including the freedom to extend existing product lines and develop new products, that receives the prior approval of the Commission. The CP License shall be exclusive (even as to ChemChina) for use in the United States for any product sold in the United States for use in crop protection in which the sole Active Ingredient is one of the CP Active Ingredients; and

2. Such tangible embodiments of the licensed rights (including, but not limited to, physical and electronic copies) as may be necessary or appropriate to enable the Acquirer to use the rights.

U. "CP Product(s)" means all of ADAMA's crop protection products, including products in development, in which the sole Active Ingredient used in the formulation or sale of the product is one of the CP Active Ingredients, including but not limited to, the CP Products listed on Appendix A to this Order.

V. "Divestiture Agreement" means (i) the Amvac Acquisition Agreement or (ii) any other agreement between Respondents (or a Divestiture Trustee) and Acquirer that receives the prior approval of the Commission to divest the CP Assets, including all related ancillary agreements (Transitional Assistance agreement (including for Support Services), intellectual property transfer and license agreement(s), and manufacturing services agreement), schedules, exhibits, and attachments thereto.

W. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on the transaction to divest the CP Assets to the Acquirer.

X. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph V. of this Order.

Y. "Government Agency(ies)" means any federal, state, local, municipal, foreign, or other governmental regulatory authority responsible for registering, or for granting or issuing any consent, license, approval, permit, clearance, or qualification for, any aspect of the research, development, manufacture, formulation, licensing, sale, or distribution of any CP Products or any of the CP Active Ingredients.

Z. "Governmental Authorization" means any registration, consent, license, approval, permit, clearance, or qualification issued, granted, given or otherwise made available by or under the authority of any Government Agency or pursuant to any legal requirement, that is necessary for any aspect of the research, development, manufacture, formulation, licensing, sale, or distribution of any CP Product or any of the CP Active Ingredients, and all pending applications therefor or renewals thereof.

AA. "License-Back" means a worldwide, royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sublicensable license to Respondents from the Acquirer under any Specified Intellectual Property included in the CP Assets (that is not exclusively related to the operation of the CP Business) for use in any business operated by Respondents prior to the Acquisition Date that does not compete with the CP Business.

BB. "Loyalty Program" means Syngenta's Key Active Ingredient Support Program (Section 2 of Syngenta's Crop Protection and Seedcare Retail Program & Policy Guide), or any other similar Syngenta program related to Syngenta's crop protection business in the United States that provides to a distributor, retailer, other customer ("Syngenta Customer") a discount for purchasing a defined minimum quantity (based on units, revenues, or any other measure) over a defined period of time of that Syngenta Customer's demand for crop protection products containing a specified Active Ingredient as the sole Active Ingredient.

CC. "Monitor" means the Person appointed by the Commission pursuant to Paragraph IV. of this Order.

DD. "Paraquat" means the chemical compound 1,1'-Dimethyl-4,4'-bipyridinium dichloride (CAS#1910-42-5).

EE. "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.

FF. "Record(s)" means information, data, books, records, files, databases, printouts, and documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, directly relating to the CP Products or the CP Business, including: customer files, customer lists, customer purchasing histories; correspondence; sales and purchase order information and records; referral sources; supplier, vendor, and procurement files and lists; specifications and information for all materials, ingredients, and components used in product formulation; process and production formulas, instructions, and guidelines, including Confidential Statements of Formulas; product data sheets and specifications; production reports; research and development data and information; quality control and quality assurance specifications, testing methods, and reports; labeling specifications; packaging specifications; Material Data Safety Sheets; advertising, marketing, display, and promotional materials; sales materials; marketing analyses and research data; educational and training materials; employee lists and contracts, salary and benefits information, and personnel files and records (to the extent permitted by law) for CP Employees; financial and accounting records and documents, financial statements; studies and reports; product registration data; registrations, licenses, and permits;

regulatory compliance records and data; applications, filings, submissions, communications and correspondence with Government Agencies; operating guides, technical information, manuals, policies and procedures; service and warranty records, maintenance logs, equipment logs; and all other Records that are necessary for the Acquirer to operate the CP Business in a manner consistent with the purposes of this Order.

GG. "Registration Data" means all data, information, and studies relating to a particular CP Active Ingredient and its formulations, including its impurities or metabolites, which are necessary for supporting an application to obtain a Governmental Authorization from an applicable Government Agency for the sale of a CP Product.

HH. "Retained Intellectual Property" means any Specified Intellectual Property relating to both the operation of the CP Business and any other business owned by ChemChina prior to the Acquisition.

II. "Specified Contract(s)" means all agreements, contracts, leases, license agreements, consensual obligations, promises, or undertakings (whether written or oral and whether express or implied), and all outstanding offers or solicitations to enter into any contract, and all rights thereunder and related thereto, including all rights relating to membership in any task force or task force seat, directly related to a CP Product or a CP Active Ingredient.

JJ. "Specified Intellectual Property" means the following intellectual property owned or licensed (as licensor or licensee) by Respondents, and all associated rights thereto, other than the Specified Trademarks, relating to the CP Products or the CP Business: (1) all trade secrets, know-how, technology, and confidential or proprietary information, including product specifications, manufacturing processes and data, and production formulas, including Confidential Statements of Formula, mixing and formulating

instructions, protocols, guidelines, and methods; quality control and quality assurance data, specifications, and methods; technical data and information; and all other information relating to formulating, handling, packaging, labeling, storing, or transporting the CP Products; (2) the trade dress associated with the CP Products, including, but not limited to, product packaging and labeling and the lettering of the product trademark, trade name, or brand name; (3) all copyrights to all materials and works directly relating to the CP Products and the CP Business, including advertising, marketing, promotional and sales materials, customer materials and information, educational information and training materials, research and other data, reports, programs, and all correspondence and communications with any Government Agencies; and (4) all rights to obtain and file for patents, trademarks, copyrights, and registrations thereof and to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, misuse, violation, or breach of any of the foregoing.

KK. "Specified Inventory" means all inventories of finished CP Products packaged, labeled, and ready for sale pursuant to all legal requirements of all relevant Government Agencies.

LL. "Specified Trademarks" 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 goodwill symbolized thereby and associated therewith, and used specifically for the CP Products, including but not limited to, the "Specified Trademarks" listed on Appendix A to this Order.

MM. "Support Services" means administrative services, technical services, and training with respect to

operating any aspect of the CP Business and CP Assets.

NN. "Syngenta" means Syngenta AG, a corporation organized, existing and doing business under, and by virtue of, the laws of Switzerland, with its corporate office and principal place of business located at Schwarzwaldallee 215, 4058 Basel, Switzerland.

## II.

**IT IS FURTHER ORDERED** that:

A. No later than twenty (20) days from the Acquisition Date, Respondents shall divest the CP Assets and grant the CP License, absolutely and in good faith, to Amvac pursuant to the Amvac Acquisition Agreement; *provided, however,* that Respondents may enter into an agreement with Amvac for a License-Back that receives the prior approval of the Commission.

B. If Respondents have divested the CP Assets and granted the CP License to Amvac prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Amvac is not acceptable as the Acquirer of the CP Assets, then Respondents shall immediately rescind the Amvac Acquisition Agreement, and shall divest the CP Assets and grant the CP License no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture or grant of license to Amvac was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications (that shall be

incorporated into a revised Amvac Acquisition Agreement) to the manner of divestiture of the CP Assets or grant of the CP License as the Commission may determine are necessary to satisfy the requirements of this Order.

C. No later than the Divestiture Date, Respondents shall secure all Consents and Governmental Authorizations from all Persons that are necessary for the Acquirer to divest and operate the CP Business and CP Assets, except as provided for under a Divestiture Agreement; *provided, however,* that:

1. In the event that Respondents are unable to obtain any such Consent, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements; and

2. In the event that Respondents are unable to obtain any such Governmental Authorization, Respondents shall provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain a comparable authorization.

D. Respondents shall:

1. At the option of the Acquirer and subject to the prior approval of the Commission, provide to the Acquirer:

   a. Support Services for a period of eighteen (18) months from the Divestiture Date;

   b. A supply of CP Products in which the sole Active Ingredient is Chlorothalonil or Abamectin for a period of twenty-four (24) months from the Divestiture Date; and

   c. A supply of CP Products in which the sole Active Ingredient is Paraquat for a period of

thirty-six (36) months from the Divestiture Date; and

2. Provide the support set forth in Paragraph II.D.1.(a)-(c) of this Order (hereinafter collectively referred to as "Transitional Assistance") at a price not to exceed Cost and in quality and quantity sufficient to enable Acquirer to operate the CP Business in substantially the same manner as Respondents prior to the Acquisition, including the ability to develop new products and increase sales of current products;

*Provided, however,* that if the CP Products or ability to provide services as Transitional Assistance pursuant to a Divestiture Agreement are or become limited for any reason, Respondents shall give priority to Acquirer's requirements over its own;

*Provided further* that (i) Acquirer may terminate any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty to Respondents and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transitional Assistance needed to achieve the purposes of this Order; and

*Provided further* that Respondents shall not (i) terminate its obligation to provide any Transitional Assistance because of a material breach by Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction or (ii) seek to limit the damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement to provide Transitional Assistance.

E. Respondents shall cooperate with and assist the Acquirer to evaluate and hire any CP Employee in

connection with the divestiture of the CP Assets, including but not limited to:

1. Not later than twenty (20) days before the Divestiture Date, Respondents shall (i) identify all CP Employees, (ii) allow Acquirer to inspect the personnel files and other documentation of all CP Employees, to the extent permissible under applicable laws, and (iii) allow Acquirer an opportunity to interview any CP Employee;

2. Respondents shall (i) not offer any incentive to any CP Employee to decline employment with Acquirer, (ii) remove any contractual impediments that may deter any CP Employee from accepting employment with Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondents that would affect the ability of such employee to be employed by Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any CP Employee by Acquirer;

3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with Acquirer for any CP Employee who accepts an offer of employment from Acquirer and (ii) provide each CP Employee with reasonable financial incentive as necessary to accept offers of employment with Acquirer; and

4. For a period of two (2) years after the CP Assets are divested, Respondents shall not solicit the employment of any CP Employee who becomes employed by Acquirer at the time the CP Assets are divested; *provided, however,* that 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 Acquirer's 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.

F. Respondents shall:

1. Not join, file, prosecute, or maintain any suit, in law or equity, or take any administrative action, either directly or indirectly through a third party (including assignees, transferees, or licensees), against the Acquirer or any of its customers or affiliates (including distributors, licensees, manufacturers, and suppliers), assigns or successors in interest, under or with regard to any Retained Intellectual Property if such suit or action would interfere with the Acquirer's freedom to practice in developing, registering, producing, manufacturing, formulating, distributing, marketing, or selling in the United States any non-crop protection products in which the sole Active Ingredient used in the formulation or sale of the product is one of the CP Active Ingredients; and

2. Include a covenant not to sue or take any other action effecting the foregoing prohibitions in Paragraph II.F.1 of this Order in any Divestiture Agreement related to the CP Assets.

G. The purpose of the divestiture of the CP 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.

## III.

**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 received or maintained by Respondents relating to the CP Business or CP Assets; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the CP Business or CP Assets, or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employ-ees or to any other Person under Paragraph III.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 III.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 III. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

## IV.

**IT IS FURTHER ORDERED** that, for a period of three (3) years from the earlier of (i) the expiration of the current annual Loyalty Programs or (ii) October 1, 2017, Respondents shall

exclude crop protection products containing any one of the CP Active Ingredients as the sole Active Ingredient from any Loyalty Program in the United States; *provided, however,* that this provision is not intended to cover volume discounts offered in the ordinary course of business or other current of future Syngenta programs, so long as those programs do not have a substantially similar effect as a Loyalty Program for any crop protection products containing a CP Active Ingredient as the sole Active Ingredient.

**V.**

**IT IS FURTHER ORDERED** that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Duff & Phelps B.V. to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Divestiture Agreement.

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 and (ii) act in a fiduciary capacity for the benefit of the Commission;

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this 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;

3. The Monitor (i) shall 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 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 after the Acquisition Date for a period of one (1) year, (ii) every ninety (90) days thereafter until Respondents have completed all obligations required by Paragraph II. of this Order (including a final report when Respondents have completed all such obligations), and (iii) at any other

time as requested by the staff of the Commission, concerning Respondents' compliance with this 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 ten (10) business days after the Monitor has completed his final report pursuant to Paragraph V.C.(ii) of this Order, 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 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 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.

## VI.

**IT IS FURTHER ORDERED** that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the CP Assets and grant the CP License and perform Respondents' other obligations 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.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, 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 other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the CP Assets and grant the CP License;

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

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons

retained by the Divestiture Trustee pursuant to Paragraph VI.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; and

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, 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 VI.

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 divestitures and other obligations or action required by this Order.

## VII.

**IT IS FURTHER ORDERED** that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondents shall comply with all terms of the agreement. Any failure by Respondents to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement 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 rights or benefits of the Acquirer or to reduce any obligations of Respondents under such agreement.

B. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. Respondents shall not modify, replace, or extend the terms of the Divestiture 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 Divestiture Agreement, any modification, replacement, or extension of any term of the Divestiture 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.

## 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:

1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter for a period of one (1) year and every ninety (90) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.D. and II.E. of this Order; and

2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, 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 status of the divestiture and transfer of the CP Assets; (ii) a description of all substantive contacts with a proposed acquirer (if other than Amvac); and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents have 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:

A. Any proposed dissolution of any Respondent;

B. Any proposed acquisition, merger, or consolidation of any Respondent; or

C. Any other change in any Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

## X.

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject

to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, 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

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 June 13, 2027.

By the Commission.

## Appendix A

## Specified Products

Abamectin Products
- ABBA 0.15EC
- ABBA 0.15ME (Alternate Brand Names: BORRADA and ABBA 0.15)
- ABBA Ultra Miticide/Insecticide

Chlorothalonil Products
- EQUUS DF
- EQUUS 500ZN
- EQUUS 720 SST

Paraquat Products
- Parazone 3SL
- Parazone 2SL (pending EPA approval)

## Specified Trademarks

PARAZONE
EQUUS
ABBA
ABBA Ultra
BORRADA

# ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

## I. Introduction

The Federal Trade Commission ("Commission") has accepted from China National Chemical Corporation ("ChemChina"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"). The Consent Agreement, which contains a proposed Decision and Order ("Order") and Order to Maintain Assets, is designed to remedy the anticompetitive effects resulting from ChemChina's proposed acquisition of Syngenta AG ("Syngenta").

Pursuant to an agreement signed on February 2, 2016 (the "Agreement"), ChemChina, through an indirect subsidiary, will submit a public tender offer for all publicly registered shares and American Depository Shares of Syngenta at an offer price of $465 per share, for total consideration of up to $43 billion in cash (the "Acquisition"). The proposed Acquisition would result in highly concentrated markets and raise significant competitive concerns in the markets for the herbicide paraquat, the insecticide abamectin, and the fungicide chlorothalonil 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 markets for formulated crop protection products based on paraquat, abamectin, and chlorothalonil in the United States.

The Consent Agreement remedies the alleged violation by replacing the competition in the three relevant markets that would be lost as a result of the proposed Acquisition. Under the terms of the Consent Agreement, ChemChina subsidiary ADAMA will divest its paraquat, abamectin, and chlorothalonil crop protection businesses in the United States to American Vanguard Corporation and its affiliate Amvac Chemical Corporation (collectively "AMVAC").

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.

## II. The Parties

ChemChina is a Chinese state-owned entity and is a diversified chemical company headquartered in Haidian District Beijing, China. ChemChina owns an Israel-based crop protection company, ADAMA. This wholly-owned subsidiary produces and/or sells formulated crop protection products based on paraquat, abamectin, and chlorothalonil.

Headquartered in Basel, Switzerland, Syngenta is a large research-based global agriculture company that manufactures and sells numerous crop protection products including paraquat, abamectin, and chlorothalonil.

## III. Crop Protection Formulations

The relevant lines of commerce in which to analyze the effects of the proposed Acquisition are crop protection formulations based on the active ingredients paraquat, abamectin, and chlorothalonil. Crop protection formulations are used to protect crops from pests. These formulations are based on key active ingredients, which are diluted from a concentrated technical grade. Crop protection chemicals fall into three broad categories: 1) herbicides, which control for weeds and other vegetation; 2) fungicides, which control fungus; and 3) insecticides, which control insects. Of the relevant lines of commerce, paraquat is a herbicide, abamectin is an insecticide, and chlorothalonil is a fungicide.

Paraquat is non-selective “burndown” herbicide, which means it does not discriminate between weeds and crops. It is used to clear fields prior to the growing season. The use of paraquat has increased in recent years due to the resistance issues faced by glyphosate caused by its overuse. Other paraquat alternatives that do not have glyphosate’s resistance issues are significantly more expensive than paraquat.

Abamectin is an insecticide used to kill mites, psyllid, and leafminers. It is used primarily in citrus and tree nut crops. Other alternative miticides are either significantly more expensive than abamectin because they are still on patent, or are less effective than abamectin. Due to resistance issues faced by insecticides, it is typical for a grower to spray five to six different types of miticides per season. Abamectin generally appears in any insecticide rotation because it is inexpensive and highly effective.

Chlorothalonil is a broad spectrum fungicide used primarily to protect peanuts and potatoes. Chlorothalonil is particularly effective because it operates with four modes of action and is critical to growers for resistance management. Syngenta recommends that growers rotate or mix chlorothalonil with systemic fungicides to prevent or slow development of resistance to single-site mode of action fungicides.

The relevant geographic area in which to analyze the effects of the Acquisition on the formulated crop protection markets is the United States. The Environmental Protection Agency requires that manufacturers register both the technical active ingredient and the formulated products for sales in the United States under the Federal Insecticide, Fungicide, and Rodenticide Act. This registration requirement limits market access to a set of products that meet U.S. regulatory requirements.

Each of the products at issue were either developed or acquired by a Syngenta predecessor company, meaning that Syngenta offers the branded version of the product and has significant market shares in each. ADAMA is either the first or second largest generic supplier for each of these products. For paraquat, ADAMA is currently the second largest supplier behind Syngenta and another generic supplier. Post-Acquisition, the combined share of the two firms would be over 60%. ADAMA is the generic market leader for abamectin and has been for some time. Post-Acquisition, the combined share of the two firms would be close to 80%. Finally, ADAMA is the second largest generic supplier of chlorothalonil and post-Acquisition the combined share of the two firms would be over 40%. There are a number of other generic providers of crop protection products generally, as well as other generic providers of paraquat, abamectin, and chlorothalonil. However, they have been largely

unable to gain sufficient share to rival the scale and market position ADAMA holds in the markets for these three products.

The proposed Acquisition removes significant competition between Syngenta and ADAMA. Though branded and generic companies employ different business models, the available evidence shows meaningful competition between the merging parties. Syngenta, for example, has lowered the price of its crop protection products in response to competitive pressure from ADAMA.

Entry will not be sufficient to deter or counteract the anticompetitive effects of the proposed Acquisition. While generic entry may be likely and occur in a timely manner, it is unlikely to be sufficient to replace the competitive significance and scale of ADAMA. Typically, new entrants forecast and ultimately achieve minimal market penetration while ADAMA, in contrast, has successfully maintained significantly higher market shares for an extended period of time. ADAMA has been a more robust competitor for the products at issue through economies of scale and more favorable supply agreements.

## IV. The Consent Agreement

The Consent Agreement eliminates the competitive concerns raised by ChemChina's proposed acquisition of Syngenta by requiring ChemChina to sell ADAMA's U.S. paraquat, abamectin, and chlorothalonil crop protection businesses. The Consent Agreement requires ChemChina to sell the relevant business assets to AMVAC, or another acquirer approved by the Commission through a purchase agreement approved by the Commission.

AMVAC is well positioned to replace the competition that will be eliminated as a result of the proposed Acquisition. It has the industry experience, reputation, and resources to replace ADAMA as an effective competitor in the U.S. markets for formulated crop protection products based on paraquat, abamectin, and chlorothalonil. The company is headquartered in Newport Beach, California, and has four separate manufacturing facilities within the U.S. AMVAC is an experienced player in the agrochemical segments in which ADAMA and Syngenta operate,

and sells to the same customer base. AMVAC currently manufacturers and formulates a large number of crop protection chemicals including herbicides, insecticides, and fungicides. The products to be divested will complement its current product lines. Finally, due to its wide spectrum of crop protection products, AMVAC is well placed to develop, register, and market new combination products, further improving scale in both crop protection and turf and ornamental applications.

Pursuant to the Consent Agreement, AMVAC (or another approved acquirer) would acquire all of the assets and other such rights necessary to be an effective competitor for paraquat-, abamectin-, and chlorothalonil-based crop protection formulations. This will include the U.S. product registrations and registration data packages for both the formulated products and the technical active ingredients, all intellectual property rights associated with the products including confidential statements of formulation, and inventories. The divesture also will include a cost-competitive transitional supply agreement for the supply of paraquat with Sanonda, ADAMA's low cost paraquat supplier, which is majority-owned by ChemChina, and a transitional services agreement with ADAMA. In addition, the Consent Agreement requires the removal of crop protection products containing any one of the three active ingredients from Syngenta's loyalty program for three years. This nurturing provision is to help ensure that AMVAC (or any approved acquirer) can step into the shoes of ADAMA and ultimately retain its competitiveness and scale.

The purpose of this analysis is to facilitate public comment on the Consent Agreement. 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

**IN THE MATTER OF**

## 1-800 CONTACTS, INC.

*Docket No. 9372. Order, January 11, 2017*

Order extending the time period for issuing a ruling on Complaint Counsel's Motion for Partial Summary Decision.

ORDER EXTENDING TIME PERIOD FOR RULING ON MOTION FOR PARTIAL SUMMARY DECISION

In order to give full consideration to the issues presented by Complaint Counsel's Motion for Partial Summary Decision in this proceeding, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend the time period for issuing a ruling on that Motion until January 18, 2017.

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# 1-800 CONTACTS, INC.

*Docket No. 9372. Order, January 18, 2017*

Order extending the time period for issuing a ruling on Complaint Counsel's Motion for Partial Summary Decision.

## ORDER EXTENDING TIME PERIOD FOR RULING ON MOTION FOR PARTIAL SUMMARY DECISION

In order to give thorough consideration to the issues presented by Complaint Counsel's Motion for Partial Summary Decision in this proceeding, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to further extend the time period for issuing a ruling on that Motion until February 1, 2017.

**IT IS SO ORDERED.**

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# 1-800 CONTACTS, INC.

*Docket No. 9372. Order, February 1, 2017*

Opinion and Order granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Second and Third Defenses.

OPINION AND ORDER OF THE COMMISSION

**By OHLHAUSEN, Acting Chairman**:

## Introduction

Internet search engines like Google and Bing sell advertising opportunities to firms across an array of different industries through computerized auctions. This matter involves agreements entered into between an online retailer of contact lenses, Respondent 1-800 Contacts, Inc., and certain of its rivals that allegedly limited competition in internet-search-advertising auctions and restricted truthful, non-misleading advertising.

The alleged background facts are straightforward. Between 2004 and 2013, 1-800 Contacts and various of its competitors agreed not to bid on each other's trademarks as keywords in internet-search-advertising auctions. They further agreed to take steps to prevent their advertisements from appearing in response to search queries that contain each other's trademarked keywords. Although 1-800 Contacts disputes the characterization of those arrangements, the Complaint refers to them as "bidding agreements." Those agreements followed trademark infringement challenges or threatened challenges by 1-800 Contacts to rivals' bidding on "1-800 Contacts" and other trademarks as keywords in online search advertising. Although it resolved most of its trademark-infringement disputes through these agreements, 1-800 Contacts lost the only one of these cases that proceeded to judgment. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1234-35, 1243-49 (10th Cir. 2013) (finding that Lens.com's bidding on 1-800 Contacts' trademarked keyword created no likelihood of confusion).

On August 8, 2016, the Commission issued an administrative complaint, alleging that the "bidding agreements" between 1-800 Contacts and its rivals harmed competition in relevant markets that include the sale of search advertising by auction in response to user queries regarding contact lenses in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Complaint alleges that 1-800 Contacts restricted competition beyond "the scope of any property right that 1-800 Contacts may have in its trademarks" and that the bidding agreements "are not reasonably necessary to achieve any procompetitive benefit." Compl. ¶ 32.[1]

Subsequently, 1-800 Contacts filed its Answer, which includes the two affirmative defenses that are at issue here. In its Second Defense, 1-800 Contacts asserts that the Section 5 claim "is barred, in whole or in part, because the lawsuits that gave rise to the trademark settlement agreements described in the Complaint have not been alleged to be and have not been shown to be objectively and subjectively unreasonable." And in its Third Defense, Respondent asserts that the claim "is barred, in whole or in part, because 1-800 Contacts' conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment of the United States Constitution."

Complaint Counsel has moved for partial summary decision as to these two defenses. For the reasons explained below, we grant the motion.

## Legal Standard and Undisputed Facts

Under Rule 3.24 of the Commission's Rules of Practice, a party may move for summary decision in its favor "upon all or

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1 This opinion uses the following abbreviations:

Compl.: Complaint
Mem. Supp.: Memorandum in Support of Complaint Counsel's Motion for Partial Summary Decision
Opp.: Memorandum of Law of Respondent 1-800 Contacts, Inc. in Opposition to Complaint Counsel's Motion for Partial Summary Decision
Reply: Complaint Counsel's Reply in Support of its Motion for Partial Summary Decision

any part of the issues being adjudicated." 16 C.F.R. § 3.24(a)(1). The same legal standard applies to those motions as to motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re N. Carolina Bd. of Dental Exam'rs*, 151 F.T.C. 607, 610-11 (2011), *aff'd N. Carolina Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 717 F.3d 359 (4th Cir. 2013), *aff'd* 135 S. Ct. 1101 (2015). Hence, if there is no genuine dispute as to any material fact "regarding liability or relief," a final decision and order properly issues. 16 C.F.R. § 3.24(a)(2).

Here, Complaint Counsel moves for partial summary decision on the issue whether 1-800 Contacts has properly stated its Second and Third Defenses. Although 1-800 Contacts challenges many of the facts that Complaint Counsel identifies as undisputed, Complaint Counsel's motion does not turn on any facts outside the pleadings. Rather, the parties' briefs show that the only real dispute concerns the scope of the claims in the Complaint. *Compare* Opp. at 1-9 (focusing on allegations in the Complaint, but not citing any disputed material facts that foreclose granting the motion) *with* Reply at 1 ("Respondent's Opposition . . . identifies no material factual disputes; rather, it contests the legal implications of Complaint Counsel's allegations."). In that respect, the present motion resembles a motion to strike 1-800 Contacts' second and third affirmative defenses because it turns on the Complaint's allegations rather than on identifying which material facts are undisputed. *Cf.* 16 C.F.R. § 3.22(a) (permitting motions to strike); Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense[.]"). Hence, in considering the present motion, we need only look to the Complaint's allegations.

**Analysis**

**A. Third Defense: Noerr is not a defense because the Complaint only challenges private agreements**

The Third Defense asserts that "1-800 Contacts' conduct is protected by the *Noerr-Pennington* doctrine and the First Amendment."[2]

2 1-800 Contacts' Opposition memorandum, however, addresses this defense solely in terms of *Noerr-Pennington* and appears to conflate the Third

The *Noerr-Pennington* doctrine immunizes non-sham petitioning of the government from antitrust liability. *See Prof'l Real Estate Investors, Inc. v. Colum. Pictures Indus.*, 508 U.S. 49, 60-61 (1993). It does not, however, reach private agreements that harm competition independent of governmental action. *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (holding that a horizontal boycott that carried "anticompetitive consequences" even without the passage of legislation was illegal); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (noting that *Noerr* does not protect "every concerted effort that is genuinely intended to influence governmental action," including "horizontal price agreements[,] . . . [h]orizontal conspiracies or boycotts"); *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (horizontal conspiracy under rubric of a settlement was illegal) (as approved by *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013)); *see also Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 819 (D.C. Cir. 2001) ("The Agreement is not unlike a final, private settlement agreement resolving the patent infringement litigation by substituting a market allocation agreement. Such a settlement agreement would not enjoy *Noerr-Pennington* immunity and neither does the Agreement here."); *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987) ("There is no such thing as the lawful enforcement of a private cartel."). *See generally* FTC STAFF REPORT, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE (2006).

1-800 Contacts does not dispute that anticompetitive, private agreements lie beyond *Noerr*'s protection. Instead, it argues that the Complaint asserts liability based on conduct beyond the bidding agreements, including 1-800 Contacts' cease and desist letters, threats to sue, lawsuit filings, and threats of further litigation. Opp. at 1-2, 4-6. But, as Complaint Counsel emphasizes, that is not the basis of the Complaint's allegations of liability. Although the Complaint alleges conduct by 1-800 Contacts other than the bidding agreements, Complaint Counsel expressly represents that "the only acts or practices challenged by the Complaint are Respondent's *agreements* with its rivals."

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Defense's First Amendment reference with *Noerr-Pennington* considerations.

Reply at 1 (emphasis in original).[3] Consistent with Complaint Counsel's representation, the Complaint's only count states a claim under Section 5 based exclusively on the "series of bilateral agreements between 1-800 Contacts and numerous online sellers of contact lenses[.]" Compl. ¶ 1. It ties the challenged anticompetitive effects directly to the bidding agreements, *id.* ¶¶ 28-31, and avers that those agreements are overbroad, restrain price competition, and are not reasonably necessary. *Id.* ¶ 32.

Given that the Complaint alleges liability based only on private agreements that do not constitute government petitioning, 1-800 Contacts' Third Defense fails.

### B. Second Defense: Although the nature of the trademark disputes may inform the antitrust analysis, the reasonableness of those disputes is not an affirmative defense

In its Second Defense, 1-800 Contacts asserts that the Complaint's claim is barred because "the lawsuits that gave rise to the trademark settlement agreements . . . have not been alleged to be and have not been shown to be objectively and subjectively unreasonable."[4] 1-800 Contacts argues that antitrust liability ordinarily does not attach to settlement agreements, Opp. at 6, and that such agreements are subject to "antitrust scrutiny" only in limited circumstances. *Id*. at 7. It reads the Supreme Court's

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3 1-800 Contacts also argues that the Complaint's "Notice of Contemplated Relief" seeks to enjoin conduct beyond "just entering into settlement agreements." Opp. at 1. But there is nothing in the relief sought to suggest it goes beyond the authority of the Commission. *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978) (noting that the Commission "has wide latitude in forming an appropriate remedy"). Moreover, 1-800 Contacts will have the opportunity in this proceeding to present any arguments—including any related to the First Amendment—regarding the proper scope of relief that may attach upon a finding of liability at such time as that issue is being considered in the proceeding. Such arguments, however, do not save 1-800 Contacts' Third Defense.

4 This defense can also be read as simply a restatement of the *Noerr-Pennington* doctrine, *i.e.*, as a restatement of the Third Defense. For the reasons explained above, *Noerr* does not immunize the private agreements that are the sole basis for liability in the Complaint. Consequently, if read this way, the defense also fails.

opinion in *Actavis* to impose a greater burden on a plaintiff seeking to establish antitrust liability when the underlying conduct involves settlements because of the "general legal policy favoring the settlement of disputes." Opp. at 7-8 (quoting *Actavis*, 133 S. Ct. at 2234). According to 1-800 Contacts, Complaint Counsel has failed to meet this supposed *Actavis* burden. Opp. at 7-8. It argues that Complaint Counsel must show that the underlying infringement claims are "objectively and subjectively unreasonable," *i.e.*, that they are a "sham." *Id*. at 7-8 & n.6.

But that is not the holding in *Actavis*. The Supreme Court made clear in *Actavis* that neither the fact that the agreements in question were settlement agreements nor the fact that they concerned patent rights rendered them immune from antitrust scrutiny. *Actavis*, 133 S. Ct. at 2232 (citing cases and observing that "this Court's precedents make clear that patent-related settlements can sometimes violate the antitrust laws"). In short, to establish liability, Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham. For example, if 1-800 Contacts restricted competition beyond "the scope of any property right that 1-800 Contacts may have in its trademarks," Compl. ¶ 32, then the *bona fide* nature of the underlying trademark dispute could not be a defense.

**Conclusion**

Because the Complaint alleges that 1-800 Contacts violated Section 5 solely by entering into private bidding agreements, we hold that the *Noerr-Pennington* doctrine does not apply and 1-800 Contacts' Third Defense fails as a matter of law. Similarly, because Complaint Counsel need not prove 1-800 Contacts' lawsuits to be objectively and subjectively unreasonable to establish a Section 5 violation, 1-800 Contacts' Second Defense also fails. We therefore grant Complaint Counsel's motion.

Accordingly,

**IT IS ORDERED THAT** Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Second and Third Defenses is **GRANTED**.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# ZF FRIEDRICHSHAFEN AG
**AND**
# TRW AUTOMOTIVE HOLDINGS CORP.

*Docket No. C-4520. Order, February 10, 2017*

Letter approving the waiver of the requirements for Commission approval and the public comment period for the amendments to the Master Supply Agreement previously approved by the Commission.

## LETTER APPROVING AMENDMENTS

Peter C. Thomas, Esq.
Simpson Thacher & Bartlett LLP

Re: In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., Docket No. C-4520

Dear Mr. Thomas:

This is in reference to your letter to me on behalf of Respondents dated January 19, 2017, seeking waiver of the Commission's formal process for approving modifications to agreements approved by the Commission as part of a divestiture agreement. Respondents propose to modify the terms of a Master Supply Agreement between THK Co., Ltd., as seller, and TRW Automotive Inc., and its affiliates, as buyer, approved by the Commission as part of the approval of a divestiture to THK Co., Ltd., under the Order in this matter.

After consideration of Respondents' request and pursuant to the authority delegated to me under Rule 2.41(f)(5)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f)(5)(ii), I hereby waive the requirements for Commission approval and the public comment period for the amendments to the Master Supply Agreement previously approved by the Commission.

If you have further questions, please contact Arthur Strong, the Compliance staff attorney assigned to this matter. Mr. Strong can be reached at 202-326-3478 or astrong@ftc.gov.

Interlocutory Orders, Etc.

## Attachments

**AMENDMENT TO MASTER SUPPLY AGREEMENT**

THIS AMENDMENT TO MASTER SUPPLY AGREEMENT (this "***Amendment***") is made and entered into as of _____, 2016, by and between is entered into by and between THK Co., Ltd. ("***THK Parent***") and THK Parent's Affiliates, all of which are listed on Schedule A-1 (individually and collectively, "***Seller***"), on the one hand, and TRW Automotive Inc. ("***TRW Parent***") and certain Affiliates (as such term is defined in the U.S. Asset Transfer Agreement (as defined below); hereinafter the same applies to this Agreement) of TRW Parent, which are listed on Schedule A-2 (such Affiliates of TRW Parent, individually and collectively, "***Buyer***"), on the other hand. Seller, Buyer and TRW Parent are each individually referred to as a "***Party***" and collectively as the "***Parties***." Capitalized terms used but not defined herein shall have the meanings set forth in the MSA (defined below).

WHEREAS, Seller and Buyer entered into that certain Master Supply Agreement dated August 31, 2015 (the "***MSA***");

WHEREAS, pursuant to the MSA and Purchase Order No. TB000381 attached hereto as Exhibit A, Seller supplies to Buyer certain Products in connection with its Fiat Ducato supply project;

WHEREAS, the Parties have agreed to changes in the estimated annual volumes and specific pricing for certain of the Products, which Products are identified on Schedule 1 to this Amendment (the "***OBJ Products***");

WHEREAS, the Parties desire to amend the MSA to reflect such changes in the estimated annual volumes and pricing for the OBJ Products as set forth below.

NOW THEREFORE, in consideration of the premises set forth above and the mutual promises contained herein, the Parties agree as follows:

**1. Amendment.** The MSA is hereby amended as follows, retroactively effective as of January 1, 2015:

(a) The estimated annual volumes set forth on Schedule C corresponding to the OBJ Products are hereby deleted and replaced with the following:

OBJ 325-0166-162-293/A0041000: **290,000 parts per year**
OBJ 325-0166-172-293/A0041001: **290,000 parts per year**

(b) The following provision is added to the end of Section 3.2 of the MSA:

> Without limiting the foregoing, the parties acknowledge and agree that Seller's maximum volume capacity for each OBJ Product is 290,000 parts per year (the "***OBJ Product Maximum Capacity***"). Seller agrees to manufacture and sell to Buyer one hundred percent of Buyer's requirements for each OBJ Product up to the OBJ Product Maximum Capacity for such OBJ Product. The parties further agree that the price for each OBJ Product shall be 5.0110€

per part and shall replace the price set forth on Schedule C for each such OBJ Product.

For purposes of this Agreement, "OBJ Product" means either of the following part numbers: OBJ 325-0166-162-293/A0041000 or OBJ 325-0166-172-293/A0041001, as more specifically described on Purchase Order No. TB000381.

(c) The following provision is added to the end of Section 4.1 of the MSA:

Notwithstanding the foregoing, the agreed price of 5.0110€ per part applicable to the OBJ Products as set forth in Section 3.2 shall apply through the end of the Term.

(d) Due to the retroactively adjusted price Buyer will pay until 42´697.59 € to Seller as supplementary payment for already delivered OBJ Products.

**2. Conflicts with the Master Supply Agreement.**

Except as expressly set forth above, this Amendment does not alter, amend, modify or change any other term, convent or condition of the MSA, as previously amended in any respect, all of which are hereby ratified and confirmed and shall continue in full force and effect. Any references to the "entire agreement" in the MSA shall be deemed to include this Amendment.

**3. Governing Law.**

The validity, construction and performance of this Amendment, and any action arising out of or relating to this Amendment, shall be governed by, and construed in accordance with, the laws of New York, excluding any choice of law rules that may direct the application of the laws of another jurisdiction.

**4. Assignment.**

The Parties hereby agree that Section 7 of the MSA shall apply to this Amendment.

**5. Counterparts.**

This Amendment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute a single agreement.

**6. Facsimile Signatures.**

This Amendment may be executed by delivery of a facsimile copy or other electronic transmission of an executed signature page with the same force and effect as the delivery of an originally executed signature page. In the event either Party delivers a facsimile copy or other electronic transmission of a signature page to this Amendment, any other document or agreement

executed in connection herewith, such Party shall deliver an originally executed signature page within three (3) Business Days of delivering such facsimile or other electronically transmitted signature page or at any time thereafter upon request; provided, however, that the failure to deliver any such originally executed signature page shall not affect the validity of the signature page delivered by facsimile or other electronic transmission, which has and shall continue to have the same force and effect as the originally executed signature page. Except where prohibited by Law, minor variations in the form of the signature page, including footers from earlier versions of this Amendment, shall be disregarded in determining the Party's intent or the effectiveness of such signature.

[signature page follows]

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed and delivered by their duly authorized representatives as of the date set forth above.

**BUYER:**

**TRW Automotive Inc., on behalf of itself and its affiliates**

By:_____
Name:_____
Title:_____

**SELLER:**

**THK CO., LTD, on behalf of itself and it affiliates**

By:_____
Name: MASAKI NAKA
Title: DIRECTOR

Hauke Baumann
Portfolio Director L&S EU

[Signature Page to Amendment to Master Supply Agreement]

Interlocutory Orders, Etc.

**Schedule 1**

OBJ Products

OBJ 325-0166-162-293/A0041000
OBJ 325-0166-172-293/A0041001

Purchase Order

Attached.

Exhibit A

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# KONINKLIJKE AHOLD N.V.
**AND**
# DELHAIZE GROUP NV/SA

*Docket No. C-4588. Order, March 2, 2017*

Letter approving the removal of Martin's Store No. 6492 from the list of "Schedule C Additional Assets."

LETTER ORDER APPROVING REMOVAL OF CERTAIN ASSETS

Sara Razi, Esquire
Simpson Thacher & Bartlett LLP

Re: *In the Matter of Koninklijke Ahold N.V. and Delhaize Group NV/SA, Docket No. C-4588*

Dear Ms. Razi:

This letter is to notify Respondents that the sale of Martin's Store No. 6492 will not be required pursuant to Paragraph II.B.1. and/or Paragraph IV.A. of the Decision and Order in the above-captioned matter. As such, and in accordance with Paragraph I.Z. of the Decision and Order, Martin's Store No. 6492 shall be removed from the list of "Schedule C Additional Assets" on April 1, 2017.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# JERK, LLC D/B/A JERK.COM
# AND
# JOHN FANNING

*Docket No. 9361. Order, March 3, 2017*

Order scheduling briefing on the remand of the compliance monitoring provisions of the Commission's remedial order by the United States Court of Appeals for the First Circuit.

## ORDER SCHEDULING BRIEFING ON REMAND

On May 9, 2016, the United States Court of Appeals for the First Circuit issued an opinion affirming "the Commission's entry of summary decision as to liability [in this proceeding] and all provisions of its remedial order except for compliance monitoring as to Fanning." *Fanning v. Federal Trade Commission*, 821 F.3d 164, 177-78 (1st Cir. 2016). The court vacated and remanded that single portion of the Commission's order for further proceedings consistent with the court's opinion. *Id*. at 178. The court's judgment was entered on May 9, 2016; on January 9, 2017, the Supreme Court denied Mr. Fanning's petition for a writ of *certiorari*; and the time period for filing a petition for rehearing ended on February 3, 2017 with no such petition having been filed. This proceeding is therefore now pending before the Commission on remand.[1]

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1 On August 23, 2016, the Commission issued an *Order Scheduling Briefing On Remand* in this matter, based on the understanding that Mr. Fanning had neither filed a petition for rehearing or rehearing *en banc* with the Court of Appeals nor filed a petition for writ of *certiorari* with the Supreme Court. However, Mr. Fanning subsequently advised the Commission that he had attempted to file a petition for writ of *certiorari* with the Supreme Court; that his petition had been returned to him for failure to comply with the Rules of the Supreme Court; and that the Clerk of Court subsequently granted him an additional sixty days within which to file a corrected petition. The Commission therefore vacated the briefing schedule in the August 23 Order. *Order Modifying August 23, 2016 Order* (Sept. 14, 2016), at https://www.ftc.gov/system/files/documents/cases/160914jerkorder.pdf.

The court's remand applies to a single paragraph of the Commission's Final Order issued on March 13, 2015. Paragraph VI of that Order reads, in relevant part:

**VI.**
**COMPLIANCE MONITORING – JOHN FANNING**

> **IT IS FURTHER ORDERED** that respondent John Fanning, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

The court of appeals stated that this provision requires Mr. Fanning to "notify the Commission of all business affiliations and employment – regardless of whether or not the affiliate or employer has responsibilities relating to the order." *Fanning*, 821 F.3d at 177. It explained that, "[w]ithout any guidance from the Commission, we cannot find these provisions are reasonably related to Fanning's violation." *Id*. at 177.

The Commission has determined that briefing by Mr. Fanning and Complaint Counsel would assist it in resolving the issue presented on remand. Such briefing shall be confined solely to that issue remanded by the court of appeals; that is, the compliance monitoring applicable to Mr. Fanning addressed in Paragraph VI of the Commission's Final Order. Accordingly,

**IT IS ORDERED THAT:**

1. On or before March 20, 2017, Mr. Fanning shall file a brief, not to exceed 2,000 words, addressing the foregoing issue regarding Paragraph VI of the Commission's Final Order and including proposed alternative language for Paragraph VI;

2. On or before fourteen days after service of Mr. Fanning's brief, Complaint Counsel may file an answering brief not to exceed 2,000 words; and

3. On or before five days after service of Complaint Counsel's answering brief, Mr. Fanning may file a reply brief not to exceed 1,250 words.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# CERBERUS INSTITUTIONAL PARTNERS V, L.P., AB ACQUISITION LLC, AND SAFEWAY INC.

*Docket No. C-4504. Order, April 7, 2017*

Letter approving application of Supervalu's sale of the Lake Stevens Store to Saar's Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Chris MacAvoy, Esquire
Baker Botts LLP

Re: *In the Matter of Cerberus Institutional Partners V, L.P., AB Acquisition LLC, and Safeway Inc., Docket No. C-4504*

Dear Mr. MacAvoy:

This letter responds to the Application for Approval of Proposed Sale of Supervalu Assets ("Application"), filed by Supervalu on February 6, 2017. The Application requests that the Federal Trade Commission approve, pursuant to Paragraph VII of the Order in this matter, Supervalu's proposed sale of the Lake Stevens Store to Saar's Inc. The Application was placed on the public record for comments until March 14, 2017, and one comment was received.

After consideration of Supervalu's Application and other available information, the Commission has determined to approve the proposed sale of the Lake Stevens Store to Saar's. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with Supervalu's Application, and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# JERK, LLC D/B/A JERK.COM
**AND**
# JOHN FANNING

*Docket No. 9361. Order, April 14, 2017*

Order revising the briefing schedule on the remand of the compliance monitoring provisions of the Commission's remedial order by the United States Court of Appeals for the First Circuit.

## ORDER REVISING BRIEFING SCHEDULE ON REMAND

On March 3, 2017, the Commission issued an Order Scheduling Briefing on Remand following entry of judgment by the United States Court of Appeals for the First Circuit denying Respondent John Fanning's petition for review in this proceeding, and denial by the Supreme Court of Mr. Fanning's petition for a writ of *certiorari*. The March 3 Order noted that the Court of Appeals had affirmed "the Commission's entry of summary decision as to liability [in this proceeding] and all provisions of its remedial order except for compliance monitoring as to Fanning." *Fanning v. Federal Trade Commission*, 821 F.3d 164, 177-78 (1st Cir. 2016). The court vacated and remanded only that portion of the Commission's order for further proceedings consistent with the court's opinion. *Id*. at 178.

The court's remand applies to a single paragraph of the Commission's Final Order issued on March 13, 2015. Paragraph VI of that Order reads, in relevant part:

### VI.
### COMPLIANCE MONITORING – JOHN FANNING

> **IT IS FURTHER ORDERED** that respondent John Fanning, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and

telephone number and a description of the nature of the business or employment and his duties and responsibilities.

The court of appeals stated that this provision requires Mr. Fanning to "notify the Commission of all business affiliations and employment – regardless of whether or not the affiliate or employer has responsibilities relating to the order." *Fanning*, 821 F.3d at 177. It explained that, "[w]ithout any guidance from the Commission, we cannot find these provisions are reasonably related to Fanning's violation." *Id*. at 177.

The Commission determined that briefing by Mr. Fanning and Complaint Counsel would assist it in resolving the issue presented on remand. In the March 3 Order, the Commission therefore ordered that briefs be filed, beginning with an opening brief from Mr. Fanning that was to be filed on or before March 20, 2017.

On March 17, 2017, Mr. Fanning filed a Motion for Clarification with the court of appeals. In that motion, Mr. Fanning argued that that court's order and judgment "does not permit the FTC another opportunity to formulate a new Compliance Monitoring sanction." He requested that the court clarify its opinion and judgment "to express that the Federal Trade Commission on remand shall strike in its entirety Paragraph VI-Compliance Monitoring from the revised final administrative order. . . ." On March 20, 2017, Mr. Fanning filed a motion with the Commission asking for a stay of the briefing schedule pending the appellate court's ruling on the Motion for Clarification.

On March 21, 2017, the Court of Appeals for the First Circuit denied Mr. Fanning's Motion for Clarification. The court explained, "The reconsideration of compliance monitoring provisions is permissibly within the scope of the remand." In light of this order, Mr. Fanning's motion for stay is moot. On March 22, 2017, Mr. Fanning filed a Motion to enlarge the March 3 Order briefing schedule. On April 12, 2017, Mr. Fanning filed a Response to the March 3 Order in which he restates his position that the Court of Appeals had precluded imposition of a new Compliance Monitoring provision and provides his views regarding the content of such a provision if the FTC declines to strike it in its entirety.

The Commission has determined to accept Mr. Fanning's April 12 filing as his opening brief and to revise the remainder of the briefing schedule. Accordingly,

**IT IS ORDERED THAT:**

1. The Motion of John Fanning to Stay and Continue Remand Proceedings Pending Ruling on Motion for Clarification is **DENIED** as moot;

2. The Unopposed Motion of Respondent John Fanning to Enlarge the Time to File Brief is **GRANTED IN PART**, and Respondent John Fanning's Response to Order Scheduling Briefing Following Remand is accepted as Mr. Fanning's opening brief;

3. On or before May 5, 2017, Complaint Counsel may file an answering brief not to exceed 2,000 words; and

4. On or before five days after service of Complaint Counsel's answering brief, Mr. Fanning may file a reply brief not to exceed 1,250 words.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# DOLLAR TREE, INC.
**AND**
# FAMILY DOLLAR, INC.

*Docket No. C-4530. Order, April 27, 2017*

Letter approving application of Sycamore Partners II, L.P.'s sale and assignment by Dollar Express of stores and leases to Dollar General Corporation.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Ian G. John
P.C. Kirkland & Ellis LLP

Re: *In the Matter of Dollar Tree, Inc. and Family Dollar, Inc.*
*Docket No. C-4530*

Dear Mr. John:

This letter responds to the Application for Approval of Proposed Sale of Dollar Express Assets ("Application") filed by Sycamore Partners II, L.P. on March 30, 2017. The Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Sycamore's proposed sale and assignment by Dollar Express of stores and leases to Dollar General Corporation. The Application was placed on the public record for comments until April 20, 2017, and nine comments were received.

After consideration of the proposed sale as set forth in Sycamore's Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed sale. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Sycamore's Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

# IMPAX LABORATORIES, INC.

*Docket No. 9373. Order, June 15, 2017*

Order granting the joint request to reschedule the evidentiary hearing in this proceeding.

## ORDER RESCHEDULING EVIDENTIARY HEARING DATE

On January 19, 2017, the Federal Trade Commission issued the Administrative Complaint in this adjudicative proceeding and scheduled the evidentiary hearing for September 19, 2017. On June 7, 2017, Impax and Complaint Counsel filed a Joint Motion that requests the Commission set a later hearing date to accommodate a brief, five-week extension of the discovery schedule. The parties agree that such additional time is necessary for "orderly and efficient completion of fact discovery that will minimize any potential burden on witnesses and third parties."[1]

In the past few weeks, a significant discovery dispute has arisen between the parties over the timeliness of document production ahead of witness depositions. Complaint Counsel argues that it is entitled to receive the witnesses' documents at least four days prior to a deposition. Impax argues that it is unable to meet that demand due to the extensive and time-consuming nature of its document gathering, review, and production efforts, as well as logistical issues with its vendor. As both parties wish to minimize the disruption to the schedule and burden on witnesses that might result from being re-called for a second deposition, and Impax agrees that it can complete its production of documents by the current fact discovery deadline, Impax and Complaint Counsel respectively request that the Commission set October 24, 2017, for the evidentiary hearing.

A modest movement in the hearing date to complete fact discovery in an expeditious and efficient way is in the public

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1 Impax and Complaint Counsel's Joint Motion For A Later Evidentiary Hearing Date at 1, In the Matter of Impax Laboratories, Inc., F.T.C. Docket No. 9373 (Jun. 7, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/d09373jtmtnlaterhearingdate.pdf.

interest. Under these circumstances, there is good cause to reschedule the evidentiary hearing to October 24, 2017. Accordingly,

**IT IS ORDERED** that the evidentiary hearing in this proceeding be, and it hereby is, rescheduled to begin at 10:00 a.m. October 24, 2017, at the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580.

By the Commission.

# RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

## HUMANA, INC.

*FTC File No. 161 0026 – Decision, June 5, 2017*

RESPONSE TO HUMANA, INC.'S PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED APRIL 17, 2017

**By McSWEENY, Commissioner:**

Humana, Inc. ("Humana" or "Petitioner") has filed a petition to limit a subpoena *duces tecum* issued by the Commission on April 17, 2017. For the reasons stated below, the petition to limit ("Petition") is denied.

### I. BACKGROUND

On October 27, 2015, Walgreens Boots Alliance ("Walgreens") announced its intent to acquire Rite Aid Corporation, one of Walgreens' major retail pharmacy competitors. As a result, the FTC opened an investigation to determine whether there is reason to believe that the proposed acquisition violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether that proposal meets the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

At their most basic, most retail pharmacy purchases involve three types of actors: (1) consumers, who buy pharmaceuticals; (2) pharmacies, who sell pharmaceuticals; and (3) payers, usually insurance providers, who receive premiums from consumers and develop plans to provide discounts on the costs of certain drugs. In order to develop insurance plans attractive to consumers and thereby build their customer base, insurers often seek to recruit pharmacies that consumers perceive as desirable (*i.e.*, lower-cost or more conveniently located) by providing them with increased reimbursements for the costs of the pharmaceuticals. The more desirable a retail pharmacy chain is to consumers, the greater the amount of reimbursement from payers it can demand, creating the

risk that payers will pass these costs on to their customers in the form of higher premiums. Some insurers' plans use a "preferred" model, in which a "preferred" pharmacy agrees to accept lower reimbursements in exchange for the plan steering customers to the pharmacy by offering greater discounts. The Centers for Medicare & Medicaid Services ("CMS") approves these plans offered to consumers, part of which involves ensuring that the plans (1) provide consumers with sufficient access to participating pharmacies in each geographic area and (2) do not misrepresent the benefits or coverage offered to consumers.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and accompanying subpoena *ad testificandum* to Humana, Inc., a payer that is one of the nation's largest providers of Medicare Part D prescription drug plans.[1] Humana offers the Humana Walmart Rx Plan, in which Walmart is the designated "preferred" provider. The Humana Walmart Rx Plan is nearly unique, in that it is one of the only Medicare Part D prescription drug plans in which neither Walgreens, Rite Aid, nor CVS is a "preferred" provider. As such, FTC staff seeks to determine whether a retail pharmacy network that features Walmart as the sole "preferred" provider is a viable and attractive option for Medicare Part D plans seeking to attract beneficiaries in any geographic areas, and if so, which geographic areas. If evidence indicated that beneficiaries in certain geographic areas do not view the Humana Walmart Rx Plan as attractive (for example, because Walmart lacks a significant presence in those areas), this would be useful to assess whether—from the perspective of Medicare Part D plan sponsors in different areas of the country—Walmart-only preferred networks are meaningful substitutes for networks that designate Walgreens, Rite Aid, and/or CVS as preferred.

The subpoena *duces tecum* ("subpoena") seeks documents concerning Humana's analysis of the proposed merger and any potential divestitures of assets by either Walgreens or Rite Aid (specifications 1 and 2); Humana's Walmart Rx Plan (specification 3); and Humana's communications with CMS

1 Humana filed a petition to quash the subpoena *ad testificandum* on May 23, 2017.

concerning whether its Medicare plans, including the Walmart Rx Plan, offer sufficiently meaningful access to pharmacies across geographic areas (specification 4). This information enables staff to assess the attractiveness of Humana's Walmart Rx Plan to beneficiaries in different geographic areas, based on Humana's own documents and documents related to CMS's oversight of the plan.

The FTC served the subpoena on Humana on April 12, 2017. In response, counsel for Humana claimed that the subpoena was "overly broad, unduly burdensome, and irrelevant" to the investigation, although counsel did not provide specific or detailed reasons supporting these objections. Nonetheless, Humana counsel and FTC staff met and conferred regarding potential narrowing of the scope of the subpoena. Staff agreed that Humana could initially confine its search for documents responsive to Specifications 1 and 2 to two key custodians, and that the FTC would request documents from additional custodians only if it became necessary. FTC staff twice agreed to extend the deadline for production of documents, first on May 1, 2017 and then again on May 8, 2017, for a final return date of May 16, 2017. On May 9, Humana produced five documents totaling 13 pages responsive to Specifications 1 and 2.

On May 16, 2017, the deadline for production, Humana requested additional time to produce documents or file a petition to limit or quash the subpoena. In response, staff declined to extend the return dates absent a definitive schedule for production. Humana also requested modifications to Specification 3, concerning the Walmart Rx Plan, and Specification 4, concerning Humana's communications with CMS. In response, staff offered to further limit the subpoena by allowing Humana to confine its production for those specifications to the two key custodians whose files Humana was already reviewing for Specifications 1 and 2. Staff also offered to relieve Humana of Specification 3's requirement to produce "all documents" regarding the Humana Walmart Rx Plan. Instead, Humana would be required to answer only the itemized subparts of Specification 3, each of which concerns the plan's ability to compete effectively. Humana rejected these offers and filed the instant petition to limit.

Humana's petition asks the Commission to quash Specifications 3 and 4 in their entirety. Humana claims that the information sought is not relevant to the present merger investigation and, in any event, that it is publicly available from other sources, including other government agencies. Humana also contends that these specifications are overly broad and unduly burdensome, particularly given Humana's status as a non-party.[2] Finally, Humana raises several general objections to the subpoena as a whole.

## II. ANALYSIS

Agency compulsory process is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the Commission's investigatory resolution.[3] Agencies have wide latitude to determine what information is relevant to their law enforcement investigations.[4] As the D.C. Circuit has explained, "[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one . . . . The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally."[5]

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2 In addition, Humana objects to Specifications 1 and 2 "out of an abundance of caution and solely to preserve its objections pursuant to the Commission's rules." It "intends to produce additional non-privileged documents in response to" those specifications once they "are fully processed and reviewed." Pet., at 4.

3 *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-90 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872-74 (D.C. Cir. 1977).

4 *See, e.g.*, *Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

5 *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

The documents requested by the subpoena are directly relevant to the FTC's investigation into Walgreens' proposed acquisition of Rite Aid. These documents enable FTC staff to assess the degree to which Humana's Walmart Rx Plan—which features Walmart as its sole preferred provider—is attractive to consumers in different geographic areas. This information is largely unavailable from sources other than Humana and only in part through its regulator, CMS. Humana also fails to support its claim that complying with the subpoena would cause undue burden.

### A. The Subpoena is Narrowly Tailored and Seeks Information Directly Relevant to the Investigation.

There is no merit to Humana's claims that the subpoena is overly broad and requests irrelevant information. In the context of administrative subpoenas, "relevance" is defined broadly and with deference to an agency's determination.[6] An administrative agency is accorded "extreme breadth" in conducting an investigation.[7] As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.[8] As a result, a CID recipient must demonstrate that the agency's determination is "obviously wrong," or the documents are "plainly irrelevant" to the investigation's purpose as defined by the investigational resolution.[9] Thus, a subpoena request is overbroad only where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[10]

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6 *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

7 *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993).

8 *Invention Submission*, 965 F.2d at 1090.

9 *Id.* at 1089; *Carter*, 636 F.2d at 788.

10 *U.S. v. Wyatt,* 637 F.2d 293, 302 (5th Cir. 1981) (quoting, *inter alia*, *Morton Salt,* 338 U.S. at 652).

In this case, the Commission's resolution authorizes an investigation "[t]o determine whether the proposed acquisition of Rite Aid . . . by Walgreens" would violate the FTC Act because it would amount to an unfair method of competition or would violate the Clayton Act because the acquisition would "substantially . . . lessen competition, or . . . tend to create a monopoly." *See* 15 U.S.C. §§ 18, 45. Humana fails to support its claim that the subpoena requests—two of which relate directly to the proposed acquisition and two of which relate to the competitive landscape for retail pharmacy services—have no bearing on the competitive significance of the proposed merger. To the contrary, the two specifications at issue, Specifications 3 and 4, are directly relevant to assessing the impact of the merger on competition. As discussed above, FTC staff seeks to determine the degree to which Humana's Walmart Rx Plan is attractive to consumers in need of Medicare Part D coverage in different geographic areas, which, in turn, will facilitate the FTC staff's analysis of the importance of competition between the merging parties in different geographic areas. Specification 3 seeks to obtain Humana's own documents regarding its experiences in developing and administering the Humana Walmart Rx Plan, while Specification 4 seeks documents relating to CMS's oversight of the Humana Walmart Rx Plan, and similar plans. As such, this information is highly relevant to staff's investigation. Moreover, the fact that staff has tailored the subpoena to this plan, and to those types of documents mostly likely to shed light on its competitiveness, confirms that the subpoena is not overly broad.

### B. The Information Sought is Not Readily Available to the FTC from Other Sources.

Humana claims that Specifications 3 and 4 are improper because they "seek[] documents that are publicly available to the FTC or readily available to the FTC through another government agency." Pet., 11-12.

There is no basis for this assertion. Humana asserts generally that the documents are "publicly available," ignoring the fact that many of the documents sought are by their nature not public, including internal documents for which Humana is the best—and only—source. For example, Specification 3 expressly calls for (1)

Humana's analysis of "the Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS"; (2) Humana's "consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network"; and (3) Humana's "actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan." While Specification 4 seeks documents relating to Humana's communications with CMS, that request is not limited to direct communications with CMS. It also covers Humana's communications with other third parties as well as Humana's *internal* analyses of its interactions with CMS, including its responses to any concerns CMS raised about Humana's plans related to pharmacy access. Again, only Humana would have access to these internal analyses.

The subpoena seeks certain non-internal documents, including communications between Humana and CMS. Humana provides no support for its suggestion that these documents are "publicly available." Humana also speculates that these documents are "readily available to the FTC" through other sources. Even if Humana were somehow correct that all or some documents were available from other sources, the Commission is not obliged to seek records from multiple sources that are readily available from a single source. Instead, the Commission may issue process to a single source likely to have all of the necessary information, as it did here.[11]

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11 In *In re Exxon Valdez*, the district court approved just such an approach, allowing a plaintiff to obtain from a nonparty trade association documents that were also available from each of the association's members because this was "more convenient, less burdensome [and] less expensive." 142 F.R.D. 380, 382-83 (D.D.C. 1992); *cf. Software Rights Archive, LLC v. Google Inc.*, No. 2:07-CV-511, 2009 WL 1438249, at *2 (D. Del. May 21, 2009) ("[T]here is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party, nor is there an absolute rule providing that the party must first seek those documents from an opposing party before seeking them from a non-party.")(quotation omitted); *Viacom Int'l, Inc. v. YouTube, Inc.,* No. C 08–80129 SI, 2008 WL 3876142, at *2-*3 (N.D. Cal. Aug.18, 2008) (same).

### C. The Subpoena is Not Unduly Burdensome

Humana also claims that Specifications 3 and 4 (and more generally, the subpoena as a whole) are unreasonable and unduly burdensome, particularly given its status as a non-party. Pet., 5-6. Humana does not offer any support for this contention other than the conclusory and unattributed statements that compliance would require it to review and produce "thousands" or possibly "hundreds of thousands" of documents. *Id.*, 6, 8.

Where possible, FTC staff routinely work with subpoena recipients to limit the burdens imposed on them. Nonetheless, the standard for enforcement of administrative compulsory process is the same whether the subpoenaed entity is a target of the investigation or a third party. The statute authorizing the Commission to issue subpoenas specifically empowers the Commission to obtain from third-party "witnesses" "*all* such documentary evidence *relating to any matter under investigation*."[12] Indeed, an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with that obtained from third parties. Thus, whether an administrative subpoena is issued to a target or a third party, it is not unduly burdensome unless the recipient shows that "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[13] This test is "not easily met."[14]

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12 15 U.S.C. § 49 (emphasis added).

13 *See, e.g.*, *Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882). *See also FTC v. Dresser Indus., Inc.*, 1977-1 Trade Cas. ¶ 61,400, 1977 WL 461238 (D.D.C. 1977) (holding that this test applies to a subpoena issued to a nonparty). *Accord Commission Order Affirming June 18, 2012 Ruling Denying Petition of Samsung Telecommunications America, LLC to Limit Subpoena Duces Tecum*, File No. 111-0163 (September 7, 2012), https://www.ftc.gov/enforcement/cases-proceedings/petitions-quash/google-inc (investigative subpoena issued on nonparty) (citing *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977)); *In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, 2004 WL 2380507, at *2 (Sept. 28, 2004) (citation omitted) (process issued to nonparties in administrative adjudicative proceeding); *FTC v. Ernstthal*, Misc. No. 78-0064, 1978 WL 1375 (D.D.C. May 30, 1978, *aff'd*, 607 F.2d 488, 489 n.1 (D.C. Cir. 1979) (rejecting burden, definiteness, and relevance challenges to administrative subpoena issued to nonparty in adjudicative hearing).

Nothing in Humana's cited cases supports its assertion that these standards are more relaxed for third parties. Pet., 5-6. The first, *Dow Chemical Co. v. Allen*, involved an administrative *trial* subpoena, not an *investigative* subpoena, and the court specifically acknowledged that investigative subpoenas may be broader in scope.[15] In addition, the type of burden at issue was completely different: the requests infringed nonparties' First Amendment academic freedoms by seeking unpublished data from ongoing and incomplete university research studies.[16] Indeed, the *Dow* court quoted from *FTC v. Dresser Industries, Inc.*, a case in which the court held that "one who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same *even if the subpoena is directed to a third party*."[17] Similarly, in *FTC v. Bowman*, the district court affirmed the Commission's authority to issue subpoenas to nonparties and enforced the subpoena, subject only to minor limitations on the scope of documents sought.[18] Indeed, *Dresser* cited *Bowman* for its holding that nonparties bear the same burden as targets of an investigation.[19]

Further, Humana offers nothing to support its assertion that compliance with the subpoena would require it to review and produce "thousands," or even "hundreds of thousands," of documents. A recipient of agency process must demonstrate that the burden of compliance is undue.[20] "Some burden on subpoenaed parties is to be expected and is necessary in

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14 *Texaco*, 555 F.2d at 882.

15 *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267-68 (7th Cir. 1982).

16 *See id.* at 1266, 1273-77.

17 *See id.* at 1277 (quoting *Dresser Indus.*, 1977 WL 461238) (emphasis added).

18 *FTC v. Bowman*, 149 F. Supp. 624, 629-30 (N.D. Ill. 1957), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

19 *Dresser Indus.*, 1977 WL 461238.

20 *In the Matter of January 16, 2014 Civil Investigative Demand Issued to the College Network, Inc.*, File No. 1323236, 2014 FTC LEXIS 90, at *5 (April 21, 2014) (citing, *inter alia*, *Texaco*, 555 F.2d at 882).

furtherance of the agency's legitimate inquiry and the public interest."[21] Thus, Humana must show the "measure of [its] grievance rather than [asking the court] to assume it."[22]

But even assuming that responsive documents number in the thousands or hundreds of thousands, that fact alone would not be sufficient to demonstrate undue burden given Humana's size, resources, and the availability of advanced search techniques. Indeed, Humana's most recent annual report notes that its current and past business practices are subject to ongoing review by various state and federal authorities, who regularly scrutinize numerous facets of Humana's business, including its pharmacy benefits.[23] Humana cannot claim that responding to the FTC's subpoena "seriously disrupts or unduly hinders" its normal business operations when those operations expressly involve government oversight and reporting.

In short, there is no basis for Humana's claim that the burden imposed by the subpoena is undue. Staff's offer to allow Humana to produce documents from only two custodians (which we adopt herein) will further temper any burden Humana must bear.

### D. Humana's General Objections Provide No Basis for Limiting or Quashing the Subpoena

Humana also lists a number of general objections, most of which merely restate its objections to particular subpoena specifications, lack accompanying argument or support, or have no bearing on disposition of the present petition. We address the remaining objections below.

General Objection 1: Duplicative to earlier information requests. Humana objects that the requests in the subpoena are

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21 *Texaco*, 555 F.2d at 882.

22 *Morton Salt*, 338 U.S. at 654.

23 *See* Humana, Inc., Annual Report (Form 10-K) at 129. This report further indicates that the company has substantial financial resources, having received over $54 billion in revenue and paid over $52 billion in operating expenses in fiscal year 2016. *See id.* at 38.

duplicative of three other requests issued to the company by the Commission: a Civil Investigative Demand ("CID") and subpoena *duces tecum* on January 14, 2016, and a CID issued on March 7, 2017. Pet., 1-2, 7-8.[24] This objection is baseless.

Although FTC staff *requested* some of the same documents in 2016, Humana did not produce those documents. The Commission issued compulsory process to Humana and the CID and subpoena issued on January 14, 2016 sought information that overlaps with the current subpoena at issue, including requests for Humana's analysis of the Walgreens-Rite Aid merger, and information regarding Humana's retail pharmacy networks. Humana produced one Excel file and a single PowerPoint slide in response.

Nor is there any duplication to the CID issued on March 3, 2017. That CID contained only one specification that sought Humana's annual purchases of retail pharmacy services by line of business and by pharmacy chain. This specification does not overlap with the current subpoena, but even if it did, this would also not be duplicative for the same reasons as above: Humana did not produce documents or data in response to this CID but rather provided only a brief factual proffer in lieu of a full production of information.

General Objection 4: Privileged information. Humana objects to the subpoena to the extent it seeks privileged information. The Commission does not seek privileged material. The Commission's Rules of Practice instruct a subpoena recipient how to assert claims of privilege, *see* Rule 2.11, 16 C.F.R. § 2.11, and that Rule is restated in the subpoena's instructions. This objection is therefore without merit.

General Objection 5: Confidential information. Humana also objects to the subpoena to the extent it seeks confidential

24 Humana also claims that the current subpoena includes requests for information that the FTC "previously conceded it did not need." Pet., 7. Again, Humana offers no support for this claim. Even if arguendo this assertion were accurate, over the course of a years-long investigation, staff may learn that particular facts have greater importance than was ascertainable at an initial stage.

commercial information. That is not a proper basis for objecting to a subpoena. The Commission's Rules of Practice and relevant statutory provisions provide ample protection for documents and information—including proprietary business and sensitive customer information—obtained by the Commission through compulsory process.[25] Courts have consistently held that these provisions provide adequate protection and that the Commission has a full right to access even the most highly sensitive information including trade secrets.[26] This objection is therefore without merit.

## III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Humana, Inc.'s Petition to Limit Subpoena *Duces Tecum* be, and it hereby is, **DENIED.**

We understand, however, that FTC staff consents to modifications to the subpoena. Accordingly, **IT IS FURTHER ORDERED THAT** the subpoena *duces tecum* be **MODIFIED** as follows:

a. Specifications 1, 2, 3, and 4 are modified to require Petitioner Humana to search for and produce responsive documents in the possession, custody, or control of custodians Jay Ecleberry and Laura White; and

b. Specification 3 is revised to replace the text "Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to," with "Submit the following documents:".

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25 *See* 15 U.S.C. §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a).

26 *See, e.g., FTC* v. *Invention Submission Corp.*, No. 89-272, 1991 WL 47104, at *4 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *In re Subpoena Duces Tecum*, 228 F.3d 341, 351 (4th Cir. 2000) (enforcing subpoena requesting sensitive health care information in light of statutory protections).

**IT IS FURTHER ORDERED THAT** Petitioner Humana, Inc. shall comply with the Commission's modified subpoena *duces tecum* on or before June 15, 2017.

By the Commission.

# TABLE OF COMMODITIES
# VOLUME 163

continued

## S



## V



## W