FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

PUBLISHED BY THE COMMISSION

VOLUME 159

Compiled by
The Office of the Secretary

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Editorial Assistants

MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2015 TO JUNE 30, 2015

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

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

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

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

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

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2015, TO JUNE 30, 2015

IN THE MATTER OF

FERRELLGAS PARTNERS, L.P., FERRELLGAS, L.P. D/B/A BLUE RHINO, AMERIGAS PARTNERS, L.P., D/B/A AMERIGAS CYNLINDER EXCHANGE, AND UGI CORPORATION

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

Docket No. 9360; File No. 111 0195
Complaint, March 27, 2014 – Decision, January 7, 2015

This consent order addresses illegal collusion by two leading suppliers of propane exchange tanks to push a key supplier to accept a reduction in the amount of propane in exchange tanks. The complaint alleges that Blue Rhino and AmeriGas Cylinder Exchange each decided to implement a price increase by reducing the amount of propane in their exchange tanks from 17 pounds to 15 pounds, without a corresponding reduction in the wholesale price. AmeriGas and Blue Rhino then colluded to pressure Walmart, a key customer, to accept a reduction in the amount of propane in the propane exchange tanks each sold to Walmart, in violation of Section 5 of the Federal Trade Commission Act. Under the terms of the orders, AmeriGas and Blue Rhino are prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise fix the prices of exchange tanks, or to coordinate communications with customers. Each is also required to maintain an antitrust compliance program.

Participants

For the *Commission: Kenneth H. Abbe, Thomas H. Brock, Susan S. DeSanti, Eric D. Edmondson, Edward D. Hassi, Amanda G. Lewis, David M. Newman, Austin A.B. Ownbey, Jacob Snow, Mark Taylor, John P. Wiegand, Erika Wodinsky,* and *Boris Yankilovich.*

For the *Respondents: Melinda Levitt, Jay Varon,* and *Lacey Withington, Foley & Lardner LLP*; and *Niall E. Lynch, Jesse B. McKellen,* and *Daniel M. Wall, Latham & Watkins LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino ("Blue Rhino"), and UGI Corporation and AmeriGas Partners, L.P., and, also doing business as AmeriGas Cylinder Exchange (collectively "AmeriGas"), have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

THE NATURE OF THE CASE

1. This action concerns anticompetitive conduct by Respondents Ferrellgas Partners, L.P and Ferrellgas, L.P. (doing business as Blue Rhino) and UGI Corporation and AmeriGas Partners, L.P. (doing business as AmeriGas Cylinder Exchange) in the distribution and sale of exchangeable portable steel tanks containing propane gas commonly referred to as "propane exchange tanks." In 2008, Blue Rhino and AmeriGas increased prices by reducing the amount of propane contained in propane exchange tanks from 17 pounds to 15 pounds (the "fill reduction"). Faced with resistance from their common customer Walmart Stores, Inc. ("Walmart"), Blue Rhino and AmeriGas colluded by secretly agreeing to maintain a united front to push their joint customer, Walmart, to accept the fill reduction.

2. In the United States, consumers typically use propane exchange tanks to fuel barbeque grills and patio heaters. At all times relevant to this complaint, Respondents were the two largest suppliers of propane exchange tanks in the United States. Blue Rhino controlled approximately 50 percent of the United States wholesale propane exchange tank market; AmeriGas controlled

approximately 30 percent of the market. No other competitor served more than nine percent of the market. No other competitor was capable of servicing large national retailers, such as Walmart, Lowe's HIW, Inc. ("Lowe's") and The Home Depot, Inc. ("The Home Depot"), except on a limited basis.

3. In spring 2008, Blue Rhino decided to increase margins by reducing the amount of propane contained in its exchange tanks from 17 pounds to 15 pounds. Blue Rhino planned to reduce the fill level in its exchange tanks without a corresponding reduction in the wholesale price. This would have the effect of raising the price per pound of propane to retail customers and likely to the ultimate consumers.

4. During spring and summer 2008, Blue Rhino informed AmeriGas and certain retail customers that it intended to implement the fill reduction. AmeriGas likewise decided to reduce its exchange tanks from 17 pounds to 15 pounds without a corresponding price decrease.

5. In summer 2008, Blue Rhino and AmeriGas each began to implement the fill reduction.

6. Some customers resisted the fill reduction. Walmart, which purchased tanks from both Blue Rhino and AmeriGas, refused to accept the fill reduction. Blue Rhino's customer Lowe's accepted the fill reduction only on the condition that all of Blue Rhino's other customers – including Walmart – also accept the fill reduction within a short period of time.

7. Faced with resistance from Walmart, Blue Rhino and AmeriGas colluded by secretly agreeing that neither would deviate from their proposal to reduce the fill level to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the fill reduction.

8. This concerted action had the purpose and effect of raising the effective wholesale prices at which Blue Rhino and AmeriGas sold propane exchange tanks to Walmart, as well as to other customers in the United States.

9. Respondents' conduct has restrained price competition and led to higher prices for sales of propane exchange tanks in the United States.

THE RESPONDENTS

10. Respondent Ferrellgas Partners, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. It maintains a nearly complete interest in and conducts its business activities primarily through Respondent Ferrellgas, L.P.

11. Respondent Ferrellgas, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. Ferrellgas, L.P., doing business as Blue Rhino, operates a national propane distribution business, and owns or has access to distribution locations nationwide. Its business includes the filling, refilling, refurbishing, sale and distribution of propane exchange tanks under the Blue Rhino name.

12. For the purposes of this complaint, "Blue Rhino" shall refer to Ferrellgas Partners, L.P., and Ferrellgas, L.P., collectively.

13. At all times relevant hereto, Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P. have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

14. The acts and practices of Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

15. Respondent AmeriGas Partners, L.P., is a publicly traded master limited partnership, 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 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Partners, L.P., operates a national propane distribution business through its subsidiary, AmeriGas Propane, L.P. Respondent AmeriGas Partners, L.P., through AmeriGas Propane, L.P., is engaged in the marketing and sale of propane and propane supply related services, including the distribution and supply of bulk propane to residential, commercial, and agricultural customers, and the preparing, filling, distributing, marketing, and sale of propane exchange tanks. AmeriGas Propane, L.P. often does business as AmeriGas Cylinder Exchange when preparing, filling, distributing, marketing, or selling propane exchange tanks.

16. Respondent UGI Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. UGI Corporation is the parent and sole owner of AmeriGas Propane, Inc. AmeriGas Propane, Inc. is the general partner of Respondent AmeriGas Partners, L.P., and is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania.

17. For the purposes of this complaint, "AmeriGas" shall refer to AmeriGas Partners, L.P., and UGI Corporation, collectively.

18. At all times relevant hereto, AmeriGas Partners, L.P., and UGI Corporation have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

19. The acts and practices of Respondents AmeriGas Partners, L.P. and UGI Corporation, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE PROPANE EXCHANGE TANK INDUSTRY

20. Propane exchange tanks are portable steel tanks, prefilled with propane, and used for supplying fuel for propane barbeque grills and patio heaters, among other things. These tanks are commonly called "20-pound tanks" (regardless of the amount of fuel they contain).

21. Propane exchange tanks have a maximum capacity of 25 pounds, but safety regulations have limited the filling of such tanks to 80 percent of their capacity, i.e., 20 pounds. Beginning in 2002, the National Fire Protection Association modified its standards to require that propane exchange tanks be equipped with an overfilling protection device ("OPD"). Following the creation of the OPD standard, Respondents and their competitors adopted the custom of filling their propane exchange tanks with 17 or 17.5 pounds of propane.

22. Propane exchange tanks sold in the United States are highly standardized products consisting of a standardized tank and a standardized valve system. Propane and propane exchange tanks are homogeneous products.

23. Propane exchange tanks are typically sold to consumers through home improvement stores, hardware stores, mass merchandisers, supermarkets, convenience stores and gas stations. Retailers who sell propane exchange tanks usually offer consumers the option of purchasing a prefilled tank in exchange for an empty tank, or, for a higher price, a prefilled tank without returning an empty tank.

24. Propane exchange tanks sold in the United States are functionally interchangeable, and the Respondents, their competitors and the retailers who sell them treat them as such. Consumers can exchange any propane exchange tank at any store that carries propane exchange tanks without regard for which company supplied the tank to be exchanged.

25. To serve retail outlets that sell propane exchange tanks, Respondents and their competitors need access to refurbishing

and refilling facilities, where empty tanks can be cleaned, refurbished, repainted and refilled.

THE RELEVANT MARKETS

26. The relevant product market in which to evaluate Respondents' conduct is the wholesale marketing and sale of propane exchange tanks.

27. There are no widely used substitutes for propane exchange tanks that provide a similar ease of use. No other product significantly constrains the prices of propane exchange tanks.

28. The relevant geographic market is the United States. To compete effectively for sales to national retailers, including Walmart, The Home Depot and Lowe's, propane exchange tank manufacturers need access to refilling and refurbishing facilities located throughout the United States. Propane exchange tank suppliers that lack nationwide access to such assets are unable to constrain the prices of propane exchange tanks suppliers that have nationwide access to such assets.

29. Beginning in or about 2006, Respondents entered into a series of "co-packing agreements." Pursuant to these agreements, each company agreed to refurbish and refill propane exchange tanks for the other company at certain of each company's facilities. Today, each Respondent processes slightly less than ten percent of the other company's used, empty tanks pursuant to co-packing agreements. Blue Rhino refurbishes and refills exchange tanks for AmeriGas at Blue Rhino facilities in Florida, Colorado, Washington and Missouri. AmeriGas refurbishes and refills exchange tanks for Blue Rhino at AmeriGas facilities in California and New Hampshire.

RESPONDENTS INCREASE PRICES BY REDUCING THE FILL LEVEL

30. In early 2008, Respondents faced rapid increases in propane exchange tank input costs. These inputs included propane, steel for the tanks and diesel fuel for delivery trucks.

31. In or about January 2008, Respondent AmeriGas considered a plan to recoup its rising input costs by reducing the fill level in its propane exchange tanks. AmeriGas decided not to pursue the fill reduction plan because, among other reasons, AmeriGas believed it could be competitively disadvantaged if other companies in the industry did not follow AmeriGas's lead by also reducing the fill level in their propane exchange tanks.

32. In April 2008, Blue Rhino management approved a proposal to reduce the fill level in the company's propane exchange tanks from the then-standard 17 pounds to 15 pounds, without a corresponding price reduction, to offset the increased input costs. The Blue Rhino proposal included a plan to ask AmeriGas in advance whether their co-packing facilities could handle the proposed fill reduction.

33. This reduction in fill level was in effect a 13% increase in the price of the propane.

34. Blue Rhino understood that unilaterally reducing the fill level in its exchange tanks risked putting the company at a competitive disadvantage if its principal competitor, AmeriGas, did not also reduce fill levels. Blue Rhino was particularly concerned about its competitive standing with its second-largest customer, Walmart, because Walmart purchased tanks from both Blue Rhino and AmeriGas.

35. Walmart is the largest propane exchange tank retailer in the United States. Blue Rhino services approximately 60 percent of the Walmart locations nationwide, while AmeriGas services approximately 35 percent. Ozark Mountain Propane Company ("Ozark'), a smaller regional propane supplier, services the remaining Walmart locations.

36. The Blue Rhino Director of Strategic Accounts responsible for Walmart reported to his manager that the fill reduction could put Blue Rhino at a competitive disadvantage to AmeriGas. He stated: "[I]n my mind the 'watch out' is the competitive difference between [Blue Rhino, AmeriGas] and Ozark. We are offering less product vs. [Walmart's] other 2 suppliers. . . . Once we explain this is a done deal (and that we are

not asking for [Walmart's] input or letting him decide), he may become resentful and threaten to take states. . . . Then, we need to pray that [AmeriGas] takes a similar move as soon as possible. If [AmeriGas] doesn't move, we will have a BIG issue." He elaborated: "The only thing that can make this go away is if Amerigas goes to 15 as well, but it has to happen very soon after us to legitimize our move."

37. On or about April 22, 2008, Blue Rhino decided to inform Walmart of its fill reduction plan.

38. On or about April 28, 2008, Blue Rhino's Director of Strategic Accounts met with the Walmart buyer and announced Blue Rhino's intention to reduce the fill in its propane exchange tanks. Walmart rejected the proposed fill reduction. Walmart's buyer told the Blue Rhino Director of Strategic Accounts that the fill reduction was a price increase to which Walmart would not agree. He also told Blue Rhino's Director of Strategic Accounts that Walmart did not want to carry propane exchange tanks with different fill levels—that is, tanks at 15 pounds in stores serviced by Blue Rhino and tanks at 17 pounds in stores serviced by AmeriGas and Ozark.

39. On or about April 29, 2008, a senior Blue Rhino manager ordered production managers to "stand down" on implementation of the fill reduction because "[t]he call with WalMart did not go according to plan."

40. Starting with Blue Rhino's communication plan in April 2008, which revealed Blue Rhino's intention to let AmeriGas know "well in advance" about the fill reduction, and continuing through a series of communications through June 2008, Blue Rhino informed AmeriGas of its plan to raise prices by reducing the fill level in their exchange tanks from 17 to 15 pounds without a corresponding price decrease.

41. On May 29, 2008, Blue Rhino proposed the fill reduction to Lowe's, Blue Rhino's largest retail customer. Approximately two weeks later, Lowe's agreed to accept 15-pound exchange tanks on the condition that Blue Rhino convert all of its customers, including Walmart, to 15-pound tanks within 30 days.

42. On June 18, 2008, Blue Rhino's President telephoned AmeriGas's Director of National Accounts. The two men called each other six more times over the next 30 hours. The following day, Blue Rhino account executives again discussed the fill reduction with Walmart. Following the last of these calls, Blue Rhino's President reported, "I've continued to have a lot of inquiries from [AmeriGas] regarding the lower fuel fill due to their need to adjust production. I've been told that it would be very challenging to produce two different size products long-term . . . once again, messaging that they'll follow closely behind us in the market."

43. On June 20, 2008, AmeriGas management produced a draft budget with a plan for reducing the fill level of AmeriGas's exchange tanks from 17 to 15 pounds.

44. On June 25, 2008, Blue Rhino began notifying its customers of its plans to reduce the fill level in its propane exchange tanks effective July 21, 2008.

45. As alleged in paragraph 31, AmeriGas considered and rejected a plan to unilaterally reduce the fill level in its propane exchange tanks. AmeriGas believed it could be competitively disadvantaged if other companies in the industry did not also reduce the fill level in their propane exchange tanks. After learning that Blue Rhino planned to reduce the fill level of its exchange tanks, AmeriGas reconsidered its earlier decision.

46. Blue Rhino was concerned that, if Walmart rejected the fill reduction, other major retailers would also reject the fill reduction on the ground that they would be at a competitive disadvantage if the propane exchange tanks they sold contained less fuel than otherwise identical exchange tanks sold at Walmart.

47. In particular, Lowe's, Blue Rhino's largest customer, agreed to accept the fill reduction only on the express condition that all Blue Rhino customers would also convert to 15-pound tanks within 30 days of Lowe's converting to 15-pound tanks.

RESPONDENTS COLLUDE TO PUSH WALMART ON THE FILL REDUCTION

48. For one or all of the reasons set forth above, Blue Rhino and AmeriGas understood they could not sustain the fill reduction unless it was accepted by Walmart. Therefore, when faced with resistance from Walmart, the two companies agreed that neither would deviate from their proposal to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the fill reduction.

49. AmeriGas announced the existence of a united front with Blue Rhino by couching its fill reduction plan as an "industry standard." For example, on July 10, 2008, AmeriGas's Director of National Accounts emailed Walmart's buyer to inform him that "the cylinder exchange industry is planning a move to a standard weight of propane in a tank from 17 lbs. net to 15 lbs. net."

50. On or about July 10, 2008, and continuing for three months thereafter, sales executives from the two Respondents communicated repeatedly by telephone and email to apprise each other of the status of their discussions with Walmart and to encourage each other to hold firm to convince Walmart to accept the reduction in fill.

a. On or about July 11, 2008, Blue Rhino's Vice President of Sales called AmeriGas's Director of National Accounts. The two sales executives spoke at length by telephone. Internal Blue Rhino documents confirm that AmeriGas and Blue Rhino sales executives discussed Walmart's rejection of AmeriGas's proposal to begin shipping 15-pound exchange tanks.

b. On or about July 21 and 22, Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke at length by telephone. Blue Rhino internal documents confirm that the AmeriGas and Blue Rhino sales executives discussed AmeriGas's plans for responding to Walmart's rejection of the fill reduction.

c. On or about August 11, 2008, the AmeriGas Director of National Accounts, who was responsible for dealing with Walmart, called Blue Rhino's Vice President of Sales and told him that he was having trouble getting in touch with Walmart to discuss the reduction in fill levels.

d. On or about August 13, 2008, the Blue Rhino sales executives responsible for dealing with Walmart discussed plans for advising AmeriGas of the need to ensure that The Home Depot, AmeriGas's largest retail customer, was supplied with 15-pound, not 17-pound, tanks, because Walmart would be more likely to accept the fill reduction if it knew that The Home Depot had already accepted it.

e. On August 21, 2008, the Blue Rhino and AmeriGas sales executives spoke several times by telephone, and shortly after these communications, the AmeriGas sales executive and AmeriGas's operations manager directed their colleagues to ensure that The Home Depot store in Rogers, Arkansas (near Walmart's Bentonville headquarters) carried only 15-pound tanks.

f. On September 2, 2008, Blue Rhino's Vice President of Sales and AmeriGas Director of National Accounts spoke by telephone again. They discussed the status of their respective efforts to convert their customers to 15-pound tanks, as well as the current retail pricing of tanks at Lowe's.

g. On September 12, 2008, Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke by telephone again. They discussed the status of their negotiations with Walmart. Expressing frustration at Walmart's intransigence, AmeriGas's Director of National Accounts suggested that it was time to issue an ultimatum to Walmart. Blue Rhino's Vice President of Sales responded by telling him that Blue Rhino was continuing to work

with Walmart and that AmeriGas should "hang in there."

h. On September 15 and 22, 2008, Blue Rhino's Vice President of Sales and AmeriGas' Director of National Accounts spoke again by telephone.

i. On September 30, 2008, the AmeriGas Director of National Accounts emailed Blue Rhino's Vice President of Sales and informed him that Walmart management was meeting the following day to discuss the proposed fill reduction.

51. On October 6, 2008, the Lowe's buyer emailed his Blue Rhino sales executive with an ultimatum. Lowe's had agreed to accept 15-pound tanks on the condition that all other Blue Rhino customers would be converted within 30 days. Lowe's observed that Walmart was still selling 17-pound tanks and that Lowe's was therefore at a competitive disadvantage. The Lowe's buyer demanded that either all of Blue Rhino's customers must be at 15 pounds or Lowe's be converted back to 17-pound tanks at the same price it was paying for the 15-pound tanks.

52. The Lowe's demand confirmed to Blue Rhino that it needed Walmart to accept the fill reduction or risk the fill reduction unraveling. It also highlighted the need for Blue Rhino and AmeriGas to continue to push Walmart to accept the fill reduction.

53. On October 6, 2008, Blue Rhino's President forwarded the Lowe's email to his Vice President of Sales and directed him to finalize Walmart's acceptance of the fill reduction that day. Within a half hour, the Blue Rhino Vice President of Sales called his counterpart at AmeriGas. The two talked for 16 minutes.

54. Following his 16-minute conversation with the AmeriGas Director of National Accounts, the Blue Rhino Vice President of Sales emailed Walmart to demand that it accept the fill reduction.

55. Early the following morning, the AmeriGas Director of National Accounts, using language similar to Blue Rhino's

communication, emailed Walmart urging it to implement the fill reduction.

56. On October 10, 2008, believing it had no alternative to the fill reduction, Walmart agreed to accept propane exchange tanks filled to 15 pounds from both Blue Rhino and AmeriGas.

57. The secret agreement between Blue Rhino and AmeriGas that neither would deviate from their proposal to Walmart when faced with resistance from Walmart, and their combined efforts to push Walmart to promptly accept the fill reduction had the effect of raising the price per pound of propane to Walmart and likely to the ultimate consumers.

58. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency and effect of restricting or eliminating competition in the wholesale sale of propane exchange tanks.

59. There are no legitimate, procompetitive efficiencies that justify the conduct of Respondents, as alleged herein, or that outweigh its anticompetitive effects.

VIOLATION
ALLEGED RESTRAINT OF TRADE

60. Paragraphs 1 to 59 above are re-alleged as if fully set forth herein.

61. When faced with Walmart's resistance to their plans to reduce the fill level of their propane exchange tanks, Respondents colluded by secretly agreeing that neither would deviate from the planned fill reduction to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the price increase they each implemented through the fill reduction. Their concerted actions unreasonably restrained trade and constituted unfair methods of competition in or affecting commerce 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 continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to Respondents that the second day of December, 2014, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a 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 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 allegations 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 of fact and conclusions of law under § 3.46 of said Rules.

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 not later than ten (10) days after an answer is filed by the last answering Respondent. 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., Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, 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. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate customers or markets, or from soliciting any competitor to enter into such an agreement.

3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the

Commission, or soliciting any competitor to enter into such an agreement.

4. Prohibiting Respondents from internally using or disclosing confidential information obtained from a competitor pursuant to a co-production agreement, joint venture or legitimate business arrangement except as necessary to further said co-production agreement, joint venture or business arrangement.

5. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.

6. Requiring that Respondents file periodic compliance reports with the Commission.

7. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of March, 2014, issues its complaint against Respondents.

By the Commission, Commissioner Ohlhausen dissenting.

DECISION AND ORDER AS TO AMERIGAS PARTNERS L.P. AND UGI CORPORATION

The Federal Trade Commission ("Commission"), having heretofore issued its complaint charging AmeriGas Partners, L.P. and UGI Corporation (hereinafter referred to as "ACE Respondents") and Ferrellgas Partners, L.P. and Ferrellgas L.P. with violations of Section 5 of the Federal Trade Commission Act, as amended, and ACE Respondents having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

ACE Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by ACE Respondents of all the jurisdictional facts set forth in the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by ACE 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with §3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent AmeriGas Partners, L.P., is a publicly traded master limited partnership, 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 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Partners, L.P.'s subsidiary AmeriGas Propane, L.P. operates a Propane Tank Exchange Business known as the AmeriGas Cylinder Exchange program.

2. Respondent UGI Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. UGI Corporation is the parent and sole owner of AmeriGas Inc., which is the sole owner of AmeriGas Propane, Inc. AmeriGas Propane, Inc. is the general partner of Respondent AmeriGas Partners, L.P., and is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the ACE 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. "ACE Respondents" means UGI Corporation and AmeriGas Partners, L.P. and the directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each, together with joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each, including AmeriGas Propane L.P. and AmeriGas Propane, Inc., and the directors,

officers, employees, agents, representatives, successors, and assigns of each.

B. "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*.

C. "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."

D. "Competitively Sensitive Non-Public Information" means proprietary or confidential information relating to the Propane Tank Exchange Business regarding the pricing, pricing strategies, Fill Level strategies, costs, revenues, margins, output, business and strategic plans, marketing, customer information and Communications with customers, advertising, promotion or research and development, *provided, however*, that "Competitively Sensitive Non-Public Information" shall not include (1) information that is publicly available or has been widely Communicated to customers or investors through methods such as website postings, analyst conference calls, press releases, and widely disseminated faxes, letters, electronic mailings and phone calls; nor (2) information required to be publicly disclosed under Federal Securities Laws, as that term is defined in §3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

E. "Competitor" means any other Person other than ACE Respondents that participates in the Propane Tank Exchange Business in the United States.

F. "Fill Level" means the weight of propane ACE Respondents put in their Propane Tanks. As of the date this Order is issued the Fill Level identified on ACE Respondents' Propane Tanks is 15 pounds.

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

H. "Propane Tanks" means portable steel tanks marketed and sold prefilled with propane, and used for supplying fuel for propane barbeque grills and patio heaters, among other things. These tanks are commonly called "grill cylinders" or "20 pound tanks" regardless of their Fill Level. Propane Tanks include prefilled propane tanks sold as exchange tanks and as spare tanks.

I. "Propane Tank Employees and Representatives" means employees, officers and agents whose duties primarily relate to a Propane Tank Exchange Business or whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

J. "Propane Tank Exchange Business" means the business of marketing, selling, filling and Refilling Propane Tanks for sale to customers who sell the Propane Tanks to, or exchange them with, end users for a fee.

K. "Propane Refilling Agreement" means an agreement to (i) Refill Propane Tanks on behalf of a Competitor, or (ii) have a Competitor Refill Propane Tanks on behalf of ACE Respondents. A Propane Refilling Agreement may include ancillary transportation services; however, an agreement that includes goods and services in addition to Refilling and ancillary

transportation services is not a Propane Refilling Agreement.

L. "Refill" or "Refilling" means preparing and filling Propane Tanks that have been returned by an end user so that the cylinders can be reused. Refilling includes, but is not limited to, cleaning, refurbishing, repainting and/or filling the cylinders.

M. "Restricted Employees" means employees, officers or agents whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

II.

IT IS FURTHER ORDERED that in connection with ACE Respondents' Propane Tank Exchange Business in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, ACE Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among ACE Respondents and any Competitor to raise, fix, maintain, or stabilize prices or price levels of Propane Tanks through any means, including modifying the Fill Level contained in Propane Tanks sold by ACE Respondents and/or its Competitors, or coordinating Communications to customers of ACE Respondents and/or their Competitors.

B. Communicating Competitively Sensitive Non-Public Information to any Competitor, or requesting, encouraging or facilitating the Communication of Competitively Sensitive Non-Public Information from

any Competitor, *provided, however,* it shall not be a violation of this Paragraph to:

1. Negotiate and fulfill the terms of a Propane Refilling Agreement so long as

    a. Competitively Sensitive Non-Public Information is Communicated only as reasonably necessary to negotiate and fulfill the terms of the relevant Propane Refilling Agreement, and
    b. no Competitively Sensitive Non-Public Information is Communicated regarding pricing to customers, pricing strategies, changes in Fill Level, Fill Level strategies, revenues, or business and strategic plans, and
    c. prospective Competitively Sensitive Non-Public Information, such as information regarding a Competitor's future volume needs or advance production requests, is not Communicated to any Restricted Employee of ACE Respondents, except that such data may be included in ACE Respondents' total production volume or the total production volume at a particular facility;

2. Disclose Competitively Sensitive Non-Public Information to a Competitor if such disclosure is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition or joint venture, or to participate in a joint venture, *so long as* ACE Respondents require such Competitor to agree not to disclose current or prospective Competitively Sensitive Non-Public Information to a Restricted Employee of the Competitor; except that Restricted Employees of the Competitor may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public

Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

3. Solicit or receive Competitively Sensitive Non-Public Information from a Competitor if doing so is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition, or joint venture, or to participate in a joint venture, *so long as* ACE Respondents take all reasonable steps to ensure that none of the Competitor's current or prospective Competitively Sensitive Non-Public Information is disclosed to any of ACE Respondents' Restricted Employees; except that Restricted Employees may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

4. Respond to health, safety, emergency or regulatory matters so long as ACE Respondents disclose Competitively Sensitive Non-Public Information in the course of responding to such matters only to the extent reasonably necessary; and

5. Participate in industry-wide data exchange or market research so long as i) neither ACE Respondents nor Competitors participate in collecting or aggregating Competitively Sensitive Non-Public Information; ii) ACE Respondents only provide Competitively Sensitive Non-Public Information that is at least three (3) months old; and iii) no Competitively Sensitive Non-Public Information is Communicated to ACE Respondents or any Competitor except as part of aggregated industry-wide data collected from at least five (5) firms, none of whose data accounts for more than 25% of the total data collected and Communicated.

III.

IT IS FURTHER ORDERED that, within five (5) days of issuance of this Order:

A. ACE Respondents shall establish and maintain an antitrust compliance program for their Propane Tank Exchange Business in the United States that sets forth the policies and procedures ACE Respondents have implemented to comply with the requirements of this Order and with the Antitrust Laws.

B. As part of establishing and maintaining an antitrust compliance program under this Paragraph ACE Respondents shall:

1. Appoint and retain for the duration of the Order an antitrust compliance officer to supervise ACE Respondents' antitrust compliance program. ACE Respondents may appoint successive antitrust compliance officers, but each must be an employee or officer of, or antitrust counsel for, ACE Respondents;

2. Provide training regarding ACE Respondents' obligations under this Order and the Antitrust Laws

as applied to ACE Respondents' Propane Tank Exchange Business in the United States

a. at least annually to all Propane Tank Employees and Representatives of ACE Respondents, and
b. within thirty (30) days after an individual first becomes a Propane Tank Employee or Representative of ACE Respondents,

Provided, however, that the antitrust training obligations in this Paragraph III.B.2 shall not apply to (i) non-management production and transportation employees and representatives who (x) do not have access to ACE Respondents' Competitively Sensitive Non-Public Information and (y) do not, in the course of their employment or representation, Communicate with any Competitors; and (ii) employees and representatives who are not involved in ACE Respondents' Propane Tank Exchange Business in the United States;

3. Enable Propane Tank Employees and Representatives of ACE Respondents to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;

4. Discipline Propane Tank Employees and Representatives of ACE Respondents for failure to comply with this Order and the Antitrust Laws; and

5. Maintain records showing that ACE Respondents have complied with and are complying with the provisions of the antitrust compliance program, including but not limited to, records showing that Propane Tank Employees and Representatives have received all trainings required under this Order during the during the preceding two (2) years.

IV.

IT IS FURTHER ORDERED that

A. ACE Respondents shall submit to the Commission a verified written report:

1. within thirty (30) days after the date this Order is issued; and
2. one (1) year after the date this Order is issued, and annually for four (4) years thereafter,

which report shall set forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order, and shall, *inter alia*, identify the antitrust compliance officer and describe the antitrust compliance program required by Paragraph III of this Order, and, to the extent not included in a prior report, provide the following information regarding each agreement or circumstance pursuant to which an ACE Respondent Communicated Competitively Sensitive Non-Public Information with or among Competitors: i) the nature of such agreement or circumstance; ii) the Competitor or Competitors with whom Competitively Sensitive Non-Public Information was Communicated; and iii) the Propane Tank Employees and Representatives of ACE Respondents, or categories of Propane Tank Employees and Representatives of ACE Respondents, involved in Communicating such Competitively Sensitive Non-Public Information.

B. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any ACE Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference,

permit any duly authorized representative of the Commission:

1. 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 the that Respondent; and
2. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

V.

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

A. any proposed dissolution of an ACE Respondent; or

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

C. any other change in an ACE Respondent, including without limitation, assignment and the creation, sale or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on January 7, 2035.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner McSweeny not participating.

DECISION AND ORDER AS TO FERRELLGAS PARTNERS, L.P. AND FERRELLGAS L.P.

The Federal Trade Commission ("Commission"), having heretofore issued its complaint charging Ferrellgas Partners, L.P. and Ferrellgas L.P. (hereinafter referred to as "Blue Rhino Respondents") and AmeriGas Partners, L.P. and UGI Corporation, with violations of Section 5 of the Federal Trade Commission Act, as amended, and Blue Rhino Respondents having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

Blue Rhino Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by Blue Rhino Respondents of all the jurisdictional facts set forth in the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Blue Rhino 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with §3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Ferrellgas Partners, L.P., is a limited partnership organized, existing and doing business

under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas.

2. Respondent Ferrellgas, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. Respondent Ferrellgas, L.P., doing business as Blue Rhino, operates a Propane Tank Exchange Business.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Blue Rhino 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. "Blue Rhino Respondents" means Ferrellgas Partners L.P. and Ferrellgas L.P. and the directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each, together with joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each.

B. "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*.

C. "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."

D. "Competitively Sensitive Non-Public Information" means proprietary or confidential information relating to the Propane Tank Exchange Business regarding the pricing, pricing strategies, Fill Level strategies, costs, revenues, margins, output, business and strategic plans, marketing, customer information and Communications with customers, advertising, promotion or research and development, *provided, however*, that "Competitively Sensitive Non-Public Information" shall not include (1) information that is publicly available or has been widely Communicated to customers or investors through methods such as website postings, analyst conference calls, press releases, and widely disseminated faxes, letters, electronic mailings and phone calls; nor (2) information required to be publicly disclosed under Federal Securities Laws, as that term is defined in §3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

E. "Competitor" means any other Person other than Blue Rhino Respondents that participates in the Propane Tank Exchange Business in the United States.

F. "Fill Level" means the weight of propane Blue Rhino Respondents put in their Propane Tanks. As of the date this Order is issued the Fill Level identified on Blue Rhino Respondents' Propane Tanks is 15 pounds.

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

H. "Propane Tanks" means portable steel tanks marketed and sold prefilled with propane, and used for supplying fuel for propane barbeque grills and patio heaters, among other things. These tanks are commonly called "grill cylinders" or "20 pound tanks" regardless of their Fill Level. Propane Tanks include prefilled propane tanks sold as exchange tanks and as spare tanks.

I. "Propane Tank Employees and Representatives" means employees, officers and agents whose duties primarily relate to a Propane Tank Exchange Business or whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

J. "Propane Tank Exchange Business" means the business of marketing, selling, filling and Refilling Propane Tanks for sale to customers who sell the Propane Tanks to, or exchange them with, end users for a fee.

K. "Propane Refilling Agreement" means an agreement to (i) Refill Propane Tanks on behalf of a Competitor, or (ii) have a Competitor Refill Propane Tanks on behalf of Blue Rhino Respondents. A Propane Refilling Agreement may include ancillary transportation services; however, an agreement that includes goods and services in addition to Refilling and ancillary transportation services is not a Propane Refilling Agreement.

L. "Refill" or "Refilling" means preparing and filling Propane Tanks that have been returned by an end user so that the cylinders can be reused. Refilling includes, but is not limited to, cleaning, refurbishing, repainting and/or filling the cylinders.

M. "Restricted Employees" means employees, officers or agents whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

II.

IT IS FURTHER ORDERED that in connection with Blue Rhino Respondents' Propane Tank Exchange Business in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Blue Rhino Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among Blue Rhino Respondents and any Competitor to raise, fix, maintain, or stabilize prices or price levels of Propane Tanks through any means, including modifying the Fill Level contained in Propane Tanks sold by Blue Rhino Respondents and/or its Competitors, or coordinating Communications to customers of Blue Rhino Respondents and/or their Competitors.

B. Communicating Competitively Sensitive Non-Public Information to any Competitor, or requesting, encouraging or facilitating the Communication of Competitively Sensitive Non-Public Information from any Competitor, *provided, however*, it shall not be a violation of this Paragraph to:

1. Negotiate and fulfill the terms of a Propane Refilling Agreement so long as

a. Competitively Sensitive Non-Public Information is Communicated only as reasonably necessary to negotiate and fulfill the

terms of the relevant Propane Refilling Agreement, and

b. no Competitively Sensitive Non-Public Information is Communicated regarding pricing to customers, pricing strategies, changes in Fill Level, Fill Level strategies, revenues, or business and strategic plans, and

c. prospective Competitively Sensitive Non-Public Information, such as information regarding a Competitor's future volume needs or advance production requests, is not Communicated to any Restricted Employee of Blue Rhino Respondents, except that such data may be included in Blue Rhino Respondents' total production volume or the total production volume at a particular facility;

2. Disclose Competitively Sensitive Non-Public Information to a Competitor if such disclosure is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition or joint venture, or to participate in a joint venture, so long as Blue Rhino Respondents require such Competitor to agree not to disclose current or prospective Competitively Sensitive Non-Public Information to a Restricted Employee of the Competitor; except that Restricted Employees of the Competitor may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (*e.g.* costs, margins, prices or strategies by customer); non-aggregated costs,

margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

3. Solicit or receive Competitively Sensitive Non-Public Information from a Competitor if doing so is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition, or joint venture, or to participate in a joint venture, so long as Blue Rhino Respondents take all reasonable steps to ensure that none of the Competitor's current or prospective Competitively Sensitive Non-Public Information is disclosed to any of Blue Rhino Respondents' Restricted Employees; except that Restricted Employees may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

4. Respond to health, safety, emergency or regulatory matters so long as Blue Rhino Respondents disclose Competitively Sensitive Non-Public Information in the course of responding to such matters only to the extent reasonably necessary; and

5. Participate in industry-wide data exchange or market research so long as i) neither Blue Rhino Respondents nor Competitors participate in collecting or aggregating Competitively Sensitive

Non-Public Information; ii) Blue Rhino Respondents only provide Competitively Sensitive Non-Public Information that is at least three (3) months old; and iii) no Competitively Sensitive Non-Public Information is Communicated to Blue Rhino Respondents or any Competitor except as part of aggregated industry-wide data collected from at least five (5) firms, none of whose data accounts for more than 25% of the total data collected and Communicated.

III.

IT IS FURTHER ORDERED that, within five (5) days of issuance of this Order:

A. Blue Rhino Respondents shall establish and maintain an antitrust compliance program for their Propane Tank Exchange Business in the United States that sets forth the policies and procedures Blue Rhino Respondents have implemented to comply with the requirements of this Order and with the Antitrust Laws.

B. As part of establishing and maintaining an antitrust compliance program under this Paragraph Blue Rhino Respondents shall:

1. Appoint and retain for the duration of the Order an antitrust compliance officer to supervise Blue Rhino Respondents' antitrust compliance program. Blue Rhino Respondents may appoint successive antitrust compliance officers, but each must be an employee or officer of, or antitrust counsel for, Blue Rhino Respondents;

2. Provide training regarding Blue Rhino Respondents' obligations under this Order and the Antitrust Laws as applied to Blue Rhino Respondents' Propane Tank Exchange Business in the United States

a. at least annually to all Propane Tank Employees and Representatives of Blue Rhino Respondents, and

b. within thirty (30) days after an individual first becomes a Propane Tank Employee or Representative of Blue Rhino,

Provided, however, that the antitrust training obligations in this Paragraph III.B.2 shall not apply to (i) non-management production and transportation employees and representatives who (x) do not have access to Blue Rhino Respondents' Competitively Sensitive Non-Public Information and (y) do not, in the course of their employment or representation, Communicate with any Competitors; and (ii) employees and representatives who are not involved in Blue Rhino Respondents' Propane Tank Exchange Business in the United States;

3. Enable Propane Tank Employees and Representatives of Blue Rhino Respondents to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;

4. Discipline Propane Tank Employees and Representatives of Blue Rhino Respondents for failure to comply with this Order and the Antitrust Laws; and

5. Maintain records showing that Blue Rhino Respondents have complied with and are complying with the provisions of the antitrust compliance program, including but not limited to, records showing that Propane Tank Employees and Representatives have received all trainings required under this Order during the during the preceding two (2) years.

IV.

IT IS FURTHER ORDERED that

A. Blue Rhino Respondents shall submit to the Commission a verified written report:

1. within thirty (30) days after the date this Order is issued; and

2. one (1) year after the date this Order is issued, and annually for four (4) years thereafter, which report shall set forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order, and shall, *inter alia*, identify the antitrust compliance officer and describe the antitrust compliance program required by Paragraph III of this Order, and, to the extent not included in a prior report, provide the following information regarding each agreement or circumstance pursuant to which a Blue Rhino Respondent Communicated Competitively Sensitive Non-Public Information with or among Competitors: i) the nature of such agreement or circumstance; ii) the Competitor or Competitors with whom Competitively Sensitive Non-Public Information was Communicated; and iii) the Propane Tank Employees and Representatives of Blue Rhino Respondents, or categories of Propane Tank Employees and Representatives of Blue Rhino Respondents, involved in Communicating such Competitively Sensitive Non-Public Information.

B. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Blue Rhino Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference,

permit any duly authorized representative of the Commission:

1. 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 the that Respondent; and

2. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

V.

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

A. any proposed dissolution of a Blue Rhino Respondent; or

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

C. any other change in a Blue Rhino Respondent, including without limitation, assignment and the creation, sale or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on January 7, 2035.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner McSweeny not participating.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, agreements containing proposed consent orders ("Consent Agreements") resolving an administrative complaint issued by the Commission on March 27, 2014. The FTC accepted a consent agreement from Respondents AmeriGas Partners, L.P., also doing business as AmeriGas Cylinder Exchange, and UGI Corporation (collectively "AmeriGas") and a separate consent agreement from "Blue Rhino" Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino (collectively "Blue Rhino"). AmeriGas and Blue Rhino are referred to collectively herein as "Respondents." The complaint charges that AmeriGas and Blue Rhino violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by colluding to push Walmart, a key customer, to accept a reduction in the amount of propane in the propane exchange tanks each sold to Walmart.

Under the terms of the Consent Agreements, AmeriGas and Blue Rhino are prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise fix the prices of exchange tanks, or to coordinate

communications with customers. Each is also required to maintain an antitrust compliance program.

The Commission believes that the terms of the proposed orders contained in the Consent Agreements will resolve the competitive issues described in the complaint. The Consent Agreements have 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 Agreements and any comments received, and will decide whether it should withdraw from the Consent Agreements or make final the proposed orders contained in the Consent Agreements.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed orders. It is not intended to constitute an official interpretation of the proposed Consent Agreements and the accompanying proposed orders or in any way to modify their terms.

The Consent Agreements are for settlement purposes only and do not constitute an admission by either Respondent that it has violated the law, or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

II. The Complaint

The following allegations are taken from the complaint and publicly available information.

A. Background

Blue Rhino and AmeriGas control approximately 80 percent of the market for propane exchange tanks. These tanks are portable, steel tanks, prefilled with propane, primarily used for propane barbeque grills and patio heaters. There are no widely used substitutes for exchange tanks that provide a similar ease of use. Consumers typically purchase these prefilled tanks at home improvement stores, hardware stores, mass merchandisers, supermarkets, convenience stores, and gas stations.

To compete effectively to serve national retailers, including mass merchandisers such as Walmart, The Home Depot, and Lowe's, propane exchange tank manufacturers must have access to refurbishing and refilling facilities located throughout the United States.[1] AmeriGas and Blue Rhino are the only manufacturers who can supply exchange tanks to large national retailers, except on a limited basis.

B. Challenged Conduct

In 2008, Blue Rhino and AmeriGas each decided to implement a price increase by reducing the amount of propane in their exchange tanks from 17 pounds to 15 pounds, without a corresponding decrease in the wholesale price. Blue Rhino publicly announced its fill reduction plan on June 25, 2008. AmeriGas publicly announced its fill reduction plan on July 10, 2008. The FTC's complaint does not allege that Respondents' initial decision to reduce fill levels to 15 pounds was the result of an agreement between the parties.

Walmart purchases tanks from both Blue Rhino and AmeriGas and initially refused to accept the planned fill reduction. Blue Rhino and AmeriGas understood they could not sustain the fill reduction unless it was accepted by Walmart. Blue Rhino's customer Lowe's accepted the fill reduction only on the condition that all of Blue Rhino's other customers, including Walmart, also accept the fill reduction within a short period of time. Faced with resistance from Walmart, Blue Rhino and AmeriGas colluded by secretly agreeing that neither would deviate from their proposal to reduce the fill level to Walmart.

On or about July 10, 2008, and continuing for three months thereafter, Blue Rhino and AmeriGas sales executives communicated repeatedly with each other regarding the status of their respective efforts to persuade Walmart to accept the fill reduction. The secret agreement between Blue Rhino and AmeriGas that neither would deviate from their proposal to

[1] As described in the complaint, Respondents have entered into a number of "co-packing" agreements, pursuant to which one of the Respondents processes and refills propane exchange tanks for the other Respondent at certain of their processing plants.

Walmart when faced with resistance from Walmart, and their combined efforts to push Walmart to promptly accept the fill reduction had the effect of raising the price per pound of propane to Walmart and likely to the ultimate consumers.

The Complaint alleges that this agreement violated Section 5 of the FTC Act by unreasonably restraining trade and constituting an unfair method of competition. The agreement alleged in the Complaint is *per se* unlawful.[2]

III. The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged against the Respondents in the complaint and to prevent future unlawful conduct. The proposed orders, although entered into separately with AmeriGas and Blue Rhino, are identical in all material respects. Paragraph II of the proposed orders contains two key prohibitions. The first, contained in Paragraph II.A., bars Respondents from soliciting, offering, participating in, or entering into any type of agreement with any competitor in the propane exchange business to modify the fill level, or maintain, stabilize, or otherwise fix the price of propane exchange tanks. In addition, it prohibits Respondents from coordinating communications to customers or competitors.

The second, contained in Paragraph II.B., prevents Respondents from sharing competitively sensitive non-public information with competitors except in identified circumstances. Respondents may exchange limited information needed to

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[2] *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24, n.59 (1940) (agreements among horizontal competitors to buy surplus gasoline on spot market to prevent prices from falling sharply held *per se* illegal, even though there was no agreement on price to be maintained; agreements to raise, lower, stabilize, or otherwise restrain price competition are summarily condemned as *per se* illegal under Section 1 of the Sherman Act.); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*) (agreement among horizontal competitors to eliminate a form of short-term credit was tantamount to an agreement to eliminate discounts and held *per se* illegal as price fixing); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 65 F.T.C. 583, 612 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965) (agreement between competitors to reduce the percentage of more expensive and higher quality durum wheat and increase the percentage of less expensive and lower quality farina wheat for pasta held *per se* illegal).

negotiate and fulfill the terms of refilling agreements. The proposed orders allow this information sharing because transporting exchange tanks is a significant expense and co-packing agreements may lower the cost of serving customers located farther away from filling facilities.

The proposed orders also allow Respondents to share information with competitors as part of legally supervised due diligence or to participate in a joint venture. However, Respondents are prohibited from sharing highly sensitive information, such as future pricing and marketing plans, with employees whose duties include pricing, sales and marketing of exchange tanks. Further, Respondents are permitted to share confidential information with competitors to respond to health, safety, emergency or regulatory matters. Finally, Respondents can participate in industry-wide data exchange or market research so long as a third party collects the data and only disseminates data that are at least three months old and aggregated from a significant portion of the propane exchange industry.

Paragraph III of the proposed orders requires that Respondents establish and maintain antitrust compliance programs for their propane tank exchange business in the United States and identifies the requirements for that program. The remaining provisions of the proposed orders contain reporting and compliance requirements commonly found in FTC competition orders.

Pursuant to FTC policy regarding the term for competition orders, the proposed orders will expire in 20 years.

Concurring Statement

STATEMENT OF CHAIRWOMAN EDITH RAMIREZ AND COMMISSIONER JULIE BRILL

The Commission is issuing for public comment two identical proposed Orders that would resolve allegations that AmeriGas and Blue Rhino entered into an unlawful agreement that neither would deviate from its plan to reduce the amount of propane in prefilled propane exchange tanks sold to Walmart. The Commission commenced administrative litigation in this matter on March 27, 2014; AmeriGas and Blue Rhino have now agreed to settle the case. The proposed Orders will prevent the parties from engaging in collusive conduct with rivals in the future. Each respondent is prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise to fix the price of exchange tanks, or to exchange competitively sensitive information. In addition, each respondent is required to maintain an antitrust compliance program.

Propane exchange tanks are a staple in the backyards of American consumers. The collusive agreement, as alleged, was facially anticompetitive and had the effect of raising the price per pound of propane exchange tanks to Walmart and likely ultimate consumers in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Our action today thus provides important relief to American consumers and sends a clear signal to the marketplace that anticompetitive collusion will not be tolerated.

AmeriGas and Blue Rhino are the two largest suppliers of propane exchange tanks in the United States, together controlling approximately 80 percent of the market. No other competitor serves more than nine percent of the market or is capable of serving large national retailers, such as Walmart and Lowe's. As detailed in the Commission's Complaint, in 2008, AmeriGas and Blue Rhino faced rapidly increasing input costs. To offset these rising costs, AmeriGas and Blue Rhino each decided to reduce the fill level in their propane exchange tanks from 17 to 15 pounds – without a corresponding price decrease. This effectively increased the per unit price of the propane by 13 percent.

Walmart rejected proposals from both AmeriGas and Blue Rhino to reduce the propane fill levels; Walmart's buyer viewed each proposal as a price increase to which Walmart was not willing to agree. Although Blue Rhino's largest customer, Lowe's, accepted the fill reduction, it did so on the express condition that all of Blue Rhino's customers (including Walmart) also accept the fill reduction promptly. Blue Rhino and AmeriGas understood that they could not sustain the fill reduction across the industry unless it was accepted by Walmart.

The Commission's Complaint does not allege that the Respondents' initial decisions to reduce fill levels to 15 pounds were the result of an agreement. However, the Complaint alleges that thereafter, in light of Walmart's continued resistance to the reduction, and the risk that other customers would also demand to return to 17-pound tanks, AmeriGas and Blue Rhino agreed that neither would accede to pressure from Walmart. Faced with this united front, Walmart capitulated to the sellers' demand. This subsequent agreement to act in concert in negotiations with Walmart is the basis for the Commission's challenge.

The investigation revealed ample evidence to provide us with a reason to believe that AmeriGas and Blue Rhino entered into an unlawful agreement.[1] For example, AmeriGas and Blue Rhino executives spoke frequently in the days leading up to Walmart's decision to accept the fill reductions, and at one point a frustrated AmeriGas Director of National Accounts suggested to Blue Rhino that it was time for them to issue an ultimatum to Walmart.[2] Blue Rhino's Vice President of Sales responded by urging AmeriGas to "hang in there" as Blue Rhino continued to negotiate with Walmart.[3]

Reducing the volume of propane gas in a tank while keeping the price constant is equivalent to a per unit price increase. Indeed, that is how Walmart understood the fill reduction. The

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[1] In the Matter of Ferrellgas Partners, L.P., et al., FTC Docket No. 9360, Complaint (Mar. 27, 2014), *available at* www.ftc.gov/system/files/documents/cases/140401amerigascomplaint.pdf.

[2] Complaint ¶ 50.

[3] *Id.*

joint strategy therefore entails a restriction on price competition and does not present any new or novel theory of liability.[4] It does not matter that the Complaint does not allege that AmeriGas and Blue Rhino agreed to keep their respective prices to Walmart constant, or that Walmart may have been free to negotiate prices with the parties, as noted in Commissioner Ohlhausen's dissent. The law is clear that price fixing agreements "may or may not be aimed at complete elimination of price competition"[5] and are unlawful in either instance because of the enormous threat they pose to the free market.[6] There is also no reasonable procompetitive justification for the alleged agreement, particularly since it was directed to a significant customer whose refusal to accept the proposal had the potential to cause the firms' fill reduction plans to unravel. The agreement thus amounts to a *per se* unlawful naked restraint on price competition.[7] As Judge

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[4] *Cf.* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980) (*per curiam*) (agreement among horizontal competitors to eliminate a form of short-term credit was tantamount to an agreement to eliminate discounts and held *per se* illegal as price fixing even though there was no agreement on actual price); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24, n.59 (1940) (agreements among horizontal competitors to buy surplus gasoline on spot market to prevent prices from falling sharply held *per se* illegal, even though there was no agreement on price to be maintained).

[5] Socony-Vacuum Oil, 310 U.S. at 224 n.59. *See also* F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1980) (noting that constriction of supply is the essence of price-fixing, whether it be accomplished by agreement upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered).

[6] As noted in Socony-Vacuum, 310 U.S. at 224 n. 59: "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *See also* NCAA v. Board Of Regents, 468 U.S. 85, 100 (1983) ("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *citing* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979)).

[7] *See* FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at:* http://www.ftc.gov/sites/default/files/documents/public_events/joint-

Posner explained in *In re Sulfuric Acid Antitrust Litigation*, "[t]he per se rule is designed for cases in which experience has convinced the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever."[8]

Whether the initial decision to reduce fill levels was the result of independent decision-making has no bearing on the unlawfulness of the parties' subsequent agreement to maintain a united front with respect to Walmart.[9] In addition, Walmart's position as the "largest propane exchange tank retailer in the United States"[10] does not protect it from coercion. Even a power buyer like Walmart is vulnerable when its only two suppliers for a product have secretly agreed not to deviate from a proposed price increase.

We continue to believe that pursuing this case was in the public interest. Contrary to Commissioner Ohlhausen's dissent, the private settlements that Blue Rhino and AmeriGas entered into resulted in very little benefit to consumers. While the settlement amounts in the private litigation noted by Commissioner Ohlhausen may superficially sound impressive, the vast majority of the *actual* funds distributed covered Plaintiffs' attorneys' fees,

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venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf ("Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful.").

[8] 703 F.3d 1004, 1011-12 (7th Cir. 2012) (rejecting *per se* treatment of agreements on the ground there were reasonable procompetitive justifications for the alleged agreement); *see also* National Macaroni Mfrs. Ass'n v. FTC, 65 F.T.C. 583, 612 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965) (agreement between competitors to reduce the percentage of more expensive and higher quality durum wheat and increase the percentage of less expensive and lower quality farina wheat for pasta held *per se* illegal).

[9] *Cf.* Sugar Institute v. United States, 297 U.S. 553, 601 (1936) (agreement to adhere to previously announced prices and terms of sale held *per se* illegal, even though the previously announced prices and terms were unilaterally determined).

[10] Complaint ¶ 35.

cy pres payments and administrative fees and expenses, with only a trivial amount disbursed to consumers. The proposed Orders will benefit consumers by prohibiting conduct that could lead to future agreements on price or other competitive terms.

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I voted against the issuance of the Part III complaint against AmeriGas and Blue Rhino last March, and I now dissent from the consent agreement proposed by the Commission. I write briefly to explain my opposition to the majority's pursuit and now settlement of this novel, unwarranted enforcement action.

Neither the theory advanced by the staff and ultimately adopted by the Commission nor the evidence offered in support thereof convinced me that there was reason to believe the parties had restrained competition in violation of Section 5 of the FTC Act. In my view, the allegations in this case – that the parties "colluded by secretly agreeing to maintain a united front to push their joint customer, Walmart, to accept the [propane tank] fill reduction"[1] – fit poorly, at best, in the Section 1 case law. I am not aware of any Section 1 case that involved an alleged agreement among competitors to coerce a single customer to accept a decrease in product size that the competitors had pursued independently and that in no way precluded independent negotiation of the product's price between each competitor and the customer. I simply "have never seen or heard of an antitrust case quite like this."[2]

One of my several concerns at the time the complaint issued was that the Walmart-as-lynchpin theory would effectively collapse into one in which the Commission was challenging the

[1] *In re* Ferrellgas Partners, L.P., FTC Dkt. No. 9360, Complaint, at 2 (Mar. 27, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140401amerigascomplaint.pdf.

[2] *In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012) (Posner, J.) (rejecting per se treatment for agreements among competitors to shut down certain of their plants and abide by exclusive territorial restrictions).

independently decided fill reduction.[3] The Commission, however, obviously did not have sufficient evidence to pursue that more direct case.

Even more troubling, the majority's treatment of the alleged conduct as per se unlawful depends on an unfounded assertion that the parties agreed to keep their prices fixed. Chairwoman Ramirez and Commissioner Brill are certainly correct that "[r]educing the volume of propane gas in a tank while keeping the price constant is equivalent to a per unit price increase."[4] The problem for the majority's position is that the complaint in this matter did not allege an agreement between AmeriGas and Blue Rhino to keep their respective prices to Walmart constant. There was no allegation in the complaint that the parties agreed in any way on the pricing of the lesser-filled propane tanks. Walmart was free to negotiate prices or any other price element with the parties. Yet, there is no allegation that Walmart tried but was unable to re-negotiate the price of the tanks with each of the parties. Thus, neither the majority's assertion that the parties "secretly agreed not to deviate from a proposed *price increase*"[5] nor their characterization of the alleged agreement as "a *per se* unlawful naked restraint on *price competition*"[6] find any support in the complaint or the evidence presented to the Commission.

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[3] *See, e.g.*, *In re* Ferrellgas Partners, L.P., FTC Dkt. No. 9360, Concurring Statement of Commissioner Joshua D. Wright, at 3 (Oct. 31, 2014) (referring to "the collusion between AmeriGas and Blue Rhino to reduce the amount of propane in tanks sold to Walmart"); *Roundtable Conference with Enforcement Officials*, ANTITRUST SOURCE, June 2014, at 4 ("Just yesterday, we announced that the Commission voted to issue an administrative complaint against AmeriGas and Blue Rhino. . . . We have alleged that the two rivals illegally coordinated on reducing the amount of propane in the tanks that were sold to a key customer.") (Chairwoman Ramirez).

[4] *In re* Ferrellgas Partners, L.P., FTC Dkt. No. 9360, Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill, at 2 (Oct. 31, 2014). *See also* Concurring Statement of Commissioner Joshua D. Wright, at 3 ("Here, it is self-evident that AmeriGas and Blue Rhino's agreement to reduce the amount of propane in tanks sold to Walmart has the economic effect of increasing the per unit price *if prices are held constant*.") (emphasis added).

[5] *Id.* at 3 (emphasis added).

[6] *Id.* at 2 (emphasis added).

Try as the majority may to fit this case into the per se category of price and output restrictions among competitors, it simply does not belong in that category. As a result, the cases and other support cited by the majority – including *Catalano*, *Sugar Institute*, and commentary addressing agreements on various elements of price – are inapposite.[7] In fact, none of the cases cited by Commissioners Ramirez, Brill, and Wright even remotely resembles the alleged facts in this case. The lack of judicial experience with the unique conduct alleged in this case further counsels against application of the per se rule, as well as any abbreviated rule of reason treatment, for that matter.[8]

The majority's attempt to fit the alleged conduct into the per se category – done in large part through a mischaracterization of the allegations actually levied in the complaint – runs contrary to the now decades-long evolution in antitrust doctrine away from per se treatment of benign or even procompetitive business conduct, as well as the more sophisticated economic analysis that animates modern antitrust law.[9] The majority did not allege that

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[7] *See* Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill, at 2 & 3 nn.4 & 9 (citing, among other cases, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); Sugar Institute v. United States, 297 U.S. 553 (1936)); Concurring Statement of Commissioner Joshua D. Wright, at 3 n.14 (citing *Catalano*; and citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶2022a, at 174 (3d ed. 2012), for the proposition that agreements to fix various "price elements" are per se unlawful); *id.* at 2-3 n.13 (discussing "bid-rigging or auction collusion").

[8] *See, e.g.*, Timothy J. Muris & Brady P.P. Cummins, *Tools of Reason: Truncation through Judicial Experience and Economic Learning*, ANTITRUST, Summer 2014, at 46 (arguing that the antitrust agencies should apply a truncated rule of reason analysis only "to restraints whose effect on competition is clear based on 'judicial experience and current economic learning'") (quoting *In re* Polygram Holding Inc., 136 F.T.C. 310, 344-45 (2003), *aff'd sub nom.* Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005)).

[9] *See, e.g.*, Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 152-53 (2012) ("One result of the incorporation of economics into antitrust law has been the widespread rejection of broad rules of per se illegality. Over three decades, the Supreme Court abandoned most per se rules, leaving only naked horizontal price fixing and market division, plus a modified per se rule for tie-ins, under per se treatment.") (footnotes omitted); Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1, 3 (2007) (arguing "that

the parties agreed on either their propane output levels[10] or the prices that they would charge Walmart (or any other customer). In my view, that takes the alleged agreement outside the scope of classic per se prohibitions of price and output restrictions, including joint conduct aimed at a single customer, such as bid rigging. At this point in the development of the antitrust laws, if anything, we should be continuing to move categories of conduct out of the per se category – not trying to squeeze conduct that we rarely encounter into the otherwise shrinking per se box.[11]

Even assuming a valid theory under Section 1, the evidence presented to the Commission failed to convince me that the parties had reached an agreement to do anything. In my view, notwithstanding the alleged communications between the parties relating to Walmart,[12] the evidence did not provide reason to

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the U.S. Supreme Court . . . is methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding").

[10] The majority alleged neither an agreement as to each party's output level nor an agreement on reducing the amount of the propane in each firm's tanks. While the former agreement, if reached, would clearly be per se unlawful, the latter would not necessarily be per se unlawful, in my view. The parties had contracted to fill each other's propane tanks in certain areas of the country where one of the firms did not have refilling and refurbishing facilities. *See* Compl. ¶ 29. As a result, there would have been an efficiency justification – the need for uniform fill levels across the two suppliers – for any agreement on the fill level, and such agreement, had one been reached, would have been appropriately evaluated under the rule of reason. I take no position here on the legality of that hypothetical agreement. Again, there was no allegation in the complaint that the parties agreed on the fill levels in their tanks.

[11] I would have voted against this case, even if it had been pursued under the rule of reason because the evidence did not provide a reason to believe that the alleged conduct had an adverse impact on competition in the market for propane exchange tanks.

[12] Commissioner Wright fairly notes that no antitrust practitioner would counsel a client to engage in the direct competitor communications that were alleged to have happened here. *See* Concurring Statement of Commissioner Joshua D. Wright, at 2. One might even consider bringing a standalone Section 5 case against competitors that have engaged in the sharing of nonpublic, competitively sensitive information. *See, e.g.*, *In re* Bosley, Inc., FTC Dkt. No. C-4404, Complaint (June 5, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregiscmpt.pdf. However, the (largely one-way) communications at issue here are a far cry from the categories of conduct that are properly deemed *per se* unlawful.

believe the parties had reached an agreement on how they would "push" Walmart, which, as the complaint notes, is "the largest propane exchange tank retailer in the United States."[13] The evidence simply did not support the allegations that Walmart (the quintessential power buyer) was susceptible to pressure, that the parties were actually coercing Walmart, that the fill reductions pursued (separately) by the parties were going to unravel, or that the parties would have returned to the higher fill levels – as opposed to, for example, Walmart accepting the lower fill levels in exchange for a lower price.

Further, even assuming a valid theory and sufficient evidence to support a Section 1 violation (both of which were lacking), I was not convinced that bringing this case was in the public interest. The alleged conduct had occurred nearly six years before the complaint was issued. More importantly, the respondents had settled private litigation that included antitrust claims (as well as other, consumer protection claims), with AmeriGas and Blue Rhino agreeing to pay up to $10 million and $25 million, respectively, to settle the private claims.[14] As part of that settlement, one of the parties, Blue Rhino, also agreed to provide additional antitrust compliance training to relevant company personnel. One can only assume that AmeriGas took comparable steps following the settlement. In light of these considerations and others, scarce Commission resources would have been better spent pursuing other, more worthwhile matters.

Although the Commission may have discovered some smoke, there clearly was no fire in this case – whether fueled by propane or otherwise. In short, there was very weak evidence supporting what I saw as, at best, a novel Section 1 case. I therefore did not have reason to believe that the parties had committed a Section 1

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[13] Compl. ¶ 35.

[14] *See* Plaintiffs' Motion for Preliminary Approval of Amended Class Settlement, *In re* Pre-Filled Propane Tank Marketing and Sales Practices Litig., MDL No. 2086, No. 4:09-cv-00465 (W.D. Mo. Apr. 29, 2010) (settlement with AmeriGas granted final approval on Oct. 4, 2010); Plaintiffs' Motion for Preliminary Approval of Class Settlement, *In re* Pre-Filled Propane Tank Marketing and Sales Practices Litig., MDL No. 2086, No. 4:09-md-2086 (W.D. Mo. Oct. 6, 2011) (settlement with Blue Rhino granted final approval on May 31, 2012).

violation. Nor did I think that it was in the public interest to pursue this enforcement action. For these reasons, I cannot vote for a consent agreement grounded on the same theory and evidence that was presented to me when the complaint originally issued.

DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to accept proposed Consent Agreements to remedy allegations that AmeriGas and Blue Rhino restrained competition by colluding to reduce the amount of propane in tanks sold to Walmart. I voted in favor of issuing the Complaint and accepting the proposed Consent Agreements because the evidence is sufficient to provide reason to believe that AmeriGas and Blue Rhino engaged in conduct that is unlawful under the antitrust laws and the proposed settlements will improve consumer welfare by preventing the parties from engaging in anticompetitive conduct in the future.[1] I write separately to explain my support for this enforcement action and the proposed settlements.

The alleged conspiracy would establish a relatively straightforward violation of the antitrust laws. In 2008, AmeriGas and Blue Rhino each independently reduced the amount of propane contained in their tanks from 17 pounds to 15 pounds.[2] The fill reductions had the effect of a 13 percent increase in the price of propane because neither AmeriGas nor Blue Rhino implemented a corresponding decrease in price.[3] If the story had ended there, with merely unilateral action and no agreement between AmeriGas and Blue Rhino, there would be no violation of the antitrust laws and the Commission would not have pursued an enforcement action.

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[1] 15 U.S.C. § 45(b) (2012) (authorizing the Commission to initiate an enforcement action when it has "reason to believe" a party has engaged in an unfair method of competition).

[2] In re Ferrellgas Partners, L.P., FTC Docket No. 9360, Complaint at ¶¶ 1, 5, 32, 43 (Mar. 27, 2014), *available at* http://www.ftc.gov/system/files/documents/cases /140401amerigascomplaint.pdf.

[3] *Id.* at ¶¶ 1, 33.

However, the story did not end there. Walmart, the largest propane exchange tank retailer in the United States, resisted the fill reductions.[4] Other retailers agreed to the fill reductions, but only on the condition that Walmart also would accept the fill reductions within a short period of time.[5] Faced with resistance from Walmart, Blue Rhino and AmeriGas encountered the very real prospect that their fill reductions could unravel and the market would return to costlier and thus less profitable 17-pound tanks. To avoid this result, AmeriGas and Blue Rhino colluded in their negotiations with Walmart to ensure it quickly accepted the fill reductions.[6] That collusion provides the basis for the Commission's complaint and proposed Consent Agreements.

More specifically, AmeriGas and Blue Rhino executives spoke frequently in the days and weeks leading up to Walmart's decision to accept the fill reductions in order to coordinate their negotiations and encourage one another not to give in to Walmart's opposition.[7] For instance, AmeriGas and Blue Rhino executives worked together to ensure that retailers near Walmart's headquarters in Bentonville, Arkansas, only carried 15-pound tanks in hopes of convincing Walmart to accept the fill reductions as the new industry standard.[8] AmeriGas and Blue Rhino executives also discussed the status of their negotiations and coordinated emails using similar language to urge Walmart to accept the fill reductions.[9] Indeed, a frustrated AmeriGas's Director of National Accounts at one point suggested to Blue Rhino that it was time for them to issue an ultimatum to Walmart.[10] Blue Rhino's Vice President of Sales responded by urging AmeriGas to "hang in there" as Blue Rhino continued to negotiate with Walmart.[11] Faced with unyielding demands from

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[4] *Id.* at ¶¶ 1, 6, 38.

[5] *Id.* at ¶¶ 6, 41, 47.

[6] *Id.* at ¶¶ 1, 7, 48.

[7] *Id.* at ¶¶ 42, 50.

[8] *Id.* at ¶ 50.

[9] *Id.* at ¶¶ 50, 54, 55.

[10] *Id.* at ¶ 50.

[11] *Id.*

its two primary propane suppliers and no viable outside option, Walmart finally conceded and agreed to accept propane tanks filled to 15 pounds.[12]

No antitrust practitioner would counsel his or her client to engage in the direct competitor communications and concerted actions that are alleged to have occurred between Blue Rhino and AmeriGas. This is with good reason: such conduct is plainly anticompetitive and unlawful under Section 1 of the Sherman Act.[13] It is well understood that collusion among suppliers regarding price, quantity, and other competitive terms negotiated with purchasers can harm consumers by impeding the competitive process.[14] Here, it is self-evident that AmeriGas and Blue Rhino's agreement to reduce the amount of propane in tanks sold

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[12] *Id.* at ¶¶ 56.

[13] Collusion by suppliers in negotiations with a single purchaser has long been accepted as a valid theory of harm under the antitrust laws. Over a century ago, collusion in negotiations by employees (i.e., suppliers of labor) with employers was challenged successfully under the Sherman Act. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274 (1908). The theory was so viable that Congress created a new labor exemption by passing Sections 6 and 20 of the Clayton Act. *See* 29 U.S.C. §§ 52, 101-115 (2012). In its most egregious form, collusion by suppliers in negotiations with a single purchaser can be challenged as bid-rigging or auction collusion, the harms of which are well documented in the economic literature and which represent one of the most common violations prosecuted by the Department of Justice's Antitrust Division. *See, e.g.*, Robert C. Marshall & Michael J. Meurer, *The Economics of Auctions and Bidder Collusion*, *in* GAME THEORY AND BUSINESS APPLICATIONS 339 (Kalyan Chatterjee & William F. Samuelson eds., 2001); Paul Klemperer, *What Really Matters in Auction Design*, 16 J. ECON. PERSP. 169, 169 (Winter 2002); Luke Froeb, Robert Koyak, & Gregory Werden, *What is the Effect of Bid-rigging on Prices?*, 42 ECONOMICS LETTERS 419 (1993). It is therefore unclear why, if one concedes it would be unlawful for AmeriGas and Blue Rhino to collude to reduce the amount of propane in tanks sold to all purchasers, it also would not be unlawful for the parties to collude in imposing such a fill reduction on a single, unwilling purchaser.

[14] *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam) (agreement by competitors to terminate certain credit terms held unlawful); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶2022a, at 174 (3d ed. 2012) (explaining "the per se rule generally governs not only explicit price fixing but agreements to fix a 'price element,' which broadly includes "any term of sale that can be regarded as affecting the price that the customer must pay or any mechanism such as a formula by which the price maybe computed").

to Walmart has the economic effect of increasing the per unit price if prices are held constant. The mere fact that AmeriGas and Blue Rhino's agreement did not preclude the possibility that they would continue to compete on price or other terms is of little consequence for antitrust analysis. Indeed, if such competition were enough to absolve otherwise anticompetitive concerted action, even a conspiracy to fix nominal prices would be lawful so long as the colluding rivals continued to compete on quality or quantity. Fortunately, antitrust law requires a different and more economically sensible result.[15]

It also is worth noting that no one—including but not limited to the parties—has presented a plausible efficiency justification that might suggest the collusion between AmeriGas and Blue Rhino to reduce the amount of propane in tanks sold to Walmart was somehow procompetitive.[16] This enforcement action therefore simply does not implicate traditional concerns over false positives and the fear that the Commission might inadvertently

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[15] *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 14, ¶2022a, at 175 ("For example, firms could presumably agree to insist on cash at the time of delivery but nevertheless compete vigorously on the price they charge. But to make much of this fact distorts the relative importance of the various terms of any transaction. The explicit 'price' of any good or service is a function not only of the nominal price but also for the credit terms, applicable discounts, rebates, terms of delivery, and the like. Firms might also agree about the nominal price but continue to compete by offering increasingly longer time periods before payment is due. The fact that such competition continues to exist does not serve to make the price-fixing agreement reasonable.").

[16] Although the argument that AmeriGas and Blue Rhino's co-filling arrangement offers an efficiency justification for the parties' concerted action against Walmart has some superficial appeal, it can be dispensed with relatively easily. First, if we are to take seriously the claim that identical propane fill levels are necessary for the efficient operation of AmeriGas's and Blue Rhino's businesses, we would expect the parties to have agreed on the initial move from 17-pound to 15-pound tanks. They did not. In fact, after a lengthy investigation, the Commission concluded the parties independently reduced the amount of propane contained in their tanks and only colluded in subsequent negotiations with Walmart. Second, it would be a curious thing for two companies attempting to achieve an efficiency benefit—one that would reduce the costs passed on to purchasers—to seek to achieve that benefit by coordinating secretly rather than explaining to purchasers the costs of maintaining divergent fill-levels for their propane tanks.

chill procompetitive behavior.[17] In addition, while much has been written about the important shift away from per se rules in favor of a more effects-based rule of reason analysis under modern antitrust doctrine, the benefits of this shift unsurprisingly accrue only where the challenged conduct potentially offers some procompetitive benefits.[18] Again, that is not the case here. The record is devoid of evidence supporting a plausible efficiency justification for the challenged agreement.

Moreover, the Supreme Court's shift toward the rule of reason has always left room for an appropriately truncated review for conduct that is likely to harm competition and without efficiency justification. The Court has made clear that attempting to place antitrust analysis into fixed categories is overly simplistic.[19] The Court has recognized that "there is often no bright line separating per se from Rule of Reason analysis"[20] and that determining whether a "challenged restraint enhances competition" requires "an enquiry meet for the case."[21]

The alleged coordination between AmeriGas and Blue Rhino bears a "close family resemblance" to conduct long since "convicted in the court of consumer welfare" based upon "economic learning and market experience" that demonstrates such restraints are likely to harm consumers.[22] Where, as here, the two principal suppliers in an industry have colluded in their

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[17] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15-17 (1984).

[18] *See, e.g.*, Joshua D. Wright, Comm'r, Fed. Trade Comm'n, The Economics of Resale Price Maintenance & Implications for Competition Law and Policy, Remarks before the British Institute of International and Comparative Law (Apr. 9, 2014), *available at* http://www.ftc.gov/system/files/documents/public_ statements/302501 /140409rpm.pdf.

[19] *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34-35 (D.C. Cir. 2005) (explaining usefully how the "Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a categorical approach to a more nuanced and case-specific inquiry").

[20] Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 779 (1999) (quoting NCAA v. Board of Regents, 468 U.S. 85, 104 n.26 (1983)).

[21] *Id.* at 779-81.

[22] *Polygram*, 416 F.3d 29 at 36-37.

negotiations with a major distributor to impose contractual terms the distributor initially resisted, and there are no plausible efficiency justifications suggesting the conduct may have been procompetitive, that enquiry is appropriately brief. Enforcement actions to prevent anticompetitive conduct with no plausible efficiency are a wise use of agency resources and should be a focus of the Commission's competition mission because they bring immediate benefits for consumers with little risk of chilling procompetitive conduct.

For all of these reasons, I voted in favor of issuing the Complaint and accepting the proposed Consent Agreements in this matter.

Complaint

IN THE MATTER OF

MICHAEL C. HUGHES

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4502; File No. 132 3088
Complaint, January 9, 2015 – Decision, January 9, 2015

This consent order addresses deceptive acts and practices regarding the collection of consumers' sensitive health information from third parties. The respondent, Michael C. Hughes, served as CEO of a company that operated a website that enabled consumers to pay their medical bills. The complaint alleges Mr. Hughes misled thousands of consumers who signed up for the online billing portal by failing to adequately inform consumers that the company would use their information to obtain access to highly detailed medical information from pharmacies, medical labs and insurance companies. The consent order requires Mr. Hughes to destroy any collected information. In addition, Mr. Hughes is banned from deceiving consumers about the way information is collected and used, including how such information might be shared with or collected from a third party. Further, Mr. Hughes must obtain consumers' affirmative express consent before collecting health information about a consumer from a third party. The Commission entered a similar order against Mr. Hughes' company, Payments MD, LLC. *See* 159 F.T.C. 241.

Participants

For the *Commission: Jacquelie Connor, David Lincicum,* and *Kevin Moriarty.*

For the *Respondent: Lisa J. Sotto, Hunton & Williams LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Michael C. Hughes ("Respondent"), individually, through his direction, control, and ownership of PaymentsMD, LLC ("PaymentsMD") 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 Michael C. Hughes was the Chief Executive Officer, sole employee, and part owner of PaymentsMD, a Georgia limited liability company, until July 2014. Individually

or in concert with others, he controlled or had the authority to control, or participated in the acts and practices alleged in this complaint. He resides in Atlanta, Georgia.

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

PAYMENTSMD'S BUSINESS PRACTICES

3. From August 2008 to July 2014, respondent, through his direction and control of PaymentsMD, has provided billing services to medical providers. Medical providers that have contracted with PaymentsMD direct their patients to the PaymentsMD website, where consumers are able to enter their invoice number and credit card information to pay their medical bills.

4. In December 2011, respondent, through his direction and control of PaymentsMD, launched a free "Patient Portal" product that provided consumers with a place to view their billing history. Unlike the bill-payment service, which enables consumers only to make a one-time payment, the billing history service of the Patient Portal enables consumers to access and view records of the consumers' past and upcoming payment obligations for any medical providers that use PaymentsMD's billing services. The Patient Portal service enabled consumers to pay their bills and to view their balance, payments made, adjustments taken, and information for other service dates.

5. In June 2012, PaymentsMD entered into an agreement with Metis Health LLC ("Metis Health") to develop an entirely new service called Patient Health Report, a fee-based service that would enable consumers to access, review, and manage their consolidated health records through a Patient Portal account. PaymentsMD and Metis Health agreed to split the profits. Both companies participated in developing the disclosures and authorizations for the service, and how and when this information would be presented to consumers during the Patient Portal registration process.

6. As described further below, in order to populate the Patient Health Report, respondent, through his direction and control of PaymentsMD, tried to obtain the sensitive health information of consumers registering for the Patient Portal from health insurance plans, pharmacies, and a medical testing lab, without appropriate authorization from those consumers. Indeed, many consumers registering for the Patient Portal had no idea that PaymentsMD, under respondent's direction and control, would seek to collect their sensitive health information from third parties for use in the Patient Health Report service.

THE PATIENT PORTAL INTERFACE FAILED TO DISCLOSE THAT PAYMENTSMD WOULD COLLECT CONSUMERS' SENSITIVE HEALTH INFORMATION FOR THE PATIENT HEALTH REPORT

7. PaymentsMD's home page described the Patient Portal as a medical billing related service. It stated that "At PaymentsMD, we can help you navigate through the maze of medical billing, reimbursement and payment processes. We also make it easy for you to maintain current information about your insurance coverage and to make payments over the Internet, at your convenience." In order to register for the Patient Portal, a consumer could click on a button labeled "Patient Portal Login." (Exhibit A).

Complaint

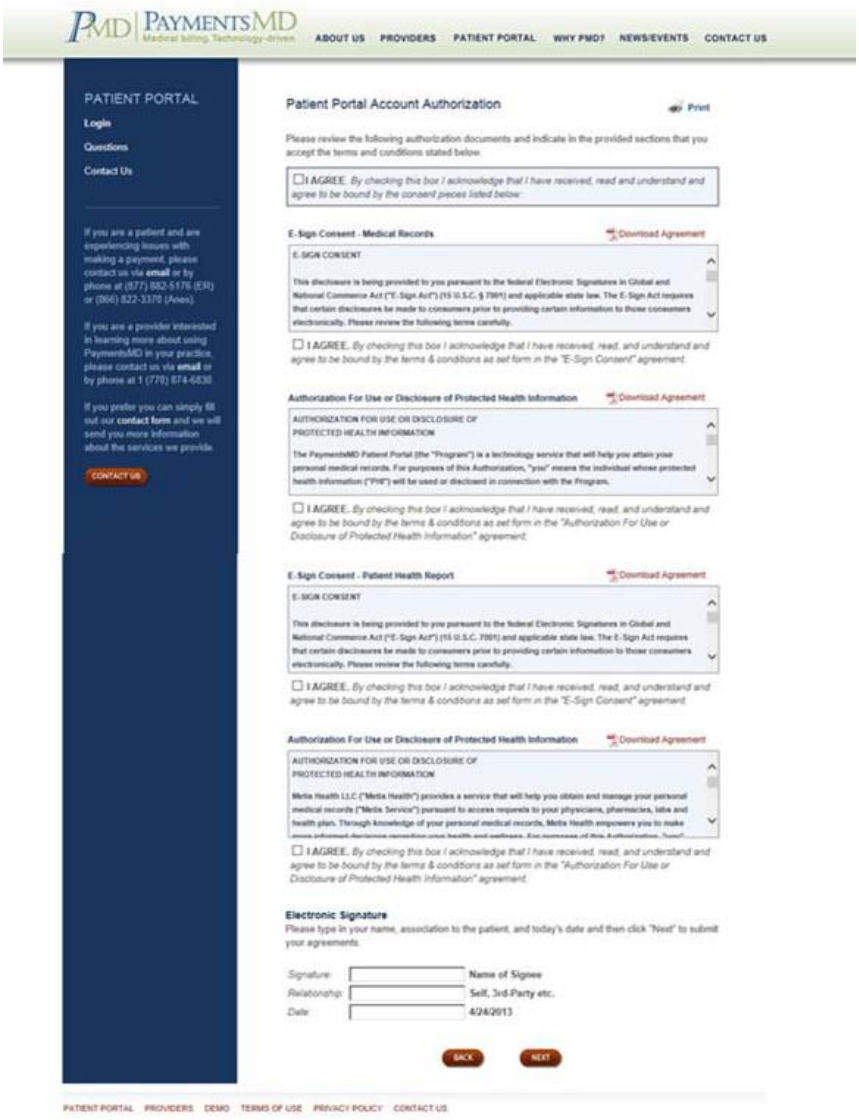
8. Consumers could then either enter their login credentials or click on a link that stated "Don't have an account? Create one now." (See Exhibit B).

Consumers that followed the link would then be taken to the Payment Portal registration page, which appeared as follows. (Exhibit C).

The registration page stated that registering for the Payment Portal service would "allow you to: View your original balance; View any payments made; View any adjustments taken; View your current balance; View information for other service dates." At no point in this process was it stated that PaymentsMD, under respondent's direction and control, would be seeking consumers' sensitive health information from third parties for use in a Patient Health Report service.

9. Consumers who clicked the "Submit" button were taken to a "Patient Portal Account Authorization" page, which required four authorizations. The page presented the authorizations in four boxes that showed only six lines of text at a time. (Exhibit D).

Complaint



Under each text box was a check box that consumers could select in order to proceed with the registration process. Alternatively, consumers could select a single box at the top of the page, which would populate all four boxes to indicate that each of the four was authorized. Although consumers who scrolled through the second and fourth boxes would have seen a statement that "[H]ealth records related to your treatment . . . may be used or disclosed pursuant to this Authorization," the site design simultaneously made it hard to read the authorizations in their entirety, and easy to skip over them by clicking a single check box that preceded all of the authorizations.

10. Consumers would reasonably believe that all four authorizations were to be used to provide the Patient Portal billing services for which they were registering. In fact, two of the four purported authorizations were used to collect sensitive health information from third parties for use with the Patient Health Report service.

11. Although PaymentsMD's home page and login page included links that allowed consumers to "click here to learn more" about the Patient Health Report service (see Exhibit A), these links conveyed that the Patient Health Report was a separate service from the Patient Portal. At no point in registering for the Patient Portal would it have been clear to consumers that they were purportedly giving PaymentsMD permission to obtain their sensitive health information from third parties for use in the Patient Health Report service.

RESPONDENT, THROUGH HIS OWNERSHIP AND CONTROL OF PAYMENTSMD, SOUGHT CONSUMERS' SENSITIVE HEALTH INFORMATION WITHOUT THEIR KNOWLEDGE OR CONSENT

12. Respondent, through his direction and control of PaymentsMD, requested sensitive health information from a large number of health plans, pharmacies, and a medical lab about everyone who registered for the Patient Portal. These requests used consumers' name, birth date, address, and sex. The information requested was as follows:

a. Pharmacies: Medication dispensed, dispense date, instructions, prescription number, prescribing physician, quantity dispensed, refill ability, co-pay amount, amount payable as co-insurance or deductible, and amount paid by health plan.

b. Health plans: Medical information (procedures, diagnoses, dates of service, medical providers, co-pay amount, amount payable for co-insurance or deductible, and the amount paid by health plan); prescription information (medications dispensed, dispense dates, prescription number, prescribing

physician, quantity dispensed, refill ability, co-pay amount, amount payable as coinsurance or deductible, and the amount paid by health plan); and lab information (test performed, date, laboratory, physician, co-pay, amount payable as co-insurance or deductible, and amount paid by health plan).

c. Laboratory: Lab test performed, date, laboratory, test results, normal range for test values, ordering physician, co-pay, amount payable as co-insurance or deductible, and the amount paid by health plan.

13. Metis Health sent requests to health plans that were identified using PaymentsMD's billing records. For the pharmacies, Metis Health sent requests to all major commercial pharmacies with locations near the consumers' home address, notwithstanding that neither PaymentsMD nor Metis Health had any reason to believe that the consumer had used any of those pharmacies.

14. Metis Health sent approximately 5,500 requests for consumers' health information to 31 different companies. One company fulfilled the requests. The others, concerned about the validity of the requests – which in some cases related to minors or consumers who were not in fact a customer of the company receiving the request – refused to fulfill the requests.

PAYMENTMD'S SUBSEQUENT COMMUNICATIONS TO CONSUMERS GENERATED NUMEROUS COMPLAINTS

15. Initially, PaymentsMD did not inform consumers that Metis Health was attempting to collect their sensitive health information. When PaymentsMD, under respondent's direction and control, began informing consumers, via an email sent a day after users registered for Patient Portal, numerous consumers filed complaints with PaymentsMD regarding the collection of their sensitive health information. The common themes of the complaints were that consumers did not want their information collected, and that they had only registered for the Patient Portal to track their bills. PaymentsMD ultimately did not sell any Patient Health Reports.

DECEPTIVE OMISSION
(Count 1)

16. As described in Paragraphs 3-15, respondent, through his direction and control of PaymentsMD, represented, directly or indirectly, expressly or by implication, that consumers registering for the free Patient Portal billing service could access and review their medical payment history.

17. Respondent, through his direction and control of PaymentsMD, failed to disclose adequately that, if consumers registered for the free Patient Portal billing service, PaymentsMD would also engage in a comprehensive collection from third parties of consumers' sensitive health information for the Patient Health Report service.

18. This fact would be material to consumers in deciding whether to register for the Patient Portal. Respondent's failure to disclose adequately this fact, in light of the representations made, is a deceptive act or practice.

DECEPTIVE REPRESENTATION
(Count 2)

19. As described in Paragraphs 3-15, respondent, through his direction and control of PaymentsMD, represented, directly or indirectly, expressly or by implication, that the authorizations were to be used exclusively to provide the free Patient Portal billing history service for which consumers were registering.

20. In fact, the authorizations were not used exclusively to provide the free Patient Portal billing history service for which consumers were registering. Instead, all of the authorizations were also used by PaymentsMD, under respondent's direction and control, to attempt to collect sensitive health information for use with the Patient Health report service, and two were only used for this purpose. Therefore, this representation is false or misleading.

VIOLATIONS OF SECTION 5

21. 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 ninth day of January, 2015, has issued this complaint against respondent.

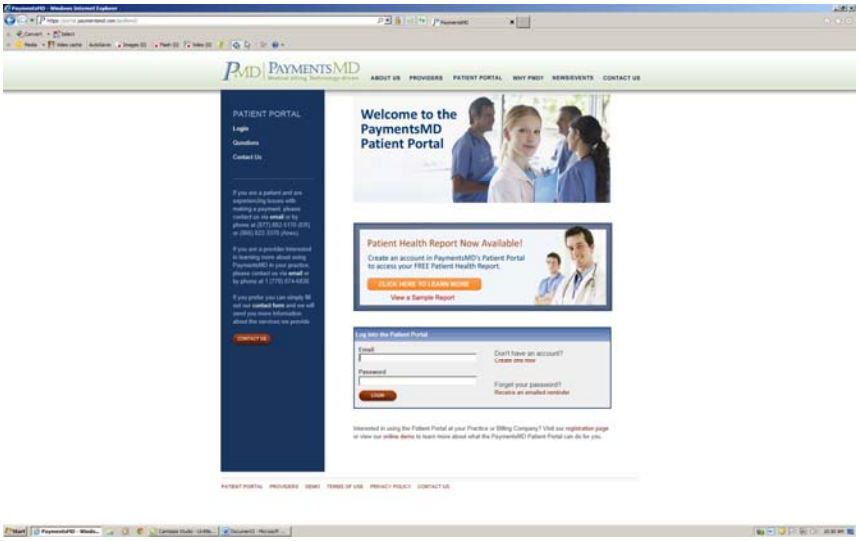
By the Commission.

Complaint

EXHIBIT A

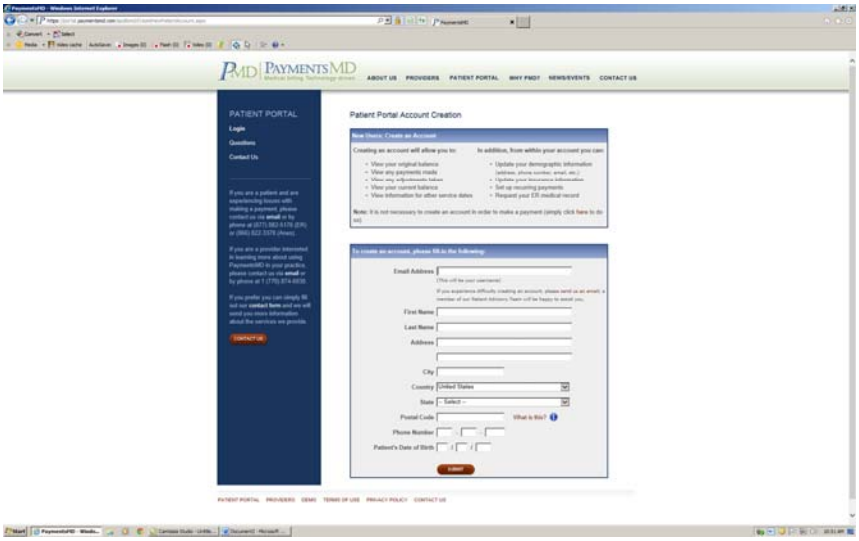
Complaint

EXHIBIT B



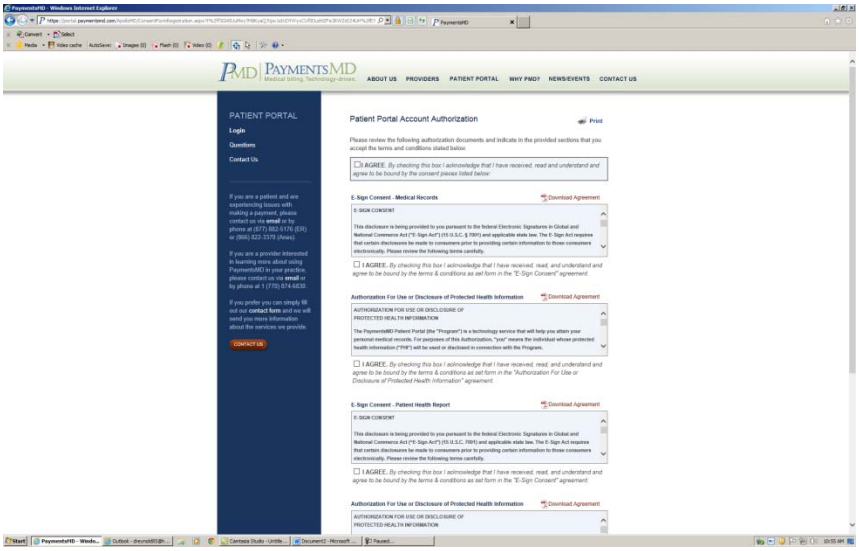
Complaint

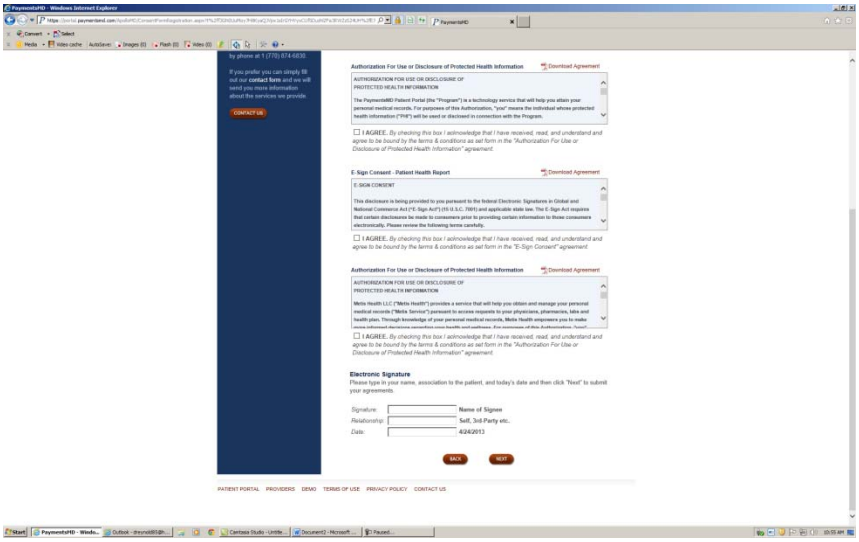
EXHIBIT C



Complaint

EXHIBIT D





DECISION AND ORDER

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

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

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

1. Respondent Michael C. Hughes was the CEO and partial owner of PaymentsMD, LLC from approximately August 2008 to July 2014. Individually, or in concert with others, he formulated, directed, controlled, or participated in the policies, acts, or practices of the company. He resides in Atlanta, Georgia.

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

ORDER

DEFINITIONS

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

1. "Covered information" shall mean information from or about an individual consumer, including but not limited to (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) an insurance account number or other insurance information; (i) credit or debit card information; (j) credit report information; (k) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; and (l) health information, as defined below.

2. "Health information" shall mean information about an individual consumer's health or medical care, including but not limited to (a) an insurance account number or other insurance information; (b) prescription information; (c) medical records; (d) information concerning the consumer's diagnoses or treatments; and (e) medical or health related purchases.

3. Unless otherwise specified, "respondent" shall mean Michael C. Hughes, individually.

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

5. "Clear(ly) and prominent(ly)" shall mean:

   a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

   b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and

   e. In all instances, the required disclosures: (1) are presented in an understandable language and syntax, and (2) include nothing contrary to, inconsistent with, or in mitigation of any statement contained within the disclosure or within any document linked to or referenced therein.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent uses, maintains, and protects the privacy, confidentiality, security, or integrity of covered information collected from or about consumers, including but not limited to:

A. Services for which consumers are being enrolled in as part of any sign-up process;

B. The extent to which respondent will share covered information with, or seek covered information from, third parties; and

C. The purpose(s) for which covered information collected from third parties will be used.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any service, shall:

A. Separate and apart from any final "end user license agreement," "privacy policy," "terms of use" page, or similar document, clearly and prominently disclose to consumers the practices regarding the collection, use, storage, disclosure or sharing of health information prior to seeking authorization to collect health information from a third party; and

B. Obtain affirmative express consent from consumers prior to collecting health information from a third party.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, shall not use or collect any covered information pursuant to any authorization obtained from consumers registering for the Patient Portal, or permit any third party to use or maintain any such covered information in respondent's custody or control. Within sixty (60) days after the date of service of the order, respondent shall permanently delete or destroy any and all covered information in respondent's possession or control that was collected pursuant to such authorization and shall provide a written statement to the Commission, sworn under penalty of perjury, confirming that all such information has been deleted or destroyed or that respondent does not possess or control such information. *Provided that*, if respondent is prohibited from deleting or destroying such information by law, regulation, or court order, respondent shall provide a written statement to the Commission, sworn under penalty of perjury, identifying any information that has not been deleted or destroyed and the specific law, regulation, or court order that prohibits respondent from deleting or destroying such information. Unless otherwise directed by a representative of the Commission, all statements required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line In the Matter of Michael C. Hughes, LLC, FTC File No. C-4502. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, for a period of five (5) years from the date of preparation or dissemination, whichever is

later, a print or electronic copy of all documents relating to compliance with this order, including but not limited to:

A. statements disseminated to consumers that describe the extent to which respondent maintains and protects the privacy, security and confidentiality of any covered information, including, but not limited to, any statement related to a change in any website or service controlled by respondent that relates to the privacy, security, and confidentiality of covered information, with all materials relied upon in making or disseminating such statements;

B. all consumer complaints directed to respondent, or forwarded to respondent by a third party, that relate to the conduct prohibited by this order, and any responses to such complaints; and

C. all forms, websites, and other methods used to obtain affirmative express consent to collect health information from third parties; and any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question compliance with this order.

V.

IT IS FURTHER ORDERED that respondent, for any business that such respondent is the majority owner of or controls directly or indirectly, shall deliver a copy of this order to all current, and for five (5) years to all future subsidiaries, principals, officers, directors, and managers, and to all current, and for five (5) years to all future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent, for five (5) years after entry of this order, shall notify the Commission of any changes to his current business or employment, or his affiliation with any new business or employment. Such notice shall include: the name and address of each business that respondent is affiliated with, employed by, creates or forms, incorporates, or performs services for; a detailed description of the nature of the business; and a detailed description of respondent's duties and responsibilities in connection with the business or employment; and any changes in respondent's name or use of any aliases or fictitious names, including "doing business as" names. All notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line In the Matter of Michael C. Hughes, FTC File No. C-4502. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

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 his compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, he shall submit an additional true and accurate written report.

VIII.

This order will terminate on January 9, 2035, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the

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

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Michael C. Hughes ("Hughes").

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

Michael C. Hughes is the former Chief Executive Officer, sole employee, and part owner of PaymentsMD, LLC ("PaymentsMD"). PaymentsMD's principal line of business is the delivery of electronic billing records and the collection of accounts receivable for medical providers. In December 2011, PaymentsMD launched a free "Patient Portal" product that enabled consumers to pay their bills and to view their balance, payments made, adjustments taken, and information for other service dates.

The Commission's complaint alleges that PaymentsMD, under Hughes' direction and control, deceived consumers regarding the collection of consumers' sensitive health information from third parties. In June 2012, PaymentsMD entered into an agreement with Metis Health LLC ("Metis Health") to develop an entirely new service called Patient Health Report, a fee-based service that would enable consumers to access, review, and manage their consolidated health records through a Patient Portal account. In order to populate the Patient Health Report, PaymentsMD, under Hughes' direction and control, obtained consumers' authorization to collect sensitive health information for one purpose – to track their medical bills – and then used that authority to attempt to collect a massive amount of sensitive health information, including treatment information, from third parties without consumers' knowledge or consent. Based on such authorization, sensitive health

information about everyone who registered for the Patient Portal was then requested from a large number of health plans, pharmacies, and a medical lab.

a. The first count of the Commission's complaint alleges that Hughes, through his direction and control of PaymentsMD, represented that consumers registering for their free Patient Portal billing service could access and review their medical payment history, but failed to disclose adequately that PaymentsMD would also engage in a comprehensive collection of consumers' sensitive health information for a Patient Health Report. The second count alleges that Hughes, through his direction and control of PaymentsMD, deceptively represented that the consumers' authorizations were to be used exclusively to provide the billing service.

b. The proposed order contains provisions designed to prevent Hughes from engaging in the future in practices similar to those alleged in the complaint. Part I prohibits Hughes or any entity he owns or controls from misrepresenting the extent to which he or any entity he owns or controls uses, maintains, and protects the privacy, confidentiality, and security of covered information collected from or about consumers, including but not limited to (1) the services for which consumers are being enrolled as part of any sign-up process; (2) the extent to which he will share covered information with, or seek covered information from, third parties; and (3) the purpose(s) for which covered information collected from third parties will be used. Part II requires Hughes or any entity he owns or controls to clearly and prominently disclose practices regarding the collection, use, storage, disclosure or sharing of health information prior to seeking authorization to collect health information from a third party, and to obtain affirmative express consent from consumers prior to collecting health information from a third party.

c. Part III prohibits Hughes or any entity he owns or controls from using, collecting, or permitting any third party to use or maintain any covered information pursuant to any

authorization obtained prior to the date of the order from consumers registering for the Patient Portal. Hughes also must, within sixty days, delete all covered information in his possession or control that was collected in relation to the Patient Health Report service.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Hughes to retain documents relating to his compliance with the order. The order requires that Hughes retain all of the documents for a five-year period. Part V requires dissemination of the order for a period of five years to all current and future subsidiaries, principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order for any business that Hughes is the majority owner of or controls directly or indirectly. Part VI ensures notification, for a period of five years, to the FTC of changes to Hughes' current business or employment, or his affiliation with any new business or employment. Part VII mandates that Hughes submit a compliance report to the FTC within 60 days, and periodically thereafter 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 or order or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

LONE STAR FUND V (U.S.), L.P., BI-LO HOLDINGS, LLC, ETABLISSEMENTS DELHAIZE FRÈRES ET CIE "LE LION" (GROUP DELHAIZE) SA/NV, AND DELHAIZE AMERICA, LLC

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

Docket No. C-4440; File No. 131 0162
Complaint, February 24, 2014 – Decision, January 13, 2015

This consent order addresses the anticompetitive effects that otherwise would result from Bi-Lo Holdings LLC's ("Bi-Lo") $265 million acquisition of Delhaize America LLC's ("Delhaize") Sweetbay, Harvey's, and Reid supermarkets in the retail sale of food and other grocery products in Florida, Georgia, and South Carolina. The complaint alleges that Bi-Lo's acquisition of 154 stores from Delhaize, if consummated, would likely harm consumers through higher prices, diminished quality and reduced service levels. The consent order requires the merged Bi-Lo/Delhaize to sell 12 stores to Rowes IGA Supermarkets, HAC, Inc., W. Lee Flowers & Co., Inc. and Food Giant.

Participants

For the *Commission: Amanda Lewis, Anthony Saunders, Sam Sheinberg,* and *Joshua Smith.*

For the *Respondents: Joshua Soven, Gibson, Dunn & Crutcher LLP*; and *Bruce Hoffman* and *Amanda Wait, Hunton & Williams LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Bi-Lo Holdings, LLC ("Bi-Lo"), of which Respondent Lone Star Fund V (U.S.), L.P. ("Lone Star") is the majority owner, and Respondent Delhaize America, LLC ("Delhaize America"), of

which Respondent Etablissements Delhaize Frères et Cie "Le Lion" (Group Delhaize) SA/NV ("Delhaize") is the majority owner, all subject to the jurisdiction of the Commission, entered into an agreement and plan of merger pursuant to which Bi-Lo will acquire certain assets of Delhaize America, 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, 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 Lone Star is a limited partnership 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 at 2711 North Haskell Avenue, Suite 1700, Dallas, Texas 75204.

2. Respondent Bi-Lo is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business at 5050 Edgewood Court, Jacksonville, Florida 32254.

3. Respondent Lone Star, through Bi-Lo, of which Lone Star is the majority owner, owns and operates the BI-LO and Winn-Dixie supermarket chains in the southeastern United States, including Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

4. Respondent Delhaize is a public limited company (société anonyme/naamloze vennootschap) organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at Square Marie Curie 40, 1070 Brussels, Belgium.

5. Respondent Delhaize America is a limited liability corporation organized, existing, and doing business under and by virtue of the laws of the state of North Carolina, with its office and principal place of business at 2110 Executive Drive, Salisbury, North Carolina 28145.

6. Respondent Delhaize, through Delhaize America, of which Delhaize is the majority owner, operates a number of supermarket chains throughout the United States, including Sweetbay, Harveys, Reid's, Food Lion, and Hannaford.

7. Lone Star, Bi-Lo, Delhaize, and Delhaize America ("Respondents") own and operate supermarkets in each of the geographic markets relevant to this Complaint and compete and promote their businesses in these areas.

II. JURISDICTION

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

III. THE PROPOSED ACQUISITION

9. On January 31, 2014, Respondents entered into an agreement pursuant to which Bi-Lo would acquire from Delhaize America 73 Sweetbay stores (including one to-be-opened store), 71 Harveys stores, 10 Reid's stores, and leases to 10 closed Sweetbay locations for a purchase price of approximately $266.5 million (the "Proposed Acquisition").

IV. THE RELEVANT PRODUCT MARKET

10. The relevant line of commerce in which to analyze the Proposed Acquisition is the retail sale of food and other grocery products in supermarkets.

11. For purposes of this complaint, the term "supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food

and beverage products, including canned, jarred, bottled, boxed and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer and/or distilled spirits.

12. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units ("SKUs"), as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

13. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not typically set or change their food or grocery prices in response to prices at other types of stores.

14. Although retail stores other than supermarkets may also sell food and grocery products, these types of stores—including convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores—do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. These retail stores do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping at other types of stores, or significantly increase grocery purchases at other types of stores, in response to a small but significant price increase by supermarkets.

V. THE RELEVANT GEOGRAPHIC MARKETS

15. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live.

16. Respondents currently operate supermarkets under the BI-LO, Winn-Dixie, Sweetbay, Harveys, and Reid's banners within approximately two-tenths of a mile to three miles of each other in each of the relevant geographic markets. The primary trade areas of Respondents' banners in each of the relevant geographic markets overlap significantly.

17. The relevant geographic markets in which to assess the competitive effects of the Proposed Acquisition are localized areas in Arcadia, Dunnellon, Lake Placid, Madison, and Wauchula, Florida; Bainbridge, Statesboro, Sylvania, Vidalia, and Waynesboro, Georgia; and Batesburg, South Carolina. A hypothetical monopolist controlling all supermarkets in each of these areas could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

18. The relevant geographic markets are already highly concentrated, and the Proposed Acquisition will substantially increase concentration in each market, whether measured by the Herfindahl-Hirschman Index ("HHI") or by the number of competitively significant firms remaining in each market post-acquisition.

19. The market concentration levels in each of the relevant geographic markets give rise to a presumption that the Proposed Acquisition, if consummated, would be unlawful. Post-acquisition HHI levels in the relevant geographic markets would range from 5,005 to 10,000, and the Proposed Acquisition would result in HHI increases ranging from 540 to 4,978. Exhibit A

presents market concentration levels for each of the relevant geographic markets.

20. The Proposed Acquisition will reduce the number of meaningful competitors from two to one in the Madison, Florida and Sylvania, Georgia markets and from three to two in the remaining nine relevant geographic markets.

VII. ENTRY CONDITIONS

21. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the Proposed Acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for a supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE ACQUISITION

22. The Proposed Acquisition, if consummated, is likely to substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic markets identified in Paragraph 17 in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents Bi-Lo and Delhaize;

b. by increasing the likelihood that Respondent Bi-Lo will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining participants in each of the relevant markets.

23. The ultimate effect of the Proposed Acquisition would be to increase the likelihood that the prices of food, groceries, or services will increase, and that the quality and selection of food,

groceries, or services will decrease, in the relevant sections of the country.

IX. VIOLATIONS CHARGED

24. The agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of February, 2014, issues its complaint against said Respondents.

By the Commission.

Complaint

EXHIBIT A

City	State	Merger Result	HHI (pre)	HHI (post)	Delta
Arcadia	**FL**	**3 to 2**	**4645**	**5331**	**686**
Bainbridge	**GA**	**3 to 2**	**5016**	**5556**	**540**
Batesburg	**SC**	**3 to 2**	**4074**	**5062**	**988**
Dunnellon	**FL**	**3 to 2**	**4294**	**5081**	**787**
Lake Placid	**FL**	**3 to 2**	**3881**	**5005**	**1124**
Madison	**FL**	**2 to 1**	**5556**	**10000**	**4444**
Statesboro	**GA**	**3 to 2**	**4798**	**5423**	**625**
Sylvania	**GA**	**2 to 1**	**5022**	**10000**	**4978**
Vidalia	**GA**	**3 to 2**	**5002**	**5556**	**554**
Wauchula	**FL**	**3 to 2**	**4215**	**5115**	**900**
Waynesboro	**GA**	**3 to 2**	**4316**	**5149**	**833**

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Bi-Lo Holdings, LLC ("Bi-Lo"), a subsidiary of Respondent Lone Star Fund V (U.S.), L.P. ("Lone Star"), of certain assets of Respondent Delhaize America, LLC ("Delhaize America"), a subsidiary of Respondent Etablissements Delhaize Frères et Cie "Le Lion" (Group Delhaize) SA/NV ("Delhaize"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and 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 Lone Star is a limited partnership 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 at 2711 North Haskell Avenue, Suite 1700, Dallas, Texas 75204.

2. Respondent Bi-Lo is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business at 5050 Edgewood Court, Jacksonville, Florida 32254.

3. Respondent Delhaize is a public limited company (société anonyme/naamloze vennootschap) organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at Square Marie Curie 40, 1070 Brussels, Belgium.

4. Respondent Delhaize America is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of North Carolina, with its office and principal place of business at 2110 Executive Drive, Salisbury, North Carolina 28145.

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

ORDER

I.

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

A. "Lone Star" means Respondent Lone Star Fund V (U.S.), L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its joint

ventures, subsidiaries, divisions, groups, and affiliates controlled by Lone Star Fund V (U.S.), L.P. (including Respondent Bi-Lo), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Bi-Lo" means Respondent Bi-Lo Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bi-Lo Holdings, LLC (including, after the Acquisition is consummated, the Harveys, Reid's and Sweetbay Supermarket assets acquired from Respondent Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Delhaize" means Respondent Etablissements Delhaize Frères et Cie "Le Lion" (Group Delhaize), its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Delhaize (including Respondent Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Delhaize America" means Respondent Delhaize America, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled Delhaize America, LLC (including, prior to the Acquisition, the Harveys, Reid's and Sweetbay Supermarket assets proposed for sale to Bi-Lo), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means Lone Star, Bi-Lo, Delhaize and Delhaize America, individually and collectively.

F. "Acquirer" means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.

G. "Acquisition" means Bi-Lo's proposed acquisition of Harveys, Reid's and Sweetbay Supermarket assets from Delhaize America, to be effectuated through eight separate closings, pursuant to the Acquisition Agreement.

H. "Acquisition Agreement" means the Agreement and Plan of Merger by and among Delhaize America, LLC, Kash N' Karry Food Stores, Inc., J.H. Harvey, Co., LLC, Food Lion, LLC, Retained Subsidiary One, LLC, Bi-Lo, LLC and Samson Merger Sub, LLC, dated as of May 27, 2013, as amended and restated on January 31, 2014.

I. "Assets To Be Divested" means the Harveys Supermarkets (Store Nos. 2336, 2349, 2370, 2374, 2375, 2378, and 2379), the Reid's Supermarket (Store No. 442), and the Sweetbay Supermarket (Store No. 1791) identified on Schedule A of this Order, and all rights, title and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. At each Acquirer's option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks or trade names, except with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Transition Services Agreement.

J. "Divestiture Agreement" means any agreement between Respondents and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph III of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term "Divestiture Agreement" includes, as appropriate, the Food Giant Divestiture Agreement, the Homeland Divestiture Agreement, the Sunripe Market Divestiture Agreement, and the W. Lee Flowers Divestiture Agreement.

K. "Divestiture Date" means a closing date of the respective divestitures required by this Order.

L. "Divestiture Trustee" means any person or entity appointed by the Commission pursuant to Paragraph III of the Order to act as a trustee in this matter.

M. "Fifth Closing" means the fifth scheduled closing pursuant to Article II of the Acquisition Agreement.

N. "Sixth Closing" means the sixth scheduled closing pursuant to Article II of the Acquisition Agreement.

O. "Seventh Closing" means the seventh scheduled closing pursuant to Article II of the Acquisition Agreement.

P. "Eighth Closing" means the eighth and final scheduled closing pursuant to Article II of the Acquisition Agreement.

Q. "Food Giant" means Food Giant Supermarkets, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its offices and principle place of

business located at 120 Industrial Drive, Sikeston, Missouri.

R. "Food Giant Divestiture Agreement" means the Divestiture Agreement dated as of January 24, 2014, by and between Respondent Bi-Lo and Food Giant, attached as non-public Appendix I, for the divestiture of Harveys Store Nos. 2378 (Bainbridge, Georgia) and 2379 (Madison, Florida).

S. "Homeland" means HAC, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its offices and principle place of business located at 390 N.E. 36th Street, Oklahoma City, Oklahoma.

T. "Homeland Divestiture Agreement" means the Divestiture Agreement dated as of January 28, 2014, by and between Respondent Bi-Lo and Homeland, attached as non-public Appendix II, for the divestiture of Harveys Store Nos. 2336 (Vidalia, Georgia), 2374 (Statesboro, Georgia) and 2375 (Statesboro, Georgia).

U. "Proposed Acquirer" means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes, as appropriate, Food Giant, Homeland, Sunripe Market and W. Lee Flowers.

V. "Relevant Areas" means the county or counties that include the following cities and towns in Florida, Georgia and South Carolina:

1. Arcadia, Florida;

2. Dunnellon, Florida;

3. Lake Placid, Florida;

4. Madison, Florida;

5. Wauchula, Florida;

6. Americus, Georgia;

7. Bainbridge, Georgia;

8. Statesboro, Georgia;

9. Sylvania, Georgia;

10. Vidalia, Georgia;

11. Waynesboro, Georgia;

12. Batesburg, South Carolina; and

13. Hampton, South Carolina.

W. "Sunripe Market" means Sunripe Market, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with a mailing address of 1226 N. Tamiama Trail, Sarasota, Florida.

X. "Sunripe Market Divestiture Agreement" means the Divestiture Agreement dated as of November 4, 2014, by and between Respondent Bi-Lo and Sunripe Market, attached as non-public Appendix III, for the divestiture of Sweetbay Store No. 1791 (Wauchula, Florida).

Y. "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products,

including canned, jarred, bottled, boxed and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer and/or distilled spirits.

Z. "Third Party Consents" means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

AA. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between one or more Respondents and an Acquirer of any of the assets divested under this Order to provide, at the option of each Acquirer, any services (or training for an Acquirer to provide services for itself) necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order.

BB. "W. Lee Flowers" means W. Lee Flowers & Company, Inc., a Supermarket operator organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its offices and principle place of business located at 127 East W. Lee Flowers Road, Scranton, South Carolina.

CC. "W. Lee Flowers Divestiture Agreement" means the three Divestiture Agreements dated as of January 24, 2014, by and between Respondent Bi-Lo and W. Lee Flowers, attached as non-public Appendix IV, for the divestiture of Harveys Store Nos. 2349 (Waynesboro, Georgia) and 2370 (Sylvania, Georgia), and Reid's Store No. 442 (Batesburg, South Carolina).

II.

IT IS FURTHER ORDERED that:

A. Lone Star and Bi-Lo shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Supermarket businesses, as follows:

1. Within 10 days of the Fifth Closing pursuant to the Acquisition Agreement, Harveys Store Nos. 2336 (Vidalia, Georgia), 2374 (Statesboro, Georgia) and 2375 (Statesboro, Georgia) shall be divested to Homeland pursuant to and in accordance with the Homeland Divestiture Agreement;

2. Within 10 days of the Sixth Closing pursuant to the Acquisition Agreement, Harveys Store No. 2370 (Sylvania, Georgia) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement;

3. Within 10 days of the Seventh Closing pursuant to the Acquisition Agreement, Harveys Store No. 2349 (Waynesboro, Georgia) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement;

4. Within 10 days of the Eighth Closing pursuant to the Acquisition Agreement, Harveys Store Nos. 2378 (Bainbridge, Georgia) and 2379 (Madison, Florida) shall be divested to Food Giant pursuant to and in accordance with the Food Giant Divestiture Agreement, and Reid's Store No. 442 (Batesburg, South Carolina) shall be divested to W. Lee Flowers pursuant to and in accordance with the W. Lee Flowers Divestiture Agreement;

5. Within 30 days of the date this Order becomes final, Sweetbay Store No. 1791 (Wauchula, Florida) shall be divested to Sunripe Market

pursuant to and in accordance with the Sunripe Market Divestiture Agreement.

Provided, however, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

B. *Provided, further*, that if, prior to the date this Order becomes final, Lone Star and Bi-Lo have divested the Assets To Be Divested pursuant to Paragraph II.A and if, at the time the Commission determines to make this Order final, the Commission notifies Lone Star and Bi-Lo that:

1. Any Proposed Acquirer identified in Paragraph II.A is not an acceptable Acquirer, then Lone Star and Bi-Lo shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets as ongoing Supermarket businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Lone Star and Bi-Lo that such Proposed Acquirer is not an acceptable Acquirer; or

2. The manner in which any divestiture identified in Paragraph II.A was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee

pursuant to Paragraph III of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

C. Respondents shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the applicable Divestiture Date.

D. All Divestiture Agreements approved by the Commission:

1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of any such Divestiture Agreement shall constitute a violation of this Order.

2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any 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.

E. At the option of each Acquirer of any Assets To Be Divested, and subject to the prior approval of the Commission, Respondents shall enter into a Transition Services Agreement for a term extending up to 180 days following the relevant Divestiture Date. The services subject to the Transition Services Agreement shall be provided at no more than Respondents' direct costs and may include, but are not limited to, payroll,

employee benefits, accounting, IT systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support.

F. Pending divestiture of any of the Assets To Be Divested, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and

2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.

G. With respect to each Divestiture Agreement:

1. No later than fifteen (15) days after signing each Divestiture Agreement, Respondents shall provide an opportunity for the Proposed Acquirer to:

a. Meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the employees of the Supermarket assets to be divested pursuant to the Divestiture Agreement; and

b. Make offers of employment to any one or more of the employees of the Supermarket assets to be divested pursuant to the Divestiture Agreement; and

2. Respondents shall: not interfere with the hiring or employing by the Acquirer of employees of the divested Supermarkets; remove any impediments within the control of Respondents that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer); and not make any counteroffer to any employee who has an outstanding offer of employment from such Acquirer. This obligation shall continue for a period of one (1) year from the date of the divestiture of any of the Assets To Be Divested to an Acquirer.

H. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Supermarket business 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. If Lone Star and Bi-Lo have not divested all of the Assets To Be Divested in the time and manner required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested 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, Lone Star and Bi-Lo shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a

Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Lone Star and Bi-Lo shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Lone Star and Bi-Lo, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Lone Star and Bi-Lo 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 Lone Star and Bi-Lo of the identity of any proposed Divestiture Trustee, Lone Star and Bi-Lo shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, contract, deliver, or otherwise convey the relevant assets or rights that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order.

3. Within ten (10) days after appointment of the Divestiture Trustee, Lone Star and Bi-Lo 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 divestitures or transfers required by the Order.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. 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(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.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this 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.

6. 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 Lone Star's and Bi-Lo's absolute and unconditional obligation to divest expeditiously 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 relevant Assets To Be Divested, and if the Commission determines to approve more than one such acquiring entity for such assets, the Divestiture Trustee shall divest such assets to the acquiring entity selected by Lone Star and Bi-Lo from among those approved by the Commission; *provided further, however*, that Lone Star and Bi-Lo shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Lone Star and Bi-Lo, 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 Lone Star and Bi-Lo, 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(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 his or her services, all remaining monies shall be paid at the direction of Lone Star and Bi-

Lo, 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 required to be divested by this Order.

8. Lone Star and Bi-Lo shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the 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 III.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

12. The Divestiture Trustee shall report in writing to the Commission every thirty (30) days concerning

the Divestiture Trustee's efforts to accomplish the divestiture(s).

13. 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.

14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

IV.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years commencing on the date this Order is issued, Lone Star and Bi-Lo shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

1. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in any of the Relevant Areas.

2. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in any of the Relevant Areas.

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

B. Said notification under 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, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Lone Star and Bi-Lo and not of any other party to the transaction. Lone Star and Bi-Lo shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Lone Star and Bi-Lo shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

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

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Lone Star and Bi-Lo shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

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 the Respondents, including but not limited to, assignment and the creation or

dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2025.

By the Commission, Commission McSweeny not participating.

SCHEDULE A
Assets to be Divested

Harvey's Store No. 2336, located 300 W 1st St., Vidalia, Georgia
Harvey's Store No. 2349, located at 208 W 6th St., Waynesboro, Georgia
Harvey's Store No. 2370, located at 101 Mims Rd, Sylvania, Georgia
Harvey's Store No. 2374, located at 603 Northside Dr. W, Suite 2, Statesboro, Georgia
Harvey's Store No. 2375, located at 620 Fair Rd, Statesboro, Georgia
Harvey's Store No. 2378, located at 1615 E. Shotwell St., Bainbridge, Georgia
Harvey's Store No. 2379, located at 819 E. Base St., Madison, Florida
Reid's Store No. 442, located at 217 W. Columbia Ave., Batesburg, South Carolina
Sweetbay Store No. 1791, located at 1133 US Highway 17 South, Wauchula, Florida

APPENDIX I
Food Giant Divestiture Agreement

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

APPENDIX II
Homeland Divestiture Agreement

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

APPENDIX III
Sunripe Market Divestiture Agreement

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

APPENDIX IV
W. Lee Flowers Divestiture Agreement

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Bi-Lo Holdings, LLC ("Bi-Lo"), a subsidiary of Respondent Lone Star Fund V (U.S.), L.P. ("Lone Star"), of certain assets of Respondent Delhaize America, LLC ("Delhaize America"), a subsidiary of Respondent Etablissements Delhaize Frères et Cie "Le Lion" (Group Delhaize) SA/NV ("Delhaize"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts as 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 the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Lone Star is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate headquarters and principle place of business located at 2711 North Haskell Avenue, Suite 1700, Dallas, Texas 75204.

2. Respondent Bi-Lo is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business at 5050 Edgewood Court, Jacksonville, Florida 32254.

3. Respondent Delhaize is a public limited company (société anonyme/naamloze vennootschap)organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at Square Marie Curie 40, 1070 Brussels, Belgium.

4. Respondent Delhaize America is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of North Carolina, with its office and principal place of business at 2110 Executive Drive, Salisbury, North Carolina 28145

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

II.

IT IS FURTHER ORDERED that:

A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.

B. Respondents shall not terminate the operation of any Supermarket To Be Maintained. Respondents shall continue to maintain the inventory of each Supermarket To Be Maintained at levels and selections consistent with those maintained by Respondents at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Maintained intact, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Supermarket To Be Maintained. Included in the above obligations, Respondents shall, without limitation:

1. Maintain all operations and departments, and not reduce hours, at each Supermarket To Be Maintained;

2. Not transfer inventory from any Supermarket To Be Maintained, other than in the ordinary course of business consistent with past practice;

3. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each Supermarket To Be Maintained, in each case in a manner consistent with past practice;

4. Maintain the books and records of each Supermarket To Be Maintained;

5. Not display any signs or conduct any advertising (e.g., direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Maintained to another location, or that indicates a Supermarket To Be Maintained will close;

6. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Maintained; and

7. Not change or modify in any material respect the existing advertising practices, programs and policies for each Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

III.

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

A. Any proposed dissolution of Respondents;

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

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until this Order to Maintain Assets terminates, each Respondent 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 all provisions of this Order to Maintain Assets. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order to Maintain Assets.

V.

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 with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representative of the Commission:

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

provided by Respondents at the request of the authorized representative(s) of the Commission and at the expense of Respondents; and

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

VI.

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

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each Supermarket To Be Maintained, the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of Assets To Be Divested related to such Supermarket, as described in and required by the Decision and Order.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction And Background

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Order") from Lone Star Fund V (U.S.), L.P. ("Lone Star"), Bi-Lo Holdings, LLC ("Bi-Lo"), *Etablissements Delhaize Frères et Cie "Le Lion"* (Group Delhaize) SA/NV ("Delhaize"), and Delhaize America, LLC ("Delhaize America") (collectively "Respondents"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from Bi-Lo's acquisition of certain supermarkets owned by Delhaize America (the "Acquisition"). Under the terms of the proposed Consent Order, Bi-Lo is required to divest its supermarkets and related assets in eleven local geographic markets to Commission-approved buyers. The divestitures must be completed no later than 10 days following the Acquisition.

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 again will review the proposed Consent Order and comments received, and decide whether it should withdraw the Consent Order, modify the Consent Order, or make it final.

On May 27, 2013, Bi-Lo and Delhaize America executed an agreement whereby Bi-Lo agreed to acquire from Delhaize America 73 Sweetbay stores (and leases to 10 closed stores), 72 Harveys stores, and 11 Reid's stores for $265 million. Respondents amended their agreement on January 31, 2014 to exclude one Reid's and one Harveys store from the original acquisition agreement, and adjusted the purchase price accordingly.[1] The Commission's Complaint alleges that the

[1] Respondents amended the acquisition agreement to exclude one Harveys in Americus, Georgia and one Reid's in Hampton, South Carolina, from the Acquisition. Accordingly, the proposed Consent Order does not require a divestiture in Americus, Georgia and Hampton, South Carolina. By amending

Acquisition as amended, 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 removing an actual, direct, and substantial supermarket competitor from eleven local geographic markets ("relevant geographic markets"): Arcadia, Dunnellon, Lake Placid, Madison, and Wauchula, Florida; Bainbridge, Statesboro, Sylvania, Vidalia, and Waynesboro, Georgia; and Batesburg, South Carolina. The elimination of this competition would result in significant competitive harm, specifically higher prices and diminished quality and service levels in these markets. The proposed Consent Order would remedy the alleged violations by requiring Respondent Bi-Lo to divest the acquired Delhaize America supermarkets in the relevant geographic markets. The divestitures will establish a new independent competitor to Respondent Bi-Lo in the relevant geographic markets, replacing competition that otherwise would be eliminated as a result of the Acquisition.

II. The Respondents

Bi-Lo is the parent company of the BI-LO and Winn-Dixie grocery store chains, which are located in the Southeastern United States. As of July 10, 2013, Bi-Lo operated 685 supermarkets throughout Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee under its Winn-Dixie and BI-LO banners. Lone Star Funds, a private equity firm specializing in distressed assets, through Respondent Lone Star, is the majority owner of Bi-Lo.

Delhaize America is a wholly owned subsidiary of Delhaize. Delhaize owns supermarket chains in North America, Europe, and Indonesia. In the Northeast and Southeast of the

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the acquisition agreement so that Delhaize retains these two stores (which will be operated as part of its Food Lion division), the Acquisition does not increase market concentration and the competitive status quo is maintained in Americus and Hampton. Resolving the Commission's concerns through an amendment to the acquisition agreement is suitable under the specific circumstances of this case. In particular, the selling company is selling only a small fraction of its assets, has substantial and similar operations remaining post-transaction that will absorb easily and maintain profitably the retained stores, and where the Commission has concluded that Delhaize will be an effective operator of those stores post-transaction.

United States, Delhaize America operates six supermarket chains: Sweetbay, Harveys, Reid's, Hannaford, Bottom Dollar Food, and Food Lion. Food Lion is Delhaize America's primary banner, and it accounts for 73% (1,127 stores) of its total 1,553 U.S. stores.

III. Supermarket Competition In The Relevant Areas In Florida, Georgia, And South Carolina

Bi-Lo's proposed acquisition of Delhaize's Sweetbay, Harvey's, and Reid's supermarkets poses substantial antitrust concerns in the retail sale of food and other grocery products in supermarkets in the relevant geographic markets.[2] Supermarkets are defined as traditional full-line retail grocery stores that sell, on a large-scale basis, food and non-food products that customers regularly consume at home—including, but not limited to, fresh meat, dairy products, frozen foods, beverages, bakery goods, dry groceries, detergents, and health and beauty products. This broad set of products and services provides a "one-stop shopping" experience for consumers by enabling them to shop in a single store for all of their food and non-food grocery needs. The ability to offer consumers one-stop shopping is a critical differentiating factor between supermarkets and other food retailers.

The relevant product market includes supermarkets within "hypermarkets," such as Wal-Mart Supercenters. Hypermarkets also sell an array of products that would not be found in traditional supermarkets. However, hypermarkets, like conventional supermarkets, contain bakeries, delis, dairy, produce, fresh meat, and sufficient product offerings to enable customers to purchase all of their weekly grocery requirements in a single shopping visit.

Other types of retailers – such as convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores – also sell certain food and non-food grocery items. However, these types of retailers do not compete in the relevant product market because they do not have a supermarket's full complement of products and services. Shoppers typically do

[2] The Acquisition raises competitive concern in five markets in Florida, five markets in Georgia, and one market in South Carolina.

not view these food and other grocery retailers as adequate substitutes for supermarkets.[3] Further, although these other types of retailers offer some competition to supermarkets, supermarkets do not view them as providing as significant or close competition as traditional supermarkets. Thus, consistent with prior Commission precedent, these other types of retailers are not considered as competitors in the relevant product market.[4]

The relevant geographic markets in which to analyze the Acquisition's effects are the areas within an approximate three- to ten-mile radius of the parties' supermarkets in each of the following eleven localized areas: Arcadia, Dunnellon, Lake Placid, Madison, and Wauchula, Florida; Bainbridge, Statesboro, Sylvania, Vidalia, and Waynesboro, Georgia; and Batesburg, South Carolina. Where the Respondents' supermarkets are located in rural, isolated areas, the relevant geographic areas are larger than areas where the Respondents' supermarkets are located in more densely populated suburban areas. A hypothetical monopolist of the retail sale of food and non-food grocery products in supermarkets in each relevant geographic market could profitably impose a small but significant non-transitory increase in price.

The evidence gathered during the course of staff's investigation demonstrates that Respondents are close and vigorous competitors in terms of format, service, product

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[3] Shoppers would be unlikely to switch to one of these retailers in response to a small but significant price increase or "SSNIP" by a hypothetical supermarket monopolist. *See* U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

[4] *See*, *e.g.*, AB Acquisition, LLC, Docket C-4424 (Dec. 23, 2013); *Koninklijke Ahold N.V./Safeway Inc.,* Docket C-4367 (Aug. 17, 2012); *Shaw's/Star Markets*, Docket C- 3934 (June 28, 1999); *Kroger/Fred Meyer*, Docket C-3917 (Jan. 10, 2000); *Albertson's/American Stores*, Docket C–3986 (June 22, 1999); *Ahold/Giant*, Docket C-3861 (Apr. 5, 1999); *Albertson's/Buttrey*, Docket C-3838 (Dec. 8, 1998); *Jitney-Jungle Stores of America, Inc.*, Docket C-3784 (Jan. 30, 1998). *But see Wal-Mart/Supermercados Amigo*, Docket C-4066 (Nov. 21, 2002) (the Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

offerings, promotional activity, and location in the relevant geographic markets. Bi-Lo and Delhaize America have the only supermarkets in Madison, Florida and Sylvania, Georgia. Additionally, Bi-Lo and Delhaize America have the only traditional supermarkets in eight of the relevant geographic markets; the remaining competitor in each of these eight markets is a hypermarket, Wal-Mart Supercenter. Moreover, the Bi-Lo and Delhaize stores are located near each other— less than 1 mile apart in three markets, 1 to 2 miles apart in six markets, and 2 to 3 miles apart in two markets. Competition in food retailing is primarily a function of similarity of format and proximity between competing stores. Stores with similar formats located nearby each other provide a greater competitive constraint on each other's pricing than do stores of different formats or stores located farther apart from each other. Absent the relief, the Acquisition would eliminate significant head-to-head competition between Respondents and would increase Respondent Bi-Lo's ability and incentive to raise prices unilaterally post-Acquisition. The Acquisition also would decrease incentives to compete on non-price factors, such as service levels, convenience, and quality. Finally, absent the relief, the Acquisition may also facilitate coordination in markets where only the parties' stores and one other traditional supermarket competitor remains post-Acquisition. Given the transparency of pricing and promotional practices between supermarkets and the fact that supermarkets "price check" competitors in the ordinary course of business, reducing the number of nearby competitors from three to two may facilitate collusion between the remaining supermarket competitors by making coordination easier to establish and monitor.

The relevant geographic markets are highly concentrated already, and would become significantly more so post-Acquisition. The Acquisition would result in an effective merger-to-monopoly in two relevant areas, Madison, Florida and Sylvania, Georgia, and an effective merger-to-duopoly in nine relevant areas.[5] The Acquisition would increase the Herfindahl-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and

[5] *See* Appendix A.

Federal Trade Commission Horizontal Merger Guidelines ("HMG"), in the relevant geographic markets by a range of 540 to 4,978 points, with post-Acquisition HHI total levels ranging from 5,005 to 10,000 points. These concentration levels far exceed the levels required to trigger the presumption that the Acquisition likely enhances Respondent Bi-Lo's market power in each of the relevant geographic markets.

New entry or expansion in the relevant geographic markets is unlikely to deter or counteract the anticompetitive effects of the Acquisition. Moreover, even if a prospective entrant existed, the entrant must secure a viable location, obtain the necessary permits and governmental approvals, build its retail establishment or renovate an existing building, and open to customers before it could begin operating and serve as a relevant competitive constraint. It is unlikely that entry sufficient to achieve a significant market impact and act as a competitive constraint would occur in a timely manner.

IV. The Proposed Consent Order

The proposed remedy, which requires divestiture of the Delhaize America stores in the relevant geographic markets to a Commission-approved purchaser, will restore the competition that otherwise would be eliminated in these markets as a result of the Acquisition.

Respondents Lone Star and Bi-Lo have agreed to divest the Delhaize America stores to four separate buyers. These purchasers are well suited and well positioned to enter the relevant geographic markets and prevent the increase in market concentration and likely competitive harm that otherwise would result from the Acquisition. The supermarkets currently owned by the purchasers are all located outside the relevant geographic markets.

Respondents have agreed to divest the Sweetbays located in Arcadia (#1883), Dunnellon (#1795), Lake Placid (#1879), and Wauchula (#1791), Florida to Rowe's IGA Supermarkets ("Rowe's"). Rowe's currently operates five supermarkets in the

greater Jacksonville, Florida area under the "Rowe's IGA" banner.

Respondents have agreed to divest Harveys #2336 in Vidalia, Georgia, and Harveys #2374 and #2375 in Statesboro, Georgia, to HAC Inc. ("HAC"). HAC is an employee-owned supermarket company based in Oklahoma City, Oklahoma. HAC operates approximately 80 stores consisting of Homeland and United Supermarkets in Oklahoma, Country Mart Stores in Lawton, Kansas, Super Save Stores in North Central Texas, and Piggly Wiggly and Food World stores in Georgia. HAC will operate the stores in Statesboro under the Food World banner and the store in Vidalia under the Piggly Wiggly banner.

Respondents have agreed to divest Reid's #442 in Batesburg, South Carolina, Harveys #2349 in Waynesboro, Georgia, and Harveys #2370 in Sylvania, Georgia, to W. Lee Flowers & Co., Inc. ("Flowers"). Currently, Flowers operates 35 supermarkets under its Floco Foods subsidiary in South Carolina and Georgia. Flowers is also a wholesale grocery distributer, and the company supplies many IGA supermarkets in South Carolina.

Finally, Respondents have agreed to divest Harveys #2379 in Madison, Florida, and Harveys #2378 in Bainbridge, Georgia, to Food Giant. Food Giant operates 108 stores under several different banner names, including Food Giant and Piggly Wiggly, throughout eight states, including Tennessee, Kentucky, Arkansas, Mississippi, Alabama, and Missouri. Food Giant will re-banner both stores to the Food Giant name. Food Giant already operates four stores in Florida and two in Georgia.

The proposed Order requires Respondents Lone Star and Bi-Lo to divest the Delhaize America supermarkets and related assets in the eleven relevant geographic markets to the four buyers no later than 10 days following the respective closing date under the Respondents' agreement. Pursuant to the Respondents' acquisition agreement, the Acquisition will be effectuated through eight separate closings over a period of approximately 10 weeks. This staged closing will allow both Bi-Lo and the buyers of the divested stores to re-banner the acquired stores in a timely and orderly manner. The divestitures will take place no later than 10

days after the closing involving the relevant divestiture store. If any of the buyers are not approved by the Commission to purchase the assets, Lone Star and Bi-Lo must immediately rescind the divestiture agreement and divest the Delhaize America store and related assets to a buyer that receives the Commission's prior approval. Further, for a period of one year, the Order prohibits Respondents from interfering with the hiring of or employment of any employees currently working at the Delhaize America stores in the divestiture markets. Additionally, for a period of 10 years, Lone Star and Bi-Lo are required to provide the Commission with prior notice of plans to acquire a supermarket, or an interest in a supermarket, that has operated or is operating in the counties that include the relevant geographic markets.

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Order. This Analysis does not constitute an official interpretation of the proposed Consent Order, nor does it modify its terms in any way.

Analysis to Aid Public Comment

APPENDIX A

City	State	Merger Result	HHI (pre)	HHI (post)	Delta
Arcadia	**FL**	**3 to 2**	**4645**	**5331**	**686**
Bainbridge	**GA**	**3 to 2**	**5016**	**5556**	**540**
Batesburg	**SC**	**3 to 2**	**4074**	**5062**	**988**
Dunnellon	**FL**	**3 to 2**	**4294**	**5081**	**787**
Lake Placid	**FL**	**3 to 2**	**3881**	**5005**	**1124**
Madison	**FL**	**2 to 1**	**5556**	**10000**	**4444**
Statesboro	**GA**	**3 to 2**	**4798**	**5423**	**625**
Sylvania	**GA**	**2 to 1**	**5022**	**10000**	**4978**
Vidalia	**GA**	**3 to 2**	**5002**	**5556**	**554**
Wauchula	**FL**	**3 to 2**	**4215**	**5115**	**900**
Waynesboro	**GA**	**3 to 2**	**4316**	**5149**	**833**

Complaint

IN THE MATTER OF

GLAXOSMITHKLINE, PLC AND NOVARTIS AG

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

Docket No. C-4498; File No. 141 0141
Complaint, November 26, 2014 – Decision, January 13, 2015

This consent order addresses Novartis's consumer health care products joint venture with GlaxoSmithKline (GSK). The complaint alleges that Novartis and GSK are the only companies that market branded nicotine patches in the United States, and two of only three companies that supply private label patches to retailers. Novartis's ownership of both Habitrol (its branded nicotine replacement therapy patch) and a substantial interest in the joint venture that sells GSK's nicotine patches would substantially reduce competition in the market for the manufacture, marketing, distribution, and sale of NRT transdermal patches. To preserve competition in the market for nicotine patches, the consent order requires Novartis to divest Habitrol, as well as its private-label patch business, to India-based Dr. Reddy's, one of the largest sellers of private-label over-the-counter health products in the U.S. market.

Participants

For the *Commission: Stephanie Bovee, Peter Colwell, Ben Lorigo, Amy Posner, Mark Silvia,* and *David Von Nirschl.*

For the *Respondents: Kathleen Bradish, George Cary,* and *Fareel Malone, Cleary Gottlieb Steen & Hamilton LLP; Justin Stewart-Teitelbaum* and *Paul Yde, Freshfields Bruckhaus Deringer, 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 Respondents GlaxoSmithKline, PLC ("GSK"), a corporation subject to the jurisdiction of the Commission, and Novartis AG ("Novartis"), a corporation subject to the jurisdiction of the Commission, have agreed to enter into a joint venture in violation

of Section 5 of the Federal Trade Commission Act ("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 GSK is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters located at 980 Great West Road, Brentford Middlesex, TW8 9GS, England.

2. Respondent Novartis is a corporation organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters located at Lichtstrasse 35, Basel, Switzerland CH 4056 and the address of its U.S. subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, NY 10169.

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 TRANSACTION

4. Pursuant to a series of agreements signed on April 22, 2014 (the "Agreements"), GSK and Novartis intend to combine the GSK consumer healthcare business and most of the Novartis consumer health business (excluding Novartis's U.S. nicotine replacement therapy ("NRT") transdermal patch business) into a joint venture in which GSK will hold a 63.5% controlling share and Novartis will hold the remaining 36.5% share (the "Transaction"). The Transaction is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

5. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Transaction is the manufacture, marketing, distribution, and sale of NRT transdermal patches.

6. For the purposes of this Complaint, the United States is the relevant geographic area in which to assess the competitive effects of the Transaction in the relevant line of commerce.

IV. THE STRUCTURE OF THE MARKETS

7. GSK and Novartis are the only two suppliers of branded NRT transdermal patches in the United States. GSK's branded NRT transdermal patches are marketed under the NicoDerm CQ® brand, and Novartis's are marketed under the Habitrol® brand. GSK and Novartis also are two of only three suppliers of private label NRT patches in the United States. Therefore, the Transaction would likely substantially increase concentration in the relevant market described in Paragraphs 5 and 6.

V. ENTRY CONDITIONS

8. Entry into the relevant market described in Paragraphs 5 and 6 would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Transaction. Development of a patch product by a new entrant would be difficult, expensive, and time-consuming, and even if it were to succeed in developing a new patch, it would then face a lengthy FDA approval period.

VI. EFFECTS OF THE TRANSACTION

9. The effects of the Transaction, if consummated, may be to substantially lessen competition, or 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, by

a. reducing actual, direct, and substantial competition between GSK and Novartis in the supply of branded NRT transdermal patches, thereby increasing the likelihood that Novartis would increase the prices of Habitrol®;

b. reducing actual, direct, and substantial competition between GSK and Novartis in the supply of private label NRT transdermal patches, thereby increasing the likelihood that Novartis would increase the prices of its private label NRT transdermal patches;

c. reducing actual, direct, and substantial competition between Novartis's private label NRT transdermal patches and GSK's NicoDerm CQ®, thereby further increasing Novartis's incentive to increase prices of its private label NRT transdermal patches; and

d. reducing actual, direct, and substantial competition between Novartis's Habitrol® product and GSK's private label NRT transdermal patches, thereby further increasing Novartis's incentive to increase the prices of Habitrol®.

VII. VIOLATIONS CHARGED

10. The Agreements described in Paragraph 4 constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

11. The Transaction 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-sixth day of November, 2014 issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed joint venture between Respondent Novartis AG ("Novartis" or "Respondent") and GlaxoSmithKline PLC ("GSK"), 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 and GSK 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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, CH 4056, and the address of its United States

subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.

2. GSK is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9GS, England.

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

ORDER

I.

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

A. "Novartis" or "Respondent" means: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG (including, without limitation, Novartis Consumer Health, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "GSK" means: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by GlaxoSmithKline plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that the 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 the Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

E. "Acquisition Date" means the date on which the Joint Venture is consummated.

F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

G. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 *et seq*., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all

correspondence between the Respondent and the FDA related thereto.

H. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.

I. "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.

J. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

K. "Closing Date" means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Habitrol Assets to the Acquirer pursuant to this Order.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, the Respondent prior to the Acquisition Date that is not in the public domain and that is directly related to the conduct of the Business related to Habitrol. The term "Confidential Business Information" excludes the following:

1. information relating to the Respondent's general business strategies or practices that does not discuss with particularity Habitrol;

2. information specifically excluded from the Habitrol Assets;

3. information that is contained in documents, records or books of the Respondent that is provided to the Acquirer by the Respondent that is unrelated to Habitrol or that is exclusively related to Retained Product(s); and

4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

M. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, scale-up, development-stage , 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.

N. "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 to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for Habitrol, "Direct Cost" means such cost as is provided in such Remedial Agreement for Habitrol.

O. "Divestiture 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 that was owned, licensed, or controlled by Respondent Novartis:

1. to research and Develop Habitrol for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell Habitrol within the Geographic Territory;

3. to import or export Habitrol to or from the Geographic Territory to the extent related to the marketing, distribution or sale of Habitrol in the Geographic Territory; and

4. to have Habitrol made anywhere in the World for distribution or sale within, or import into the Geographic Territory;

provided however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by the 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 the Respondent.

P. "Divestiture Product Releasee(s)" means the following Persons:

1. the Acquirer for the Habitrol Assets;

2. any Person controlled by or under common control with the Acquirer; and

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of such Acquirer-affiliated entities.

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) (universal 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 Product Trademarks required to be divested.

S. "Dr. Reddy's" means Dr. Reddy's Laboratories SA, a corporation organized, existing and doing business under and by virtue of the laws of the of the Swiss Confederation with its headquarters address located at Elizabethenanlage II, 4051, Basel Switzerland, and the address of its United States subsidiary, Dr. Reddy's Laboratories, Inc., 107 College Road East, Princeton, New Jersey 05840.

T. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

U. "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.

V. "GSK Smoking Cessation Products" means all Products Developed, marketed, sold, owned, or controlled by the GSK under the trade names NicoDerm®, NicoDerm® CQ®, and Nicorette® and all over-the-counter Products indicated for the

reduction of withdrawal symptoms, including nicotine craving, associated with quitting smoking.

W. "Habitrol" means all of the over-the-counter Products that both: (i) contain the active pharmaceutical ingredient generically known as nicotine, and (ii) that use a patch as a delivery mechanism for the active pharmaceutical ingredient, in Development, manufactured, marketed, sold, owned or controlled by Novartis prior to the Acquisition Date within the Geographic Territory. "Habitrol" includes, without limitation, all Products marketed or sold by Novartis under the trademark Habitrol® and any of the smoking cessation Products using a patch manufactured, marketed, or sold by Novartis prior to the Acquisition Date under private labels, in each case, within the Geographic Territory.

X. "Habitrol Assets" means the following assets and rights of Respondent, as such assets and rights are in existence as of the date Respondent signs the Agreement Containing Consent Orders in this matter and as are maintained by Respondent in accordance with the Asset Maintenance Order until the Closing Date:

1. all rights to all of the Applications related to Habitrol bearing NDA No. 020076;

2. all Product Intellectual Property related to Habitrol that is not Product Licensed Intellectual Property;

3. all Product Approvals related to Habitrol;

4. all Product Marketing Materials related to Habitrol;

5. all Product Scientific and Regulatory Material related to Habitrol;

6. all Website(s) related exclusively to Habitrol;

7. the content related exclusively to Habitrol that is displayed on any Website that is not dedicated exclusively to Habitrol;

8. a list of all of the NDC Numbers related to Habitrol, and rights, to the extent permitted by Law:

    a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of Habitrol within an appropriate period of time following the Closing Date except for returns, rebates, allowances, and adjustments for sales of such Product prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

    b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) except for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and except as may be required by applicable Law;

    c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondent of any such cross-referencing that is discovered by Respondent);

    d. to seek cross-referencing from a customer of the Respondent's NDC Numbers related to Habitrol with the Acquirer's NDC Numbers related to Habitrol;

    e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of Habitrol except for

returns, rebates, allowances, and adjustments for Habitrol sold prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and

f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);

9. all Product Development Reports related to Habitrol;

10. at the option of the Acquirer of Habitrol, all Product Assumed Contracts related to Habitrol (copies to be provided to the Acquirer on or before the Closing Date);

11. a list of all customers and targeted customers for Habitrol and a listing of the net sales (in either units or dollars) of Habitrol to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of Habitrol on behalf of the High Volume Account and his or her business contact information;

12. at the option of the Acquirer of Habitrol 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, and finished goods related to Habitrol;

13. copies of all unfilled customer purchase orders for Habitrol as of the Closing Date, to be provided to

the Acquirer of Habitrol not later than five (5) days after the Closing Date;

14. at the option of the Acquirer of Habitrol, all unfilled customer purchase orders for Habitrol; and

15. all of the Respondent's books, records, and files to the extent directly related to the foregoing;

provided, however, that "Habitrol Assets" shall not include: (i) documents relating to the Respondent's general business strategies or practices relating to the conduct of its Business of marketing over-the-counter pharmaceutical Products, where such documents do not discuss with particularity Habitrol; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of Habitrol by the Interim Monitor or the Acquirer of Habitrol; (v) any real estate and the buildings and other permanent structures located on such real estate; (vi) the employment relationship with any employee of the Respondent; and (vii) all Product Licensed Intellectual Property;

provided further, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to Habitrol and to Retained Products or Businesses of the Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to Habitrol; or (ii) for which the Respondent has a legal obligation to retain the original copies, the Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondent 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 Respondent provides the Acquirer with the above-described information without

requiring the Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

Y. "Habitrol Divestiture Agreements" means, the following:

1. the Asset Purchase Agreement by and between Dr. Reddy's Laboratories, SA and Novartis Consumer Health, Inc. dated as of October 18, 2014;

2. the Habitrol Supply Agreement (to be executed as attached to the Asset Purchase Agreement); and, all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Habitrol Assets that have been approved by the Commission to accomplish the requirements of this Order. The Habitrol Divestiture Agreements are contained in Non-Public Appendix I.

Z. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of Habitrol in the United States of America from Respondent were, or are projected to be among the top twenty highest of such purchase amounts by Respondent's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the Habitrol Assets; or (iv) the end of the last quarter following the Acquisition or the Closing Date.

AA. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

BB. "Joint Venture" means the consumer health joint venture between GSK and Novartis pursuant to: (i) a

Deed of Amendment and Restatement, dated May 29, 2014, relating to a Contribution Agreement between Novartis, GSK, and Leo Constellation Limited, dated April 22, 2014; and (ii) Agreed Terms of a Shareholders' Agreement between GSK, Novartis, and GSK Consumer Healthcare Holdings Limited, dated May 29, 2014 (together the "JV Agreements"). The JV Agreements were submitted to the Commission. The JV Agreements are contained in Non-Public Appendix II.

CC. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

DD. "Manufacturing Designee" means any Person other than the Respondent that has been designated by the Acquirer to manufacture Habitrol for the Acquirer.

EE. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

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

GG. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

HH. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

II. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (except where this Order specifies a different time), and includes all reissues,

additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

JJ. "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.

KK. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

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 within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

MM. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to Habitrol and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, Habitrol from Respondent unless such contract applies generally

to Respondent's sales of Products to that Third Party;

2. pursuant to which Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of Habitrol;

3. relating to the particularized marketing of Habitrol or educational matters relating solely to Habitrol(s);

4. pursuant to which a Third Party manufactures Habitrol on behalf of Respondent;

5. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of Habitrol on behalf of Respondent;

6. constituting confidentiality agreements involving Habitrol (other than confidentiality agreements entered into in connection with the process conducted to find a purchaser for the Habitrol Assets as contemplated by this Order);

7. involving any royalty, licensing, covenant not to sue, or similar arrangement involving Habitrol;

8. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of Habitrol to Respondent including, but not limited to, consultation arrangements; and/or

9. pursuant to which any Third Party collaborates with Respondent in the performance of research,

Development, marketing, distribution or selling of Habitrol or the Business related to Habitrol;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to Habitrol, but concurrently may retain similar rights for the purposes of the Retained Product(s).

NN. "Product Copyrights" means rights to all original works of authorship of any kind directly related to Habitrol and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of the Respondent 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 that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

OO. "Product Development Reports" means:

1. Pharmacokinetic study reports related to Habitrol;

2. Bioavailability study reports (including reference listed drug information) related to Habitrol;

3. Bioequivalence study reports (including reference listed drug information) related to Habitrol;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to Habitrol;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to Habitrol;

7. currently used or planned product package inserts (including historical change of controls summaries) related to Habitrol;

8. FDA approved patient circulars and information related to Habitrol;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to Habitrol;

10. summary of Product complaints from physicians related to Habitrol;

11. summary of Product complaints from customers related to Habitrol;

12. Product recall reports filed with the FDA related to Habitrol, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in Habitrol;

14. reports related to Habitrol from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce Habitrol that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of Habitrol;

16. analytical methods development records related to Habitrol;

17. manufacturing batch records related to Habitrol;

18. stability testing records related to Habitrol;

19. change in control history related to Habitrol; and

20. executed validation and qualification protocols and reports related to Habitrol.

PP. "Product Intellectual Property" means all of the following related to Habitrol (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 "GSK" or "Novartis" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondent or the related corporate logos thereof, or general registered images or symbols by which GSK or Novartis can be identified or defined.

QQ. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to Habitrol that the 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 Geographic Territory to limit the use or disclosure thereof, that are related to Habitrol and that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product.

RR. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of Habitrol in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to Habitrol.

SS. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

TT. "Product Trade Dress" means the current trade dress of a Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

UU. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade

names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

VV. "Remedial Agreement(s)" means the following:

1. any agreement between the Respondent and the 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 the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to Habitrol to the benefit of the 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 the Respondent and the Acquirer (or between a Divestiture Trustee and the 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 the 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 the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to Habitrol to the benefit of the Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

WW. "Retained Product" means any Product(s) other than Habitrol.

XX. "Third Party(ies)" means any non-governmental Person other than the following: the Respondent; the Joint Venture; or, the Acquirer.

YY. "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 the Respondent; *provided, however,* "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by the Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that the Respondent can convey its rights, if any, therein; or (2) content unrelated to Habitrol.

II.

IT IS FURTHER ORDERED that:

A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent shall divest the Habitrol Assets and grant the related Divestiture Product License,

absolutely and in good faith, to Dr. Reddy's pursuant to, and in accordance with, the Habitrol Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Dr. Reddy's or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Habitrol Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Habitrol Assets to Dr. Reddy's 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 Dr. Reddy's is not an acceptable purchaser of the Habitrol Assets, then Respondent shall immediately rescind the transaction with Dr. Reddy's, in whole or in part, as directed by the Commission, and shall divest the Habitrol Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondent has divested the Habitrol Assets to Dr. Reddy's 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 Habitrol Assets to Dr. Reddy's (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, Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the assets required to be divested pursuant to this Order to the Acquirer, and to permit the Acquirer to continue the Business of Habitrol;

provided, however, Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. Respondent shall:

1. submit to the Acquirer, at Respondent's 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 Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to Habitrol 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 related to the

Business of Habitrol other than as necessary to comply with the following:

a. the requirements of this Order;

b. Respondent's 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 the Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of Habitrol to the marketing or sales employees associated with the Business related to the GSK Smoking Cessation Products.

D. Respondent shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of Habitrol within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of the GSK Smoking Cessation 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 Habitrol as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

E. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to Habitrol by 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. 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. Respondent shall provide a copy of the notification to the Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's principal business office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

F. Until Respondent completes the divestiture required by this Order,

1. Respondent shall take actions as are necessary to:

a. maintain the full economic viability and marketability of the Businesses associated with Habitrol;

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 Habitrol;

d. ensure that the Habitrol Assets are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval

processes related to the Business associated with Habitrol; and

2. Respondent shall not sell, transfer, encumber or otherwise impair the Habitrol 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 associated with Habitrol.

G. From the Closing Date, neither the Respondent nor the Joint Venture shall join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Divestiture Product Releasee(s) of the Acquirer under the following:

1. 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;

2. 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 the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of Habitrol for the purposes of marketing, sale or offer for sale within the United States of America of Habitrol; or (ii) the use within, import into, or the supply, distribution, or sale within, the United States of America of Habitrol. Respondent shall also covenant to the 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 the Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of Habitrol for the purposes of marketing, sale or offer for sale within the United States of America of Habitrol; or (ii) the use within, import into, or the supply, distribution, or sale or offer for sale within, the United States of America of Habitrol. 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.

H. Upon reasonable written notice and request from the Acquirer to Respondent, Respondent or the Joint Venture shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent or the Joint Venture to assist the 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 Habitrol, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of Habitrol for the purposes of marketing, sale or offer for sale within the United States of America of Habitrol; or (ii) the use within, import into, or the supply, distribution, or sale within, the United States of America of Habitrol; *provided however*, the provisions of this paragraph do not apply to any employees of the Joint Venture who were not employees of the Respondent prior to the Acquisition Date.

I. For any patent infringement suit filed prior to the 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 the Closing Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of Habitrol for the purposes of marketing, sale or offer for sale within the United States of America of Habitrol; or (ii) the use within, import into, or the supply, distribution, or sale or offer for sale within, the United States of America of Habitrol, Respondent shall:

1. cooperate with the 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 Habitrol;

2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to Habitrol; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of the Respondent's outside counsel related to Habitrol.

J. The purpose of the divestiture of the Habitrol 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 Habitrol within the Geographic Territory; and

2. to create a viable and effective competitor that is independent of Respondent and the Joint Venture in the Business of Habitrol within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the

Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of 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 Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with

the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Habitrol Assets in a manner that fully satisfies the requirements of the Orders;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim 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 Habitrol Assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim 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 Interim Monitor's duties and responsibilities.

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

H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by each Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order.

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

J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's

consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

IV.

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 Habitrol 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, 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 the 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 Interim 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.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, the 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 the Acquirer or access original documents provided to the Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure the 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 Habitrol or the assets and Businesses associated with Habitrol;

provided, however, that the Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, however, that pursuant to this Paragraph V, the Respondent shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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 the Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent 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 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 Habitrol 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 shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A., II.B., II.C.1.-3., II.D., II.E., and II.F., Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent 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, and (ii) transitional services being provided by the Respondent to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. One (1) year after the Order Date, annually for the next nine (9) 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 has complied and is complying with the Order.

VIII.

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

A. any proposed dissolution of the Respondent;

B. any proposed acquisition, merger or consolidation of the 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 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 the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2025.

By the Commission.

NON-PUBLIC APPENDIX I
AGREEMENTS RELATED TO THE DIVESTITURE

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

NON-PUBLIC APPENDIX II
JV AGREEMENTS

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed joint venture between Respondent Novartis AG ("Novartis" or "Respondent") and GlaxoSmithKline PLC ("GSK"), 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 and GSK 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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, CH 4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.

2. GSK is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9GS, England.

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

ORDER

I.

IT IS ORDERED that, as used in this Order 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. "Novartis" or "Respondent" means: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG (including, without limitation, Novartis Consumer Health, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "GSK" means: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by GlaxoSmithKline plc, 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. "Habitrol Business" means the Business of Respondent within the Geographic Territory specified in the Decision and Order related to Habitrol 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, the Respondent.

F. "Interim 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.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

A. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Habitrol Business, to minimize any risk of loss of competitive potential for such Habitrol Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Habitrol Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the Habitrol 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 Habitrol Business.

B. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall maintain the operations of the Habitrol 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 marketability, viability, and competitiveness of the Habitrol Business and shall use its best efforts to preserve the existing relationships with the following: manufacturers; suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; employees; and others having business relations with the Habitrol Business. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing the Habitrol Business 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 Habitrol Business;

2. continuing, at least at their scheduled pace, any additional expenditures the Habitrol Business authorized prior to the date the Consent Agreement was signed by Respondent 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 Habitrol and/or to prevent any diminution in sales of Habitrol during and after the Acquisition process and prior to the complete transfer and delivery of the related Habitrol Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of Habitrol at the High Volume Accounts;

5. making available for use by the Habitrol Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such Business;

6. providing such support services to the Habitrol Business as were being provided to such Business by Respondent as of the date the Consent Agreement was signed by Respondent;

7. developing and implementing a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of Habitrol by the Acquirer is not delayed or impaired by the Respondent for the purposes of ensuring and orderly marketing and distribution transition to the Acquirer;

8. designating employees of Respondent knowledgeable about the marketing, distribution and sale related to Habitrol who will be responsible for communicating directly with the Acquirer, and the Interim Monitor (if one has been appointed), for the purposes of assisting in the transfer of Habitrol;

9. maintaining and managing inventory levels of Habitrol in consideration of the marketing and distribution transition to the Acquirer;

10. continuing to market, distribute and sell Habitrol until such time as agreed upon with the Acquirer for the Acquirer to assume these functions, including, continuing, at their scheduled pace, any meetings with customers of the Habitrol Business (such as, meetings to review planograms or

displays, discuss marketing strategies, product promotions or product purchases);

11. allowing the Acquirer to access at reasonable business hours to all Confidential Business Information related to Habitrol and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to Habitrol that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;

12. providing the Acquirer with a listing of inventory levels (week of supply) for each customer (i.e., retailer, group purchasing organization, wholesaler or distributor) in a timely manner;

13. providing the Acquirer with anticipated reorder dates for each customer in a timely manner; and

14. establishing projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.

C. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall maintain a work force that is (i) at least as large (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with Habitrol for the last fiscal year.

D. Pending divestiture of the Habitrol Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business other than as necessary to comply with the following:

   a. the requirements of this Order;

b. Respondent's 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 such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information to the employees associated with the Business related to the GSK Smoking Cessation 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.

E. 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, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by 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.

F. 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. Respondent shall provide a copy of the notification to the relevant 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 stating that the acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

G. 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.

H. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Habitrol Business within the Geographic Territory through its full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Habitrol Business within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Habitrol Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that

Respondent expeditiously comply with all of the obligations and perform all of the responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim 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 Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Habitrol Assets in a manner that fully satisfies the requirements of the Orders;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim 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. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim 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 Interim Monitor's duties and responsibilities.

G. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in

connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

H. Respondent shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by each Acquirer with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.

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

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondent has fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondent 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. Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. 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 relevant assets and rights, and (ii) transitional services being provided by the 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 at the same time as, the reports

required to be submitted by Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of the Respondent;

B. any proposed acquisition, merger or consolidation of the 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 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 the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the divestiture of all of the Habitrol Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Novartis AG ("Novartis"), which is designed to remedy the anticompetitive effects of Novartis's proposed consumer healthcare joint venture with GlaxoSmithKline, PLC ("GSK").

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 final the Decision and Order ("Order").

Pursuant to a series of agreements dated April 22, 2014, GSK and Novartis intend to combine the GSK consumer healthcare business and most of the Novartis consumer healthcare business (excluding Novartis's nicotine replacement therapy ("NRT") transdermal patch business) into a joint venture in which GSK will hold a 63.5% controlling share and Novartis will hold the remaining 36.5% share (the "Transaction"). Both parties sell over-the-counter ("OTC") NRT transdermal patches in the United States. The Commission alleges in its Complaint that the 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, by lessening competition in the market for the manufacture, marketing, distribution, and sale of NRT transdermal patches. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Transaction. Specifically, under the terms of the Consent Agreement, Novartis would be required to divest all of its rights and assets related to U.S. NRT transdermal patches, including its branded product, Habitrol. Novartis has proposed

Dr. Reddy's Laboratories ("Dr. Reddy's") as the buyer of these assets.

II. The Product and Structure of the Market

The proposed joint venture would likely substantially increase concentration in the market for NRT transdermal patches. Tobacco consumption introduces nicotine into the body, and nicotine addiction is a major contributor to addiction to tobacco. Nicotine replacement therapies work by providing nicotine to the body through sources other than smoking, thereby replacing the nicotine that would have come from tobacco and helping to ease tobacco cravings in those who are attempting to quit. Users of NRT products are therefore more likely to have success in quitting tobacco. NRT transdermal patches work by adhering to the skin, much like an adhesive bandage, and slowly providing a steady amount of nicotine through the skin over the course of a day. Patches are usually provided in decreasing dosages to help the user step down their nicotine intake over time.

Novartis markets and sells the branded NRT transdermal patch Habitrol. The only other branded patch is GSK's NicoDerm CQ. Both companies also market private label versions of their branded patch. Private label products are competitive with the branded products, but there is only one other manufacturer of private label patches, Aveva Drug Delivery Systems. Therefore, without a remedy, the Transaction will consolidate the only two providers of branded NRT transdermal patches, and two of the three producers of private label NRT transdermal patches.

III. Entry

Entry into the manufacture and sale of NRT transdermal patches would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Transaction. Developing a patch that adheres to the skin and properly delivers nicotine to the body over time is expensive and time consuming, and has a high risk of failure. Even if an entrant is able to successfully develop a new patch, it must then obtain an FDA approval to market the product, which adds several years to the entry process.

IV. Effects

The Transaction is likely to result in significant competitive harm in the market for NRT transdermal patches. Although the Novartis NRT patch business has been excluded from the consumer healthcare joint venture, GSK's patch business will be included. Thus, Novartis's partial interest in the joint venture means it will benefit from any sales lost to GSK NRT patches in the future. With an interest in its most significant competing product, Novartis would have an increased incentive to raise prices for its NRT patches post-transaction. The Transaction, by altering the interactions between Novartis's and GSK's branded and private label NRT transdermal patches, would likely result in price increases for NRT patches in several ways. First, the Transaction would reduce the competition between the only two branded NRT transdermal patches, and reduce the competition between Novartis's branded Habitrol product and GSK's private label patches, both of which would increase the likelihood that Novartis would increase the prices of Habitrol. Second, the Transaction would reduce the competition between Novartis's private label patches and GSK's NicoDerm CQ and private label patches, which would create incentives for Novartis to increase the price of its private label NRT transdermal patches.

V. The Consent Agreement

The proposed Consent Agreement effectively remedies the Transaction's anticompetitive effects in the relevant market. Pursuant to the Consent Agreement, the parties are required to divest Novartis's rights and assets related to its U.S. NRT transdermal patch business to Dr. Reddy's. Further, the proposed Consent Agreement requires Novartis to assign to Dr. Reddy's its contract manufacturing agreements for the divested assets. Finally, Novartis will provide a short term packaging agreement to Dr. Reddy's for secondary packaging of the product while Dr. Reddy's seeks a contract packager. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Transaction is consummated.

Dr. Reddy's is well positioned to assume Novartis's role in the NRT transdermal patch market. Dr. Reddy's manufactures a wide range of branded and private label OTC products for sale in the

United States, including private label versions of popular allergy and gastrointestinal products. Thus, Dr. Reddy's is already a supplier to most major retailers of OTC consumer healthcare products. In addition, because Novartis will be transferring its existing contract manufacturing arrangement for its NRT transdermal patches, the divestiture to Dr. Reddy's will not require a transfer of manufacturing processes or facilities. Dr. Reddy's will therefore be able to step into Novartis's current position and immediately begin competing in the market for NRT transdermal patches.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Transaction. If the Commission determines that Dr. Reddy's is not an acceptable acquirer of the divested assets, or that the manner of the divestiture is not acceptable, the parties must unwind the sale of rights to Dr. Reddy's, and divest the U.S. NRT transdermal patch assets to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the product if the parties fail to divest the business as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestiture is successful. The Order requires Novartis to take all action necessary to maintain the economic viability, marketability, and competitiveness of the product to be divested until such time that they are transferred to a Commission-approved acquirer. The Order also requires that Novartis transfer all confidential business information, including customer information related to the divestiture product, to Dr. Reddy's.

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

MEDTRONIC, INC. AND COVIDIEN PLC

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

Docket No. C-4503; File No. 141 0187
Complaint, January 13, 2015 – Decision, January 13, 2015

This consent order addresses the $42.9 billion dollar acquisition by Medtronic, Inc. of Covidien plc. Medtronic and Covidien both are developing drug-coated balloon catheters used to treat peripheral artery disease. C.R. Bard, Inc. is currently the only company that supplies these products in the U.S. market. Because Medtronic and Covidien are the only companies with products in clinical trials in the Food and Drug Administration's approval process, the complaint alleges that, post-acquisition, it is unlikely that other competitors could enter the market in time to counteract the effects of the merger. Therefore, the acquisition, if consummated, would substantially lessen competition in the U.S. market for drug-coated balloon catheters indicated for the femoropopliteal ("fem-pop") artery. Under the Commission's order, Medtronic must sell the drug-coated balloon catheter business to a Colorado-based medical device company, The Spectranetics Corporation, thereby preserving the competition that would otherwise be eliminated by the acquisition.

Participants

For the *Commission: Christine Tasso* and *Michelle A. Wyant.*

For the *Respondents: George S. Cary, Cleary Gottlieb Steen & Hamilton LLP*; and *Nelson O. Fitts, Wachtell, Lipton, Rosen & Katz.*

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 Medtronic, Inc. ("Medtronic"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Covidien plc ("Covidien"), a public limited company 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 Medtronic is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its headquarters address located at 710 Medtronic Parkway, Minneapolis, Minnesota 55432-5604.

2. Respondent Covidien is a public limited company organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland, with its headquarters address located at 20 on Hatch, Lower Hatch Street, Dublin 2, Ireland.

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 Transaction Agreement dated June 15, 2014, Medtronic proposes to merge with Covidien in exchange for cash and stock valued at approximately $42.9 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

5. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the development, licensing, manufacturing, marketing, distribution, and sale of drug-coated balloon catheters indicated for the femoropopliteal ("fem-pop") artery.

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 line of commerce.

IV. THE STRUCTURE OF THE MARKET

7. Drug-coated balloon catheters indicated for the fem-pop artery are used to treat peripheral arterial disease in the fem-pop artery, an artery located above the knee. Peripheral arterial disease results from atherosclerosis, the narrowing of blood vessels due to plaque buildup. The U.S. market for drug-coated balloon catheters indicated for the fem-pop artery is highly concentrated with only one current supplier, C.R. Bard, Inc. Medtronic and Covidien are likely to enter as the second and third U.S. suppliers, respectively. Medtronic and Covidien are the only two potential market participants that have advanced to the clinical-trial stage of the Food and Drug Administration ("FDA") approval process for drug-coated balloon catheters indicated for the fem-pop artery.

V. ENTRY CONDITIONS

8. Entry into the relevant market described in Paragraphs 5 and 6 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. 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.

VI. EFFECTS OF THE ACQUISITION

9. 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 future competition between Medtronic and Covidien in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery;

b. by increasing the likelihood that the combined entity would forego or delay the launch of one company's drug-coated balloon catheter indicated for the fem-pop artery;

c. by increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional U.S. supplier of drug-coated balloon catheters indicated for the fem-pop artery; and

d. by reducing research and development in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery.

VII. VIOLATIONS CHARGED

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

11. 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 thirteenth day of January, 2015, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Medtronic, Inc. ("Medtronic") of the voting securities of Respondent Covidien plc ("Covidien"), 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 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 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. Respondent Medtronic, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its headquarters

address located at 710 Medtronic Parkway, Minneapolis, MN 55432-5604.

2. Respondent Covidien plc is a public limited company, organized, existing, and doing business under and by virtue of the laws of Ireland, with its headquarters address located at 20 on Hatch, Lower Hatch Street, Dublin 2, Ireland.

3. 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. "Medtronic" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates in each case controlled by Medtronic, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Medtronic shall include Covidien and Medtronic plc.

B. "Covidien" means Covidien plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Covidien, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Covidien shall not include Medtronic.

C. "New Medtronic" means Medtronic Holdings Limited (f/k/a Kalani I Limited), which will become Medtronic plc, the new Irish holding company that will exist after the acquisition of Covidien by Medtronic.

D. "Respondent(s)" means Medtronic and Covidien, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Actual Cost" means the actual cost incurred to provide the relevant goods or services, including the cost of direct labor and direct material used and allocation of overhead that is consistent with past custom and practice.

G. "Acquisition" means the acquisition of Covidien by Medtronic under New Medtronic pursuant to the Transaction Agreement between Medtronic, Covidien, New Medtronic, Makani II Limited, Aviation Acquisition Co., Inc., and Aviation Merger Sub, LLC dated as of June 15, 2014.

H. "Acquisition Date" means the date on which the Acquisition is consummated.

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 the Drug-Coated Balloons. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

J. "Assets To Be Divested" means the Drug-Coated Balloon Business, the PTA License, the PTA Materials, and the Background IP License.

K. "Background IP" means all patents, copyrights, trade secrets or other intellectual property rights owned by Covidien as of the Closing Date (other than trademarks or trade dress), that are used in or would otherwise be infringed by the Drug-Coated Balloon Business or the research, Development, and manufacture of PTA Products for the incorporation of such PTA Products into Drug-Coated Balloons as of the Closing Date but

that are not included in the Drug-Coated Balloon Business, the PTA License, and the PTA Materials.

L. "Background IP License" means a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license to the Commission-Approved Acquirer under any Background IP to operate the Drug-Coated Balloon Business, including the research, Development, manufacture, distribution, marketing or sale of Drug-Coated Balloons anywhere in the world and the research, Development, and manufacture of PTA Products for the incorporation of such PTA Products into Drug-Coated Balloons anywhere in the world.

M. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a product, and includes, without limitation, such clinical trials as are designed to satisfy the requirements of an Agency in connection with any product and any other human study used in research and Development of a product.

N. "Closing Date" means the date on which Respondents (or a Divestiture Trustee) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Assets To Be Divested to a Commission-Approved Acquirer pursuant to this Order.

O. "Commission-Approved Acquirer" means the following:

1. Spectranetics; or

2. An entity that receives the prior approval of the Commission to acquire the Assets To Be Divested.

P. "Confidential Business Information" means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Drug-

Coated Balloon Business. The term "Confidential Business Information" excludes the following:

1. Information relating to any Respondent's general business strategies or practices that does not discuss with particularity the Drug-Coated Balloon Business;

2. Information that is contained in documents, records or books of any Respondent that are provided to the Commission-Approved Acquirer by a Respondent that is unrelated to the Drug-Coated Balloon Business acquired by the Commission-Approved Acquirer or that is exclusively related to the Retained Business;

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;

4. Information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality and non-disclosure agreement with respect to such information by Respondents;

5. Information related to the Drug-Coated Balloon Business that Medtronic can demonstrate it obtained without the assistance of Covidien prior to the Acquisition;

6. Information that is required by Law to be disclosed;

7. Information that does not directly relate to the Drug-Coated Balloon Business; and

8. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:

a. 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;

b. Is information the disclosure of which is consented to by the Commission-Approved Acquirer;

c. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement; or

d. Is disclosed in complying with this Order.

Q. "Development" means all preclinical and clinical drug and medical device 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.

R. "Divestiture Agreement" means the "Asset Purchase Agreement" by and between Covidien LP and Spectranetics dated as of October 31, 2014, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated thereby, related to the Assets To Be Divested, that have been approved by the Commission to accomplish

the requirements of this Order. The Divestiture Agreement is attached to this Order as Non-Public Appendix A.

S. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

T. "Drug-Coated Balloons" means Covidien's over the wire percutaneous transluminal angioplasty balloon catheters with paclitaxel coated balloons for peripheral vascular use; *provided, however,* that Drug-Coated Balloons shall not include PTA Products that do not contain a paclitaxel coated balloon.

U. "Drug-Coated Balloon Business" means all of Covidien's right, title and interest in and to the assets, tangible and intangible, businesses and goodwill as of the Closing Date, that are related primarily to the research, Development, manufacture, marketing, sale or distribution of Drug-Coated Balloons, including, without limitation, all of Covidien's right, title and interest as of the Closing Date, in and to the following:

1. All Drug-Coated Balloon Intellectual Property;

2. The Drug-Coated Balloon Plant Lease;

3. All Drug-Coated Balloon Manufacturing Technology;

4. All Drug-Coated Balloon Scientific and Regulatory Material;

5. All of Covidien's books, records and files to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Drug-Coated Balloons;

6. All Drug-Coated Balloon Manufacturing Equipment and the Plymouth Facility Manufacturing Equipment;

7. All contracts entered into with any Third Party in the ordinary course of business with suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees, to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Drug-Coated Balloons;

8. All inventory, including raw materials, packaging materials, work-in-process, and finished goods, in each case to the extent consisting of, or intended for use in the manufacture or packaging of, Drug-Coated Balloons; and

9. All commitments and orders for the purchase of goods that have not been shipped, to the extent consisting of, or intended for use in the manufacture of, Drug-Coated Balloons;

provided, however, that "Drug-Coated Balloon Business" does not include the Retained Business or any assets, tangible or intangible, businesses or goodwill that relate to PTA Products (other than as used in the incorporation of such PTA Products into Drug-Coated Balloons); and

provided further, however, that with respect to documents or other materials included in the Drug-Coated Balloon Business that contain information (a) that relates both to Drug-Coated Balloons and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Commission-Approved Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Drug-Coated Balloons.

V. "Drug-Coated Balloon Employees" means all employees of Covidien whose job responsibilities are primarily related to the research, Development, manufacture, distribution, marketing or sale of Drug-Coated Balloons, in each case as listed in Non-Public Appendix B.

W. "Drug-Coated Balloon Intellectual Property" means all of the following to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Drug-Coated Balloons:

1. United States and foreign patents and patent applications in each case filed, or in existence, on or before the Closing Date and covered under the patent families listed in Non-Public Appendix C, and any renewal, derivation, divisions, reissues, continuation, continuations in-part, modifications, or extensions thereof; and

2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).

X. "Drug-Coated Balloon Manufacturing Equipment" means all machinery and equipment, molds, dies and other tools primarily used or held for use in the manufacture of Drug-Coated Balloons, wherever located, other than with respect to packaging or labeling.

Y. "Drug-Coated Balloon Manufacturing Technology" means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent primarily related to the manufacture of Drug-Coated Balloons, including, but not limited to, the

following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

Z. "Drug-Coated Balloon Plant Lease" means the lease of the facility currently used by Covidien in Fremont, California, dated February 8, 2012, as amended from time to time, by and among Covidien LP (as successor-in-interest to CV Ingenuity Corp.), John Arrillaga, or his Successor Trustee, UTA dated 7/20/77, as amended, and Richard T. Perry, or his Successor Trustee, UTA dated 7/20/77, as amended.

AA. "Drug-Coated Balloon Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are primarily related to the research, Development, manufacture, marketing, distribution, or sale of Drug-Coated Balloons.

BB. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, Agency, or government commission, or any judicial or regulatory authority of any government.

CC. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order.

DD. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

EE. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

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. "Plymouth Facility Manufacturing Equipment" means all assets purchased by Covidien for exclusive use in the manufacture, research, and Development of Drug-Coated Balloons at its Plymouth, Minnesota plant.

HH. "PTA Intellectual Property" means all of the following owned by Covidien as of the Closing Date to the extent primarily related to the research, Development, and manufacture of PTA Products (except to the extent related to any Retained Product):

1. United States and foreign patents and patent applications in each case filed, or in existence, on or before the Closing Date and covered under the patent families listed in Non-Public Appendix D, and any renewal, derivation, divisions, reissues, continuation, continuations in-part, modifications, or extensions thereof; and

2. Copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).

II. "PTA License" means a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license to the Commission-Approved Acquirer under any PTA Intellectual Property and PTA Product Manufacturing Technology to operate the Drug-Coated Balloon Business, including (i) to make, have made,

use, offer to sell, sell, import, and export any Drug-Coated Balloons, and (ii) the research, Development, and manufacture of PTA Products for the incorporation of such PTA Products into Drug-Coated Balloons.

JJ. "PTA Materials" means copies of the following items (or relevant excerpts thereof) owned by and in possession of Covidien as of the Closing Date (except to the extent related to any Retained Product):

1. All PTA Product Scientific and Regulatory Material;

2. All books, records and files with respect to PTA Intellectual Property; and

3. All books, records and files with respect to PTA Product Manufacturing Technology or otherwise to the extent primarily related to the research, Development, and manufacture of PTA Products.

KK. "PTA Product(s)" means the following:

1. Covidien's EverCross™ .035 percutaneous transluminal angioplasty balloon catheter;

2. Covidien's NanoCross Elite™ .014 percutaneous transluminal angioplasty balloon catheter;

3. Covidien's PowerCross™ .018 percutaneous transluminal angioplasty balloon catheter; and

4. Covidien's RapidCross™ .014 percutaneous transluminal angioplasty balloon catheter.

provided, however, that PTA Products shall not include any Retained Product.

LL. "PTA Product Manufacturing Technology" means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether

patented, patentable or otherwise), in each case to the extent primarily related to the manufacture of PTA Products, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

MM. "PTA Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are primarily related to the research, Development, or manufacture of PTA Products.

NN. "Remedial Agreement(s)" means the following:

1. The Divestiture Agreement; and

2. Any agreement between a Respondent and a Commission-Approved Acquirer (or between a Divestiture Trustee and a Commission-Approved 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.

OO. "Retained Business" means:

1. All right, title and interest in and to the name "Covidien," 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 other than Stellarex™;

2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products;

3. Cash and cash equivalents; tax assets; stock in any entity; corporate and tax records of any entity; insurance policies; benefit plans; and accounts receivable arising prior to the Closing Date; and

4. Any assets, tangible or intangible, businesses or goodwill owned by Medtronic.

PP. "Retained Product" means any product researched, Developed, manufactured, marketed, sold or distributed by Covidien other than Drug-Coated Balloons or PTA Products, and includes but is not limited to (i) any balloon-expandable stent, including the Visi-Pro® Peripheral Stent System and (ii) any high-pressure balloon product.

QQ. "Spectranetics" means The Spectranetics Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns, its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by The Spectranetics Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

RR. "Transition Services Agreement" means an agreement by Respondents to provide all advice, consultation, and assistance reasonably necessary for any Commission-Approved Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any assets, right, or interest relating to the Assets To Be Divested.

SS. "Third Party(ies)" means any non-governmental Person other than the Respondents, or the Commission-Approved Acquirer.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Covidien shall divest the Assets To Be Divested, absolutely and in good faith, to Spectranetice pursuant to, and in accordance with, the Divestiture Agreement(s) (which agreement(s) 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 the Commission-Approved Acquirer or to reduce any obligations of Covidien under such agreement(s)), and each such agreement, if it becomes a Remedial Agreement, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Assets To Be Divested to Spectranetic 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 Spectranetics is not an acceptable purchaser of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Spectranetics, in whole or in part, as directed by the Commission, and shall divest the Assets To Be Divested within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Assets To Be Divested to Spectranetics 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 Assets To Be Divested to Spectranetics (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. Respondents shall secure all consents and waivers with respect to any rights expressly granted to Covidien by Third Parties or Government Entities, or to Third Parties or Government Entities by Covidien, from all Third Parties or Government Entities necessary for the divestiture of the Assets To Be Divested to the Commission-Approved Acquirer, or for the continued research, Development, manufacture, distribution, marketing or sale of Drug-Coated Balloons or the continued research, Development, or manufacture of PTA Products for the incorporation of such PTA Products into Drug-Coated Balloons by the Commission-Approved Acquirer. Respondents' obligations shall be satisfied as follows:

1. Prior to the Closing Date, Respondents shall provide all required notices to Third Parties and Government Entities in connection with agreements where no consent from such Third Parties and Government Entities is required to assign the rights granted to Covidien, including complying with any required notice requirements as to time prior to the transfer;

2. Prior to the Closing Date, Respondents shall secure all consents or waivers to assign to the Commission-Approved Acquirer all the agreements listed on Non-Public Appendix E; and

3. Within fifteen (15) days after the Closing Date, Respondents shall secure all the consents or waivers to assign to the Commission-Approved

Acquirer at least 90 percent of the agreements listed in Non-Public Appendix F.

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Assets To Be Divested;

2. deliver all Confidential Business Information related to the Assets To Be Divested to the Commission-Approved 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 Commission-Approved Acquirer, provide the Commission-Approved Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with the requirements of this Order, any Remedial Agreement, or any Law) related to the Drug-Coated Balloon Business, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person

except in connection with the divestiture of the Assets To Be Divested, to the Interim Monitor, if any, and to the Divestiture Trustee, if any, *provided however*, that:

1. This Paragraph II.D. shall not apply to any Confidential Business Information related to the Drug-Coated Balloon Business that Respondents can demonstrate to the Commission that Medtronic obtained other than in connection with the Acquisition;

2. This Paragraph II.D. shall not apply to any Confidential Business Information to the extent related to Retained Products, the Retained Business or PTA Products;

3. This Paragraph II.D. shall not apply to the use of Confidential Business Information by Respondents in complying with the requirements or obligations of the Laws of the United States or other countries;

4. This Paragraph II.D. shall not apply to the use of Confidential Business Information by Respondents to defend against legal claims brought by any Third Party, or investigations or enforcement actions by Government Entities; and

5. This Paragraph II.D. shall not apply to the use of Confidential Business Information by Respondents to the extent consented to by the Commission-Approved Acquirer;

provided, however, that Respondents shall require any Covidien employees or agents who as of the Closing Date have access to Confidential Business Information related to the Drug-Coated Balloon Business to enter into, no later than thirty (30) days after the Closing Date, confidentiality agreements with Respondents and the Commission-Approved Acquirer not to disclose such Confidential Business Information except as set forth in this Paragraph II.D.

E. Respondents shall:

1. Enter into an agreement to supply PTA Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of one (1) year following the Closing Date; and

2. At the Commission-Approved Acquirer's option, renew the supply agreement for PTA Products for up to two (2) additional one-year terms under such terms and conditions as approved by the Commission.

F. Respondents shall:

1. Not later than fifteen (15) days before the Closing Date (a) provide to the Commission-Approved Acquirer a list of all Drug-Coated Balloon Employees; and (b) in compliance with all Laws, allow the Commission-Approved Acquirer to inspect the personnel files and other documentation relating to such Drug-Coated Balloon Employees;

2. Not later than fifteen (15) days before the Closing Date provide an opportunity for the Commission-Approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any one or more of the Drug-Coated Balloon Employees; and (b) to make offers of employment to any one or more of the Drug-Coated Balloon Employees;

3. Not interfere, directly or indirectly, with the hiring or employing by the Commission-Approved Acquirer of Drug-Coated Balloon Employees, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the Commission-Approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those

individuals to be employed by the Commission-Approved Acquirer. In addition, Respondents shall not make any counteroffer to a Drug-Coated Balloon Employee who receives a written offer of employment from the Commission-Approved Acquirer; and

4. Not, for a period of one (1) year following the Closing Date without the Commission-Approved Acquirer's prior written consent, directly or indirectly, solicit or otherwise attempt to induce any of the Drug-Coated Balloon Employees to terminate their employment with the Commission-Approved Acquirer; *provided, however,* that Respondents may:

   a. Advertise for employees in newspapers, trade publications or other media not targeted specifically at Drug-Coated Balloon Employees, or

   b. Hire Drug-Coated Balloon Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph.

Provided, however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Drug-Coated Balloon Employee after the Closing Date where the Commission-Approved Acquirer has notified Respondents in writing that the Commission-Approved Acquirer does not intend to make an offer of employment to that Drug-Coated Balloon Employee.

G. Respondents shall include in any Remedial Agreement at the option of the Commission-Approved Acquirer a Transition Services Agreement, subject to the approval of the Commission, *provided however*, the term of any Transition Services Agreement shall be at the option of the Commission-Approved Acquirer, but not longer

than two (2) years from the Closing Date unless extended due to breach by Respondents.

H. The purpose of the divestiture of the Assets To Be Divested to a Commission-Approved Acquirer is to create an independent, viable and effective competitor in the Drug-Coated Balloon market and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim 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 Remedial Agreement(s).

B. The Commission shall select the Interim 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 a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve at least until the latter of (i) the end of the supply agreement entered into pursuant to Paragraph II.E. of this Order, and (ii) the end of the Transition Services Agreement entered into pursuant to Paragraph II.G. of this Order.

E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order, including, but not limited to, its obligations related to the Assets To Be Divested. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with this Order.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the

Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-Approved Acquirer, with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

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, if required, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Assets To Be Divested. 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 Assets To Be Divested. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General

from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to 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 divest the Assets To Be Divested.

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 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 Assets To Be Divested 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 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 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 reasonably 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 the Assets To Be Divested.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross

negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the Divestiture required by this Order.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

V.

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 obligation to the Acquirer 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.

VI.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.C. of this Order, and every sixty (60) days thereafter until Respondents have fully complied with the Paragraphs II.E. and II.F. 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 submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time:

1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;

2. A detailed plan to deliver all Confidential Business Information required to be delivered to the Commission-Approved Acquirer pursuant to Paragraph II.C. and agreed upon by the Commission-Approved Acquirer and the Interim Monitor (if applicable) and any updates or changes to such plan;

3. A description of all Confidential Business Information delivered to the Commission-Approved Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;

4. A description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and

5. A description of all technical assistance provided to the Commission-Approved Acquired during the reporting period.

VII.

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

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and with reasonable notice to Respondents made to their principal United States offices, 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; and

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2025.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted from Medtronic, Inc. ("Medtronic") and Covidien plc ("Covidien"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from Medtronic's proposed acquisition of Covidien. Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, the parties are required to divest Covidien's drug-coated balloon catheter business to The Spectranetics Corporation ("Spectranetics").

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 decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

Pursuant to a Transaction Agreement dated June 15, 2014, Medtronic proposes to merge with Covidien in exchange for cash and stock valued at approximately $42.9 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 substantially lessening competition in the U.S. market for drug-coated balloon catheters indicated for the femoropopliteal ("fem-pop") artery. 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 Minneapolis, Minnesota, Medtronic is a global leader in medical technology that develops, manufactures, and sells device-based medical therapies. Medtronic is

developing a drug-coated balloon catheter indicated for the fem-pop artery that is currently in the Food and Drug Administration ("FDA") approval process.

Headquartered in Dublin, Ireland, Covidien develops, manufactures, and sells medical devices and medical supplies. Like Medtronic, Covidien has a drug-coated balloon catheter indicated for the fem-pop artery under development for which it is seeking FDA approval.

The Relevant Product And Market Structure

Drug-coated balloon catheters indicated for the fem-pop artery are used to treat peripheral arterial disease in the fem-pop artery, an artery located above the knee. Peripheral arterial disease results from atherosclerosis, the narrowing of blood vessels due to plaque buildup. Percutaneous transluminal angioplasty ("PTA") balloon catheters are catheters with balloons that, once inserted into an artery, are expanded to push plaque against the artery's lumen wall to reopen blood flow. Drug-coated balloon catheters are a type of PTA balloon catheter that releases paclitaxel, a cell-proliferation inhibiting drug, into the artery wall during a medical procedure to prevent restenosis, or re-narrowing, of the artery.

The United States is the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition. Drug-coated balloon catheters are medical devices that are regulated by the FDA. As such, drug-coated balloon catheters sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

The U.S. market for drug-coated balloon catheters indicated for the fem-pop artery is highly concentrated with only one current supplier, C.R. Bard, Inc. Medtronic and Covidien are likely to enter as the second and third U.S. suppliers, respectively. While there are other firms with drug-coated balloon catheters in development for sale in the U.S. market, Medtronic and Covidien are the only two anticipated market participants that have advanced to the clinical-trial stage of the FDA approval process for drug-coated balloon catheters indicated for the fem-pop artery.

Entry

Entry into the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery 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 a drug-coated balloon catheter 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.

Effects Of The Acquisition

The Proposed Acquisition would cause significant competitive harm to consumers in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery. The merger would combine the second and third anticipated entrants into the market, likely prolonging a duopoly in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery. Because Medtronic and Covidien are the only two anticipated entrants that have advanced to the clinical trial stage of the FDA approval process, the consolidation of the two firms would deprive consumers of the benefits of a third competitive entrant into the market for a substantial period of time. As a result, the Proposed Acquisition likely would reduce the substantial additional price competition that would have resulted from an additional U.S. supplier of drug-coated balloon catheters indicated for the fem-pop artery. Further, the Proposed Acquisition likely would reduce innovation in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery.

The Consent Agreement

The Consent Agreement eliminates the competitive concerns raised by Medtronic's proposed acquisition of Covidien by requiring the parties divest to Spectranetics all of the assets and resources needed for it to become an independent, viable, and

effective competitor in the U.S. market for drug-coated balloon catheters indicated for the fem-pop artery.

Spectranetics possesses the industry and regulatory experience to achieve FDA approval of Covidien's drug-coated balloon catheter and become the third entrant into the U.S. market. Headquartered in Colorado Springs, Colorado, Spectranetics is a leader in peripheral vascular solutions with a portfolio of products that is highly complementary to Covidien's drug-coated balloon catheter. Spectranetics manufactures and markets a range of devices to treat peripheral and coronary arterial disease and is well positioned to restore the benefits of competition that would be lost through the Proposed Acquisition.

Pursuant to the Order, Spectranetics will receive all rights and assets related to Covidien's drug-coated balloon catheter products, including all of the intellectual property used in the drug-coated balloon catheter business. In addition, Spectranetics will take over the manufacturing facility where Covidien currently coats the PTA balloon catheters with paclitaxel. The Order further requires that Covidien provide Spectranetics with a worldwide license to produce the PTA balloon catheters incorporated into the drug-coated balloon catheters. In order to ensure continuity of supply of a critical input, the Order requires that the parties supply Spectranetics with PTA balloon catheters for up to three years while Spectranetics transitions to independent manufacturing. This provision ensures that drug-coated balloon catheters will continue to be available for ongoing clinical trials while Spectranetics works to obtain FDA approval to manufacture the PTA balloon catheters independently.

To ensure that the divestiture is successful, the Order requires the parties to enter into a transitional services agreement with Spectranetics to assist the company in establishing its manufacturing capabilities and securing all necessary FDA approvals. Further, the Order requires that the parties transfer all confidential business information to Spectranetics, as well as provide access to employees who possess or are able to identify such information. Spectranetics also will have the right to interview and offer employment to employees associated with Covidien's drug-coated balloon catheter business.

Analysis to Aid Public Comment

The parties must accomplish the divestiture no later than ten days after the consummation of the Proposed Acquisition. If the Commission determines that Spectranetics 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.

To ensure compliance with the Order, the Commission has agreed to appoint an Interim Monitor to ensure that Medtronic and Covidien 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 Spectranetics. 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 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

PAYMENTSMD, LLC

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

Docket No. C-4505; File No. 132 3088
Complaint, January 27, 2015 – Decision, January 27, 2015

This consent order addresses deceptive acts and practices regarding the collection of consumers' sensitive health information from third parties. The respondent, PaymentsMD, operated a website where consumers could pay their medical bills. They used this sign-up process for a "patient portal" as a pathway to deceptively seek consumer consent to obtain detailed medical information about the consumers. The complaint alleges PaymentMD misled thousands of consumers who signed up for the online billing portal by failing to adequately inform them that the company would seek highly detailed medical information from pharmacies, medical labs, and insurance companies. The consent order requires PaymentsMD to destroy any information collected related to the patient health report service. In addition, the respondent is banned from deceiving consumers about the way it collects and uses information, including how collected information might be shared with or collected from a third party. The respondent must also obtain consumers' affirmative express consent before collecting health information about a consumer from a third party. The Commission entered a similar order against PaymentsMD's CEO, Michael C. Hughes. *See* 159 F.T.C. 60.

Participants

For the *Commission: Jacquelie Connor, David Lincicum,* and *Kevin Moriarty.*

For the *Respondent: Kristy Brown* and *Kimberly Peretti, Alston & Bird LLP.*

COMPLAINT

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

1. Respondent PaymentsMD, LLC ("PaymentsMD") is a Georgia limited liability company with its principal office or place

of business at 5665 New Northside Dr., Suite 320, Atlanta, GA 30328. PaymentsMD is a wholly owned subsidiary of ApolloMD Business Services, LLC.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since 2008, PaymentsMD has provided billing services to medical providers. Medical providers that have contracted with PaymentsMD direct their patients to the PaymentsMD website, where consumers are able to enter their invoice number and credit card information to pay their medical bills.

4. In December 2011, PaymentsMD launched a free "Patient Portal" product that provided consumers with a place to view their billing history. Unlike the bill-payment service, which enables consumers only to make a one-time payment, the billing history service of the Patient Portal enables consumers to access and view records of the consumers' past and upcoming payment obligations for any medical providers that use PaymentsMD's billing services. The Patient Portal service enabled consumers to pay their bills and to view their balance, payments made, adjustments taken, and information for other service dates.

5. In June 2012, PaymentsMD entered into an agreement with Metis Health LLC ("Metis Health") to develop an entirely new service called Patient Health Report, a fee-based service that would enable consumers to access, review, and manage their consolidated health records through a Patient Portal account. PaymentsMD and Metis Health agreed to split the profits. Both companies participated in developing the disclosures and authorizations for the service, and how and when this information would be presented to consumers during the Patient Portal registration process.

6. As described further below, in order to populate the Patient Health Report, respondent tried to obtain the sensitive health information of consumers registering for the Patient Portal from health insurance plans, pharmacies, and a medical testing

lab, without appropriate authorization from those consumers. Indeed, many consumers registering for the Patient Portal had no idea that respondent would seek to collect their sensitive health information from third parties for use in the Patient Health Report service.

THE PATIENT PORTAL INTERFACE FAILED TO DISCLOSE THAT RESPONDENT WOULD COLLECT CONSUMERS' SENSITIVE HEALTH INFORMATION FOR THE PATIENT HEALTH REPORT

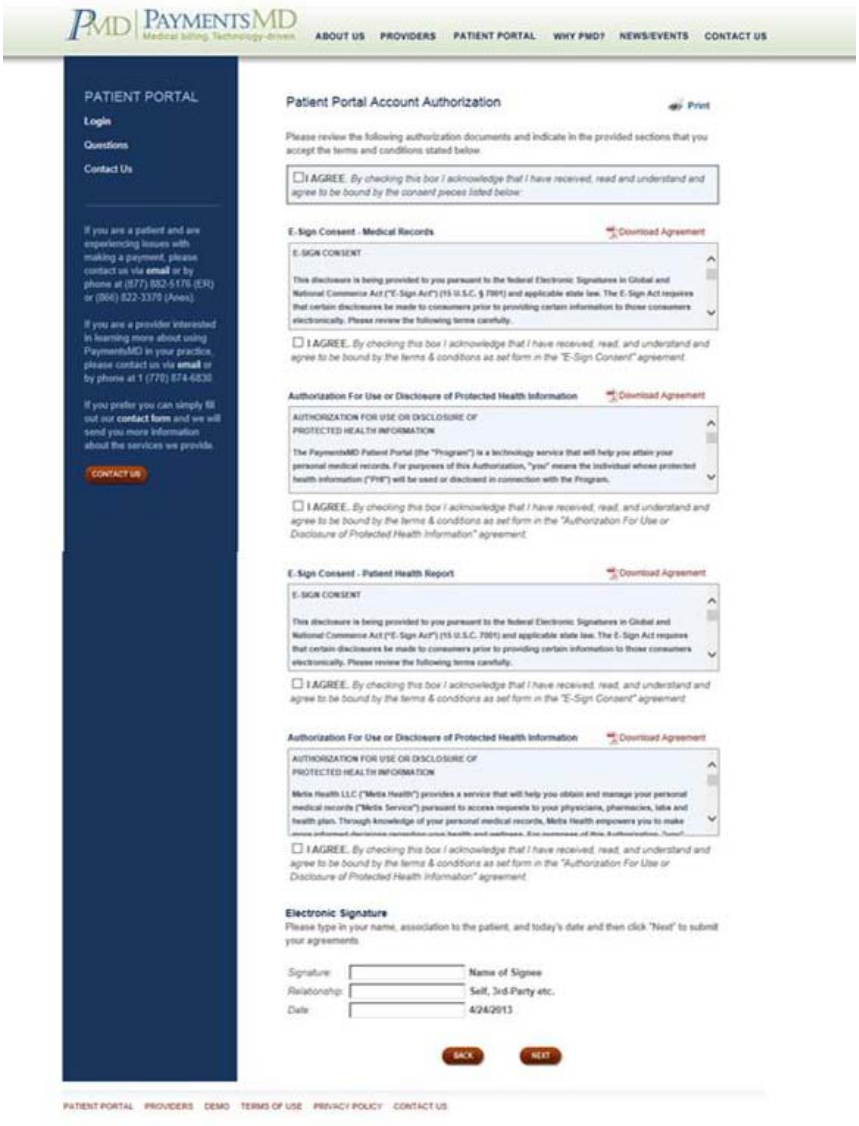
7. PaymentsMD's home page described the Patient Portal as a medical billing related service. It stated that "At PaymentsMD, we can help you navigate through the maze of medical billing, reimbursement and payment processes. We also make it easy for you to maintain current information about your insurance coverage and to make payments over the Internet, at your convenience." In order to register for the Patient Portal, a consumer could click on a button labeled "Patient Portal Login." (Exhibit A).

8. Consumers could then either enter their login credentials or click on a link that stated "Don't have an account? Create one now." (See Exhibit B).

Consumers that followed the link would then be taken to the Payment Portal registration page, which appeared as follows. (Exhibit C).

The registration page stated that registering for the Payment Portal service would "allow you to: View your original balance; View any payments made; View any adjustments taken; View your current balance; View information for other service dates." At no point in this process was it stated that respondent would be seeking consumers' sensitive health information from third parties for use in a Patient Health Report service.

9. Consumers who clicked the "Submit" button were taken to a "Patient Portal Account Authorization" page, which required four authorizations. The page presented the authorizations in four boxes that showed only six lines of text at a time. (Exhibit D).



Under each text box was a check box that consumers could select in order to proceed with the registration process. Alternatively, consumers could select a single box at the top of the page, which would populate all four boxes to indicate that each of the four was authorized. Although consumers who scrolled through the second and fourth boxes would have seen a statement that "[H]ealth records related to your treatment . . . may be used or disclosed pursuant to this Authorization," the site design simultaneously made it hard to read the authorizations in their entirety, and easy

to skip over them by clicking a single check box that preceded all of the authorizations.

10. Consumers would reasonably believe that all four authorizations were to be used to provide the Patient Portal billing services for which they were registering. In fact, respondent used two of the four purported authorizations to allow it to collect sensitive health information from third parties for use with the Patient Health Report service.

11. Although PaymentsMD's home page and login page included links that allowed consumers to "click here to learn more" about the Patient Health Report service (see Exhibit A), these links conveyed that the Patient Health Report was a separate service from the Patient Portal. At no point in registering for the Patient Portal would it have been clear to the consumer that they were purportedly giving respondent permission to obtain their sensitive health information from third parties for use in the Patient Health Report service.

RESPONDENT SOUGHT CONSUMERS' SENSITIVE HEALTH INFORMATION WITHOUT THEIR KNOWLEDGE OR CONSENT

12. Respondent requested sensitive health information from a large number of health plans, pharmacies, and a medical lab about everyone who registered for the Patient Portal. These requests used consumers' name, birth date, address, and sex. The information requested was as follows:

a. Pharmacies: Medication dispensed, dispense date, instructions, prescription number, prescribing physician, quantity dispensed, refill ability, co-pay amount, amount payable as co-insurance or deductible, and amount paid by health plan.

b. Health plans: Medical information (procedures, diagnoses, dates of service, medical providers, co-pay amount, amount payable for co-insurance or deductible, and the amount paid by health plan); prescription information (medications dispensed, dispense dates, prescription number, prescribing

physician, quantity dispensed, refill ability, co-pay amount, amount payable as coinsurance or deductible, and the amount paid by health plan); and lab information (test performed, date, laboratory, physician, co-pay, amount payable as co-insurance or deductible, and amount paid by health plan).

c. Laboratory: Lab test performed, date, laboratory, test results, normal range for test values, ordering physician, co-pay, amount payable as co-insurance or deductible, and the amount paid by health plan.

13. Metis Health sent requests to health plans that were identified using PaymentsMD's billing records. For the pharmacies, Metis Health sent requests to all major commercial pharmacies with locations near the consumers' home address, notwithstanding that neither PaymentsMD nor Metis Health had any reason to believe that the consumer had used any of those pharmacies.

14. Metis Health sent approximately 5,500 requests for consumers' health information to 31 different companies. One company fulfilled the requests. The others, concerned about the validity of the requests – which in some cases related to minors or consumers who were not in fact a customer of the company receiving the request – refused to fulfill the requests.

RESPONDENT'S SUBSEQUENT COMMUNICATIONS TO CONSUMERS GENERATED NUMEROUS COMPLAINTS

15. Initially, respondent did not inform consumers that Metis Health was attempting to collect their sensitive health information. When PaymentsMD began informing consumers, via an email sent a day after users registered for Patient Portal, numerous consumers filed complaints with PaymentsMD regarding the collection of their sensitive health information. The common themes of the complaints were that consumers did not want their information collected, and that they had only registered for the Patient Portal to track their bills. PaymentsMD ultimately did not sell any Patient Health Reports.

DECEPTIVE OMISSION
(Count 1)

16. As described in Paragraphs 3-15, respondent represented, directly or indirectly, expressly or by implication, that consumers registering for its free Patient Portal billing service could access and review their medical payment history.

17. Respondent failed to disclose adequately that, if consumers registered for its free Patient Portal billing service, respondent would also engage in a comprehensive collection from third parties of consumers' sensitive health information for the Patient Health Report service.

18. This fact would be material to consumers in deciding whether to register for the Patient Portal. Respondent's failure to disclose adequately this fact, in light of the representations made, is a deceptive act or practice.

DECEPTIVE REPRESENTATION
(Count 2)

19. As described in Paragraphs 3-15, respondent represented, directly or indirectly, expressly or by implication, that the authorizations were to be used exclusively to provide the free Patient Portal billing history service for which consumers were registering.

20. In fact, the authorizations were not used exclusively to provide the free Patient Portal billing history service for which consumers were registering. Instead, all of the authorizations were also used by respondent to attempt to collect sensitive health information for use with the Patient Health report service, and two were only used for this purpose. Therefore, this representation is false or misleading.

VIOLATIONS OF SECTION 5

21. 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 twenty-seventh day of January, 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

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

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

complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent PaymentsMD, LLC ("PaymentsMD") is a Georgia limited liability company with its principal office or place of business at 5665 New Northside Dr., Suite 320, Atlanta, GA 30328.

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

ORDER

DEFINITIONS

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

1. "Covered information" shall mean information from or about an individual consumer, including but not limited to (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) an insurance account number or other insurance information; (i) credit or debit card information; (j) credit report information; (k) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; and (l) health information, as defined below.

2. "Health information" shall mean information about an individual consumer's health or medical care, including but not limited to (a) an insurance account number or other insurance information; (b) prescription information; (c) medical records; (d)

information concerning the consumer's diagnoses or treatments; and (e) medical or health related purchases.

3. Unless otherwise specified, "respondent" shall mean PaymentsMD, LLC and its successors and assigns.

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

5. "Clear(ly) and prominent(ly)" shall mean:

   a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

   b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures: (1) are presented in an understandable language and syntax, and (2) include nothing contrary to, inconsistent with, or in mitigation of any statement contained within the disclosure or within any document linked to or referenced therein.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent uses, maintains, and protects the privacy, confidentiality, security, or integrity of covered information collected from or about consumers, including but not limited to:

A. Services for which consumers are being enrolled as part of any sign-up process;

B. The extent to which respondent will share covered information with, or seek covered information from, third parties; and

C. The purpose(s) for which covered information collected from third parties will be used.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any service, shall:

A. Separate and apart from any final "end user license agreement," "privacy policy," "terms of use" page, or similar document, clearly and prominently disclose to

consumers respondent's practices regarding the collection, use, storage, disclosure or sharing of health information prior to seeking authorization to collect health information from a third party; and

B. Obtain affirmative express consent from consumers prior to collecting health information from a third party.

III.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, shall not use, collect or permit any third party to use or collect any covered information pursuant to any authorization obtained prior to the date of service of this order from consumers registering for the Patient Portal, except for the sole purpose of offering any health-related bill-payment or bill history services. Within sixty (60) days after the date of service of the order, respondent shall permanently delete or destroy all covered information in respondent's possession or control that was collected pursuant to such authorization by or on behalf of respondent from any third party for any purpose except for the offering of any health-related bill-payment or bill history services and shall provide a written statement to the Commission, sworn under penalty of perjury, confirming that all such information has been deleted or destroyed. *Provided that*, if respondent is prohibited from deleting or destroying such information by law, regulation, or court order, respondent shall provide a written statement to the Commission, sworn under penalty of perjury, identifying any information that has not been deleted or destroyed and the specific law, regulation, or court order that prohibits respondent from deleting or destroying such information. Unless otherwise directed by a representative of the Commission, all statements required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line In the Matter of PaymentsMD, LLC, FTC File No. 1323088. *Provided, however*, that, in lieu of

overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IV.

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

A. statements disseminated to consumers that describe the extent to which respondent maintains and protects the privacy, security and confidentiality of any covered information, including, but not limited to, any statement related to a change in any website or service controlled by respondent that relates to the privacy, security, and confidentiality of covered information, with all materials relied upon in making or disseminating such statements;

B. all consumer complaints directed at respondent, or forwarded to respondent by a third party, that relate to the conduct prohibited by this order, and any responses to such complaints; and

C. all forms, websites, and other methods used to obtain affirmative express consent to collect health information from third parties; and any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question compliance with this order.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject

matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within thirty (30) days after service of this order, and to such future subsidiaries and personnel within thirty (30) days after the person or subsidiary assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons or subsidiaries receiving a copy of the order pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line In the Matter of PaymentsMD, LLC, FTC File No. 1323088. *Provided, however,* that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent within sixty (60) days after the date of service of this order, shall file

with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VIII.

This order will terminate on January 27, 2035, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to PaymentsMD, LLC ("PaymentsMD").

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

PaymentsMD's principal line of business is the delivery of electronic billing records and the collection of accounts receivable for medical providers. In December 2011, PaymentsMD launched a free "Patient Portal" product that enabled consumers to pay their bills and to view their balance, payments made, adjustments taken, and information for other service dates.

The Commission's complaint alleges that PaymentsMD deceived consumers regarding the collection of consumers' sensitive health information from third parties. In June 2012, PaymentsMD entered into an agreement with Metis Health LLC ("Metis Health") to develop an entirely new service called Patient Health Report, a fee-based service that would enable consumers to access, review, and manage their consolidated health records through a Patient Portal account. In order to populate the Patient Health Report, PaymentsMD obtained consumers' authorization to collect sensitive health information for one purpose – to track their medical bills – and then used that authority to attempt to collect a massive amount of sensitive health information, including treatment information, from third parties without consumers' knowledge or consent. Based on such authorization, sensitive health information about everyone who registered for the Patient Portal was then requested from a large number of health plans, pharmacies, and a medical lab.

The first count of the Commission's complaint alleges that PaymentsMD represented that consumers registering for their free

Patient Portal billing service could access and review their medical payment history, but failed to disclose adequately that PaymentsMD would also engage in a comprehensive collection of consumers' sensitive health information for a Patient Health Report. The second count alleges that PaymentsMD deceptively represented that the consumers' authorizations were to be used exclusively to provide the billing service.

The proposed order contains provisions designed to prevent PaymentsMD from engaging in the future in practices similar to those alleged in the complaint. Part I prohibits PaymentsMD from making any future misrepresentation regarding the extent to which it uses, maintains, and protects the privacy, confidentiality, and security of covered information collected from or about consumers, including but not limited to: (1) the services for which consumers are being enrolled as part of any sign-up process; (2) the extent to which PaymentsMD will share covered information with, or seek covered information from, third parties; and (3) the purpose(s) for which covered information collected from third parties will be used. Part II requires PaymentsMD to clearly and prominently disclose its practices regarding the collection, use, storage, disclosure or sharing of health information prior to seeking authorization to collect health information from a third party. PaymentsMD must also obtain affirmative express consent from consumers prior to collecting health information from a third party.

Part III prohibits PaymentsMD from using, collecting, or permitting any third party to use or collect any covered information pursuant to any authorization obtained prior to the date of the order from consumers registering for the Patient Portal, except for the purpose of offering health-related bill-payment or bill history services. PaymentsMD also must, within sixty days, delete all covered information that was collected in relation to the Patient Health Report service. (PaymentsMD need not destroy the information related to the bill-payment or bill history services that consumers actually signed up for.)

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires PaymentsMD to retain documents relating to its compliance with the order. The order requires that PaymentsMD retain all of the documents for a

five-year period. Part V requires dissemination of the order now and in the future to all current and future subsidiaries, principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that PaymentsMD submit a compliance report to the FTC within 60 days, and periodically thereafter 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 or order or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

PROFESSIONAL LIGHTING AND SIGN MANAGEMENT COMPANIES OF AMERICA, INC.

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

Docket No. C-4507; File No. 141 0088
Complaint, February 5, 2015 – Decision, February 5, 2015

This consent order addresses provisions in the Professional Lighting and Sign Management Companies of America ("PLASMA") bylaws that limit competition among its members. PLASMA is a non-profit corporation consisting of licensed electricians, with approximately 25 member firms across the country. PLASMA's members specialize in commercial lighting and electrical sign installation and maintenance. The complaint alleges that PLASMA violated Section 5 of the FTC Act by adopting and maintaining provisions in its Bylaws and Standard Operating Procedures that restrict members from competing in the territory of another member, that restrict price competition, and that restrict members from soliciting the customers of another member upon termination of membership in the association. Under the terms of the order, PLASMA is required to cease and desist from allocating territories, restraining price competition among its members, and restraining its members from soliciting customers. It is also required to maintain an antitrust compliance program and take other steps to further the remedial objectives of the order. The order also requires PLASMA to revise its bylaws, publicize its settlement with the FTC, and implement an antitrust compliance program.

Participants

For the *Commission: Barbara R. Blank* and *Gustav P. Chiarello.*

For the *Respondent: Edward Matto, Bricker & Ecklar 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 Professional Lighting and Sign Management Companies of America, Inc. ("Respondent" or "PLASMA"), 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. RESPONDENT

1. Respondent Professional Lighting and Sign Management Companies of America, Inc., is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Florida, with its office and principal place of business located at 1100-H Brandywine Boulevard, Zanesville, Ohio.

2. Respondent is an association of licensed electricians, with approximately 25 member firms located across the country. Respondent's members specialize in commercial lighting and electrical sign installation and maintenance. Except to the extent that competition has been restrained as alleged herein, some of Respondent's members have been and are now in competition among themselves and with other electricians.

II. JURISDICTION

3. Respondent conducts business for the pecuniary benefit of its members and is therefore a "corporation," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. The acts and practices of Respondent, including the acts and practices alleged herein, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. NATURE OF THE CASE

5. Respondent maintains a set of Member Bylaws and Standard Operating Procedures ("Bylaws") applicable to the commercial activities of its members, and requires its members to comply with its Bylaws.

6. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by designating a territory for each member, and by restricting through its Bylaws the ability of its members to compete in the designated territory of another member; to compete on price; and to solicit or compete for the customers of other members. Specifically, Respondent maintains the following provisions in its Bylaws:

a. A provision that prohibits a member from providing to a customer commercial lighting or sign services in the designated territory of another member, unless such other member first declines to perform the work;

b. A price schedule governing the price of any such work performed in the designated territory of another member; and

c. A provision that bars any member, for one year following termination of membership, from soliciting or competing for the customers (or prospective customers) of another member.

7. In furtherance of the combination alleged in Paragraph 6, Respondent established a grievance committee to uphold and maintain industry standards and member business practices as set forth in Respondent's Bylaws. The grievance committee provides an avenue for resolving alleged violations of the Bylaws, as well as a process through which Respondent may sanction violations of the Bylaws.

IV. VIOLATION CHARGED

8. The purpose, effect, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs 6 and 7 has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among licensed electricians, and by depriving consumers and others of the benefits of free and open competition among licensed electricians.

9. The combination, agreement, acts and practices alleged in Paragraphs 6 and 7 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 fifth day of February, 2015, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Professional Lighting and Sign Management Companies of America, Inc. ("Respondent" or "PLASMA") 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 Act, 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, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order ("Order"):

1. Respondent Professional Lighting and Sign Management Companies of America, Inc., is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Florida, with its office and principal place of business located at 1100-H Brandywine Boulevard, Zanesville, Ohio.

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 "PLASMA" means Professional Lighting and Sign Management Companies of America, Inc., its directors, boards, officers, employees, agents, representatives, councils, committees, foundations, divisions, 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. "FTC Settlement Statement" means the statement attached to this Order as Appendix A.

F. "Leaders" means PLASMA's board of directors and officers.

G. "Member" means a member of PLASMA.

H. "Organization Documents" means any documents relating to the governance, management, or direction

of PLASMA, including, but not limited to, bylaws, rules, regulations, codes of ethics, standard operating procedures, policy statements, interpretations, commentaries, or guidelines.

I. "Regulating" means (1) adopting, maintaining, or enforcing any rule, regulation, standard operating procedure, interpretation, ethical ruling, policy, or commentary; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

J. "Services" or "Servicing" means the installation or maintenance of any lighting, electrical sign, or related project performed in exchange for compensation.

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 an 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. Regulating, restricting, restraining, impeding, or interfering with the provision of Services by Members to customers in any geographic area;

B. Regulating, restricting, restraining, impeding, or interfering with Members' setting of rates, prices, or fees for any Services;

C. Regulating, restricting, restraining, impeding, or interfering with Members' solicitation of, or competition for, the customers of any other Member.

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from requesting, but not requiring, a Member to identify any geographic region(s) within which such Member can quickly respond for service. PLASMA shall place no restrictions

on the number of Members that may identify a particular geographic region as a "quick response" region.

III.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall:

1. Post and thereafter maintain for three (3) years on PLASMA's website, together with a link from Respondent's home or menu page that is entitled "Antitrust Compliance," the following items:

a. The FTC Settlement Statement; and

b. 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, employees, and Members.

B. No later than sixty (60) days from the date this Order is issued Respondent shall:

1. Remove from PLASMA's Organization Documents and PLASMA's website any statement that is inconsistent with Paragraph II. of this Order, and

2. Publish on PLASMA's website, alongside the items required by Paragraph III.A.1, any revisions of PLASMA's Organization Documents.

C. For a period of three (3) years after this Order is issued, distribute electronically or by other means, a copy of the FTC Settlement Statement to each:

1. New Member no later than thirty (30) days after the date of commencement of the membership; and

2. Member who receives a membership renewal notice at the time the Member receives such notice.

D. 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 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 received from any person relating to Respondent's compliance 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, including but not limited to:

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 Chief Executive Officer of Respondent, after which thee-year period a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a member of the Board of Directors, or employee of Respondent.

C. For a period of three (3) 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 (including, but not limited to, its Leaders, employees, and Members) 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, employees, and Members for failure to comply fully with this Order.

E. For a period of three (3) years from the date this Order is issued, Respondent shall conduct a presentation at each annual meeting of PLASMA 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, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 5, 2035.

By the Commission.

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 Professional Lighting and Sign Management Companies of America, Inc. ("PLASMA"). The Commission's complaint ("Complaint") alleges that PLASMA, 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 Bylaws and Standard Operating Procedures that restrict members from competing in the territory of another member, that restrict price competition, and that restrict members from soliciting the customers of another member upon termination of membership in the association.

Under the terms of the proposed Consent Agreement, PLASMA is required to cease and desist from allocating territories, restraining price competition among its members, and restraining its members from soliciting customers. It is also required to maintain an antitrust compliance program and take other steps to further the remedial objectives of the proposed order.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed order, subject to final approval, contained in the Consent Agreement. 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").

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way to modify their terms.

The Consent Agreement is for settlement purposes only and does not constitute an admission by PLASMA 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

PLASMA is a non-profit corporation consisting of licensed electricians, with approximately 25 member firms across the country. PLASMA's members specialize in commercial lighting and electrical sign installation and maintenance.

B. The Anticompetitive Conduct

PLASMA maintains a set of Member Bylaws and Standard Operating Procedures ("Bylaws") applicable to the commercial activities of its members, and requires its members to comply with its Bylaws. PLASMA maintains the following provisions in its Bylaws:

- A provision that prohibits a member from providing to a customer commercial lighting or sign services in the designated territory of another member, unless such other member first declines to perform the work;

- A price schedule governing the price of any such work performed in the designated territory of another member; and

- A provision that bars any member, for one year following termination of membership, from soliciting or competing for the customers (or prospective customers) of another member.

PLASMA also established a grievance committee to resolve alleged violations of the Bylaws, as well as a process through which PLASMA could sanction violations of the Bylaws.

II. The Allegations

The Complaint alleges that PLASMA has violated Section 5 of the Federal Trade Commission Act by designating a territory for each member, and by restricting through its Bylaws the ability of members to compete in the designated territory of another member; to compete on price; and to solicit or compete for the customers of other members.

The Complaint alleges that the purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of PLASMA has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among licensed electricians.

III. The Proposed Order

The Proposed Order has the following substantive provisions: Paragraph II requires PLASMA to cease and desist from restraining its members from competing in the territories of other members; from restraining price competition among members; and from restraining members from soliciting the customers of other members upon the termination of membership in the association. The Proposed Order does not prohibit PLASMA from requesting that its members identify any geographic region(s) within which such members can quickly respond for service. However, PLASMA may not place restrictions on the number of

members that may identify a particular geographic region as a "quick response" region.

Paragraph III of the Proposed Order requires PLASMA to remove from its website and organization documents any statement inconsistent with the Proposed Order. PLASMA must distribute a statement describing the Consent Agreement ("the Settlement Statement") to PLASMA's board of directors, officers, employees, and members. Paragraph III also requires PLASMA to provide all new members and all members who receive a membership renewal notice with a copy of the Settlement Statement.

Paragraph IV of the Proposed Order requires PLASMA to design, maintain, and operate an antitrust compliance program. PLASMA will have to appoint an Antitrust Compliance Officer for the duration of the Proposed Order. For a period of three years, PLASMA will have to provide annual training to its board of directors, offices, and employees, and conduct a presentation at its annual conference that summarizes PLASMA's obligations under the Proposed Order and provides context-appropriate guidance on compliance with the antitrust laws. PLASMA must also implement policies and procedures to enable persons to ask questions about, and report violations of, the Proposed Order and the antitrust laws confidentially and without fear of retaliation, and to discipline its leaders, employees, and members for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed order impose certain standard reporting and compliance requirements on PLASMA.

The Proposed Order will expire in 20 years.

Initial Decision

IN THE MATTER OF

ECM BIOFILMS, INC.

INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. D-9358; File No. 122 3118
Complaint, October 18, 2013 – Initial Decision, January 28, 2015

This Initial Decision addresses allegations that ECM Biofilms, Inc. ("ECM") violated Section 5 of the FTC Act by deceptively claiming, and providing others with the means to claim, that plastics treated with ECM's proprietary additive would completely biodegrade in a landfill within a period ranging from nine months to five years. In October 2013, the Commission filed an administrative complaint against ECM, alleging that ECM's MasterBatch Pellets additives failed to enhance the biodegradability of plastic products as advertised and that ECM lacked any substantiation to prove its advertised claims. Following an administrative hearing, the Administrative Law Judge ("ALJ") ruled that ECM's claims that plastics treated with its additives would biodegrade in less than five years deceived consumers in violation of the FTC Act. Further, ECM provided the means to promote this deception to others in the supply chain. However, ECM did not violate the FTC Act by claiming that plastics treated with its additives were "biodegradable" generally. Following his decision, the ALJ issued an order barring ECM from representing – or providing others the means to represent – that any product can biodegrade within any time period unless it has "competent and reliable scientific evidence" supporting the representation.

Participants

For the *Commission: Jonathan Cohen, Arturo DeCastro, Elisa Jillson, Katherine Johnson, Joshua Millard,* and *Benjamin Theisman.*

For the *Respondent: Peter Arhangelsky, Lou Caputo, Jonathan Emord,* and *Bethany Kennedy, Emord & Associates P.C.*

INITIAL DECISION

By CHAPPELL, MICHAEL D., Chief Administrative Law Judge.

I. INTRODUCTION

A. Summary of The Complaint And Answer

The Administrative Complaint in this case ("Complaint"), issued by the Federal Trade Commission ("FTC" or "Commission") on October 13, 2013 against Respondent ECM BioFilms, Inc. ("Respondent" or "ECM"), alleges that Respondent, a manufacturer and seller of a plastic additive known as "MasterBatch Pellets" (the "ECM Additive"), violated Section 5 of the Federal Trade Commission Act ("FTC Act") by misrepresenting the biodegradability of plastics made with the ECM Additive ("ECM Plastics"). Specifically, paragraph 9 of the Complaint alleges that:

> 9. Through [various marketing and promotional materials], respondent has represented, expressly or by implication, that:
>
> A. ECM Plastics are biodegradable, *i.e.*, will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
>
> B. ECM Plastics are biodegradable in a landfill;
>
> C. ECM Plastics are biodegradable in a stated qualified timeframe; and
>
> D. ECM Plastics have been shown to be biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe under various scientific tests including, but not limited to, ASTM D5511.

Complaint ¶ 9A-D.

The Complaint further alleges:

10. In truth and in fact:

A. ECM Plastics will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

B. ECM Plastics will not completely break down and decompose into elements found in nature within a reasonably short period of time after disposal in a landfill;

C. ECM Plastics will not completely break down and decompose into elements found in nature within respondent's stated qualified timeframe after customary disposal; and

D. ECM Plastics have not been shown to completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe, under various scientific tests, including, but not limited to, ASTM D5511.

Complaint ¶ 10 A-D. As discussed more fully *infra*, FTC Complaint Counsel ("Complaint Counsel") asserts that "a reasonably short period of time" for complete biodegradation is less than one year, and "customary disposal" is disposal in a municipal solid waste ("MSW") landfill. In addition, as further addressed *infra*, the "stated qualified timeframe" for biodegradation challenged by Complaint Counsel is the period of 9 months to 5 years.

The Complaint charges that the representations set forth in Paragraph 9 of the Complaint, listed above, are false or misleading. Complaint ¶ 11. The Complaint further charges that these representations are false or misleading because, at the time they were made, Respondent did not possess and rely upon a reasonable basis that substantiated such representations. Complaint ¶¶ 12-13. Moreover, the Complaint alleges, Respondent distributed the false or misleading representations alleged in the Complaint, through its marketing and promotional materials, to its customers and distributors, and thereby provided those entities with the "means and instrumentalities" for the commission of deceptive acts and practices. Complaint ¶¶ 14-15.

The Notice Order issued with the Complaint seeks to prohibit Respondent, *inter alia*, from making any "unqualified" claim that ECM Plastics are "biodegradable" unless it can substantiate, with competent and reliable scientific evidence, that ECM Plastics will biodegrade completely, in a landfill, within one year. Notice Order, Part I.A.i. In addition, under the Notice Order, any "qualified" claim as to the rate and extent of biodegradation of ECM Plastics must also be substantiated by competent and reliable scientific evidence. Notice Order, Part I.A.ii.

Respondent filed its Answer and Affirmative Defenses to the Complaint on November 15, 2013. Respondent denies that it misrepresented the characteristics of its product, or that it lacks substantiation for its biodegradable claims. Answer ¶¶ 11-13. Specifically, Respondent maintains that it provides its customers, who Respondent alleges are highly sophisticated, with accurate and non-misleading information concerning the nature and characteristics of the ECM Additive. In addition, Respondent avers, competent and reliable scientific testing proves that ECM Plastics will fully biodegrade, including in landfills. Answer ¶ 9A-D. Respondent also challenges the definition of "biodegradable" employed by the FTC and by Complaint Counsel in this case, derived from the October 2012 Revised Guides For The Use Of Environmental Marketing Claims ("Green Guides"), which requires items claimed to be "biodegradable" to completely biodegrade in a landfill within one year. According to Respondent, this definition conflicts with the representations made by ECM and with the understanding of ECM's customers

and the scientific community; is unworkable; and is arbitrary and capricious. Answer ¶ 10A-D. Respondent further denies that it engaged in any deceptive trade practices, or provided others with the means and instrumentalities to do so. Answer ¶¶ 14-15.

Respondent further interposes a number of defenses, including that the Complaint does not serve the public interest; the Notice Order barring biodegradable claims, unless such item is demonstrated to completely biodegrade in a landfill within one year, if implemented, will violate the First Amendment to the United States Constitution by suppressing truthful speech; the alleged misrepresentations were not material to ECM's customers; the Complaint constitutes arbitrary and capricious agency action; and these administrative proceedings violate the due process protections of the Constitution by failing to properly separate the FTC's prosecutorial and adjudicative functions. Answer at 1-2, 13-16.

B. Procedural History

The administrative trial in the instant case began on August 5, 2014, and concluded on August 29, 2014. By Order dated September 4, 2014, the hearing record was closed. Over 1,760 exhibits were admitted into evidence, 29 witnesses testified, either live or by deposition, and there are 3,006 pages of trial transcript. The parties' proposed findings of fact, replies to proposed findings of fact, post-trial briefs, and reply briefs total 1,782 pages.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). The parties filed concurrent post-trial briefs and proposed findings of fact on September 25, 2014. The parties filed replies to the other's proposed findings and briefs on October 16, 2014. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on October 22, 2014.

Seventy days from the last filed reply proposed findings and conclusions and briefs was December 29, 2014, and, absent an order pursuant to Rule 3.51, the Initial Decision was to be filed on

or before December 29, 2014. Based on the voluminous and complex record in this matter and other grounds, an Order was issued on December 19, 2014, finding good cause for extending the time period for filing the Initial Decision by 30 days. Accordingly, issuance of this Initial Decision by January 28, 2015 is in compliance with Commission Rule 3.51(a).

C. Evidence

This Initial Decision is based on a consideration of the whole record relevant to the issues, including the exhibits properly admitted into evidence, deposition transcripts, and the transcripts of testimony at trial, and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties, and all contentions and arguments therein were thoroughly reviewed and considered.

Proposed findings of fact submitted by the parties but not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. Similarly, legal contentions and arguments of the parties that are not addressed in this Initial Decision were rejected, because they lacked support in fact or law, were not material, or were otherwise lacking in merit. Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act ("APA") that is almost identical to language in FTC Rule 3.51(c)(1), the United States Supreme Court held that "[b]y the express terms of [that Act], the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material'." *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 82 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency"). Furthermore, the Commission has held that

Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, at *566-67 (Nov. 2, 1983).

Under Commission Rule 3.51(c)(1), "[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the APA, an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."[1]

D. Summary Of Initial Decision

Complaint Counsel has demonstrated that until late 2013, Respondent's marketing and promotional materials included claims that plastics treated with the ECM Additive would fully biodegrade, in a landfill, within 9 months to 5 years, and that tests

[1] References to the record are abbreviated as follows:

CCX – Complaint Counsel's Exhibit
RX – Respondent's Exhibit
JX – Joint Exhibit
Tr. – Transcript of testimony before the Administrative Law Judge
Dep. – Transcript of Deposition
CCB – Complaint Counsel's Post-Trial Brief
CCRB – Complaint Counsel's Post-Trial Reply Brief
CCFF – Complaint Counsel's Proposed Findings of Fact
CCRRFF – Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
RB – Respondent's Post-Trial Brief
RRB – Respondent's Reply Brief
RFF – Respondent's Proposed Findings of Fact
RRCCFF – Respondent's Reply to Complaint Counsel's Proposed Findings of Fact

proved such claim. The evidence further shows that these claims were false and unsubstantiated because ECM Plastics will not, in fact, fully biodegrade in a period of 9 months to 5 years in a landfill, as represented, and tests do not prove the claimed biodegradation rate. In addition, the evidence demonstrates that these false and unsubstantiated claims were material to ECM's customers, as well as to downstream sellers and distributors of ECM Plastics. Accordingly, Respondent's claim that ECM Plastics would fully biodegrade, in a landfill, within 9 months to 5 years, and that tests proved such claim, were deceptive in violation of Section 5 of the FTC Act. Moreover, the evidence proves that Respondent passed these deceptive claims on to its customers and others, and is thereby liable for providing them with the means and instrumentalities to deceive others in the stream of commerce.

It is undisputed that Respondent claims that plastics treated with the ECM Additive are "biodegradable," including in a "landfill" (Respondent's "biodegradable" or "biodegradability" claims). The evidence shows that Respondent claimed that tests proved that ECM Plastics are biodegradable. However, Complaint Counsel has failed to prove that Respondent's biodegradability claims are deceptive. Complaint Counsel's theory, consistent with that of the Green Guides, is that Respondent's "unqualified" biodegradable claim (*i.e.*, Respondent's claim that ECM Plastics are "biodegradable," without qualification as to a time period for complete biodegradation after customary disposal) impliedly claims that ECM Plastics would completely break down into elements found in nature in a landfill within one year (the "Implied One Year Claim"), and that this implied claim is deceptive because ECM Plastics will not completely biodegrade in a landfill within one year. The evidence in this case fails to prove Complaint Counsel's theory. The Implied One Year Claim is inconsistent with the language and the overall net impression of the marketing materials at issue; is not proven by Complaint Counsel's proffered consumer survey evidence; and is refuted by high quality survey evidence introduced by Respondent. Because the evidence fails to demonstrate that a significant number of reasonable consumers would interpret Respondent's claim that ECM Plastics are "biodegradable" to be conveying the further, implied message that ECM Plastics will biodegrade completely into elements found in

nature, in a landfill, within one year, Complaint Counsel has not met its burden of proving the Implied One Year Claim. Therefore, Respondent's biodegradability claims cannot be deemed false or unsubstantiated on the theory that ECM Plastics do not completely biodegrade in a landfill within one year.

To the extent Complaint Counsel contends that Respondent's "unqualified" biodegradable claims are false or unsubstantiated, apart from any express or implied time period for complete biodegradation, Complaint Counsel has failed to meet its burden of proof on this issue. First, Complaint Counsel has failed to prove that the ECM Additive does not render plastics biodegradable. The term "biodegradable" is defined by qualified experts in the field to mean that an item degrades via biotic or biological agents, and does not require completion or impose a time restraint. Evaluated in accordance with this scientific definition, the evidence fails to show that Respondent's biodegradability claims are false. Second, Complaint Counsel has failed to prove that the many scientific tests presented by Respondent at trial showing that the ECM Additive renders conventional plastics biodegradable, including in a landfill environment, are inadequate to substantiate Respondent's biodegradability claims. Rather, the evidence shows that Respondent's testing constitutes competent and reliable scientific evidence demonstrating that ECM Plastics are biodegradable, including in a landfill. Thus, Complaint Counsel has failed to prove that Respondent's biodegradability claims are unsubstantiated or that Respondent falsely, or without adequate substantiation, claimed that tests prove that ECM Plastics are biodegradable.

Consistent with the findings in this case, summarized above, the Order issued with this Initial Decision prohibits Respondent from representing that any product or package will completely biodegrade within any time period, or that tests prove such representation, unless such representation is true, not misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. The Order will prohibit and prevent Respondent from making the deceptive claims found to have been made in this case, is reasonably related to the unlawful acts or practices found to exist, and is sufficiently clear and precise.

II. FINDINGS OF FACT

A. Witnesses

1. Complaint Counsel's Fact Witnesses

1. Between February 18, 2014 and May 30, 2014, Complaint Counsel took sixteen fact depositions of testing laboratories and ECM customers all over the country, including Hawaii, California, New York, Ohio, and the District of Columbia. (*See* CCX 799-CCX 805; CCX 809-812; CCX 815; CCX 817; CCX 821-CCX 823).

2. Respondent was unrepresented, or had counsel appear telephonically, at 14 fact witness depositions. (*See* CCX 800; CCX 803; CCX 801; CCX 810; CCX 811; CCX 812; CCX 817; CCX 822; CCX 802; CCX 804; CCX 808; CCX 809; CCX 815; CCX 821).

3. Complaint Counsel did not call any fact witnesses at trial. (Tr. 259).

2. Complaint Counsel's Customer Deposition Testimony

3M COMPANY

4. 3M Company ("3M") is a diverse multi-national manufacturer, headquartered in St. Paul, Minnesota, with $30 billion in annual sales. 3M employs approximately 80,000 people worldwide. (CCX 821 (3M, Dep. at 12)).

5. Mr. Stephen Joseph is 3M's corporate designee. (CCX 821 (3M, Dep. at 9)).

6. 3M sells products for a variety of markets across a variety of different businesses in many different parts of the world. 3M has several businesses that serve markets such as the industrial and transportation industry. It also has consumer, office, and healthcare businesses, and safety, security and protection services. (CCX 821 (3M, Dep. at 11)).

7. 3M manufactures products that are made of plastics. 3M also manufactures various additives that can be used in conjunction with plastic processing. (CCX 821 (3M, Dep. at 11)).

8. 3M purchased the ECM Additive in February 2010. (CCX 821 (3M, Dep. at 95)).

ANS PLASTICS CORPORATION

9. ANS Plastics Corporation ("ANS") is located in New Brunswick, New Jersey. ANS employs 15 people and its annual sales revenue is approximately $1.9 million. (CCX 822 (ANS, Dep. at 9-10)).

10. Mr. Ramy Samuel, one of the owners and the vice president of ANS, is ANS' corporate designee. (CCX 822 (ANS, Dep. at 7, 9)).

11. ANS manufactures plastic "t-shirt" style shopping bags. (CCX 822 (ANS, Dep. at 8)).

12. The purchasers of ANS manufactured bags are wholesalers, distributors and some end users. ANS considers its end users to be stores, such as restaurants, bagel shops, auto parts stores, supermarkets, pet stores, and pizza stores. (CCX 822 (ANS, Dep. at 8-9, 26).

13. ANS purchased the ECM Additive in 2009. (CCX 822 (ANS, Dep. at 9)).

BER PLASTICS, INC.

14. BER Plastics, Inc. ("BER"), located in Riverdale, New Jersey, manufactures a film that is made into textile packaging for the food industry and clothing industry, and for plastic pillow bags. BER is one of the biggest pillow film producers in the country. (CCX 800 (BER, Dep. at 11)).

15. BER-produced plastic film goes to converters. A converter will place an order with BER for a particular size, gauge, and thickness of material, and the converter then converts

the film into a rolled stock of plastic bags, usually with printing on them. (CCX 800 (BER, Dep. at 11)).

16. BER's customers all make low density polyethylene bags with different applications. (CCX 800 (BER, Dep. at 19)).

17. BER employs approximately 22 employees that work in three shifts, 24 hours a day, six days a week. BER makes approximately $10 million in annual revenue. (CCX 800 (BER, Dep. at 13-14, 15)).

18. Mr. Robert Ringley, who is the vice president of BER, is BER's corporate designee. (CCX 800 (BER, Dep. at 4, 7)).

19. BER uses the ECM Additive in the manufacture of low density polyethylene film for packaging, including packaging for the food industry and the clothing industry. (CCX 800 (BER, Dep. at 10)).

20. BER has 10 customers to which it sold films made with the ECM Additive. (CCX 800 (BER, Dep. at 10)).

21. BER does not generally know the end use of its plastic product. BER does not sell to any end user. (CCX 800 (BER, Dep. at 11)).

22. BER was an ECM Customer from January 2009 until January 2014. (CCX 800 (BER, Dep. at 12)).

D&W FINE PACK, LLC

23. D&W Fine Pack, LLC ("D&W") is located in Fountain Inn, South Carolina. (CCX 801 (D&W, Dep. at 14)).

24. D&W's corporate designees are Mr. Donald Kizer, supply chain manager for D&W, and Ms. Ashley Leiti, an employee since 2008 in the fields of marketing, product development, and sales. (CCX 801 (D&W, Dep. at 11); CCX 802 (D&W, Dep. at 14)).

25. D&W is a manufacturer of disposable products for the food service industry. D&W manufactures plastic cutlery, drinking straws, and foam trays. (CCX 801 (D&W, Dep. at 12)).

26. Prior to 2009, D&W was known as "Dispoz-o Products" ("Dispoz-o"). (CCX 801 (D&W, Dep. at 11–12)).

27. Dispoz-o began purchasing the ECM Additive in 2008. (CCX 801 (D&W, Dep. at 17)).

28. In 2008, Dispoz-o had approximately $83 million in revenue, and 740 employees. (CCX 801 (D&W, Dep. at 15-16)).

29. In 2009, D&W had approximately $120 million in revenue, and 1,540 employees. (CCX 801 (D&W, Dep. at 16-17)).

30. In August 2009, D&W stopped making the claim "biodegradable" regarding its "Enviroware" line of products containing the ECM Additive. (CCX 802 (D&W, Dep. at 62, 67-68, 135-137)).

31. All products sold by D&W are sold to distributors. In turn, the distributors sell to retail businesses, such as restaurants. The restaurants' customers do not likely know that they are receiving D&W products. (CCX 802 (Leiti, Dep. at 160-161)).

DOWN TO EARTH ORGANIC AND NATURAL

32. Down to Earth Organic and Natural ("DTE") is a chain of grocery stores, with five stores, four on the island of Oahu, Hawaii, and one on Maui, Hawaii. DTE has approximately 200 employees and annual sales revenue of approximately $30 million. (CCX 803 (DTE, Dep. at 10-12)).

33. Mr. Frank Santana, the marketing director for DTE, testified on behalf of DTE. (CCX 803 (DTE, Dep. at 8)).

34. DTE promotes organic farming, by selling organic and natural products, and promotes an organic and natural lifestyle. (CCX 803 (DTE, Dep. at 12)).

35. DTE began searching for biodegradable grocery bags in 2008 and began communicating with a distributor of ECM products mid-2008. (CCX 803 (DTE, Dep. at 19-20)).

36. DTE bought their bags made with the ECM Additive from Island Plastic Bags, through Triple F, a distributor. (CCX 803 (DTE, Dep. at 46); CCX 307 at 2).

EAGLE FILM EXTRUDERS INC.

37. Eagle Film Extruders, Inc. ("Eagle Film"), located in Grand Rapids, Michigan, started its business August 1, 2001. (CCX 804 (Eagle Film, Dep. at 64)).

38. Mr. George Collins, president of Eagle Film, who has been with the company since 2001, is Eagle Film's corporate designee. (CCX 804 (Eagle Film, Dep. at 9)).

39. Eagle Film manufactures blown plastic film. The blown film is used for countless facets of industry. (CCX 804 (Eagle Film, Dep. at 10)).

40. Generically, Eagle Film sells coating films of varying degrees, including signage. Eagle Film serves customers in such industries as food, medical, pharmaceutical, and health and beauty. (CCX 804 (Eagle Film, Dep. at 10)).

41. In most instances, Eagle Film sells their blown film to a converter, who in turns sells the blown film to somebody else. A converter is typically someone who is going to print, laminate, die cut, or coat those types of services. (CCX 804 (Eagle Film, Dep. at 65-66)).

42. Eagle Film first purchased the ECM Additive around 2008, and has continued purchasing, as needed, into the first quarter of 2014. (CCX 804 (Eagle Film, Dep. at 11-12)).

43. From 2008 to present, Eagle Film's sales revenue ranged from $14 to $18 million. From 2008 to the present, Eagle Film has sold 1.2 million pounds of blown film containing the ECM Additive, out of a total of approximately 67 million pounds of blown film sold. (CCX 804 (Eagle Film, Dep. at 12-13)).

FLEXIBLE PLASTICS, INC.

44. Flexible Plastics, Inc. ("Flexible") prints and manufactures plastic bags. All printing is done in-house. (CCX 809 (Flexible, Dep. at 8)).

45. Mr. David Sandry testified on behalf of Flexible. (CCX 809 (Flexible, Dep. at 4)).

46. Flexible has been operating since 1985. Flexible is located in South Central Minnesota. (CCX 809 (Flexible, Dep. at 61)).

47. Flexible purchases rolls of plastic from extruders. (CCX 809 (Flexible, Dep. at 9)).

48. Flexible sells all over the country. Half of Flexible's business is the manufacture of printed poly meat bags for the meat processing industry (including small town butchers and meat markets). (CCX 809 (Flexible, Dep. at 62, 66)).

49. Half of Flexible's business consists of garbage bags that are sold regionally in Minnesota, South Dakota, Iowa and Wisconsin to small cities, municipalities, or small trash haulers, who buy custom printed garbage bags for volume-based refuse collection. (CCX 809 (Flexible, Dep. at 62, 66)).

50. Flexible uses the ECM Additive for its plastic bags. Flexible first purchased the ECM Additive around October 2008, and still uses it. (CCX 809 (Flexible, Dep. at 9, 13)).

51. Flexible uses the ECM Additive for all its "white" bags, which are printed bags with a handle cut out of them, and which Flexible calls its "white trade show bags." Flexible's white bags are sold to 20 different distributors that are advertising specialty companies. Flexible also uses the ECM Additive to manufacture a black garbage bag that it manufactures for a veterinary supply company that sells the bags for animal waste. (CCX 809 (Flexible, Dep. at 9-10, 66)).

52. Flexible's gross receipts for 2013 were approximately $1.8 million. Ten to twenty percent of that revenue is related to products made with the ECM Additive, depending upon the breakdown of the white versus colored bags. (CCX 809 (Flexible, Dep. at 10-11)).

FREE-FLOW PACKAGING INTERNATIONAL, INC.

53. Free-Flow Packaging International, Inc. ("FP"), headquartered in Fremont, California, manufactures and sells protective packaging products and packaging systems. In addition to selling plastic products, FP also makes, produces, and designs machinery that makes the products. (CCX 810 (FP, Dep. at 13)).

54. Among FP's plastic products are polystyrene packing "peanuts," polyethylene air cushions, polyethylene foam, and polyethylene "bubble," all of which are used for protection of items during shipping. (CCX 810 (FP, Dep. at 13-14)).

55. Mr. James Blood, the senior vice president and general counsel of FP, is FP's corporate designee. (CCX 810 (FP, Dep. at 12-13, 50, 214).

56. FP's customers are distributors that distribute and sell to anybody who ships products in boxes. (CCX 810 (FP, Dep. at 15)).

57. FP does not sell any packaging products directly to end-use consumers. (CCX 810 (FP, Dep. at 18)).

58. FP began purchasing the ECM Additive in 2008. From 2008 through 2013, FP purchased approximately 2.2 million dollars' worth of ECM Additive. (CCX 810 (FP, Dep. at 15, 19)).

59. FP sold loosefill product and air cushion product with the ECM Additive. (CCX 810 (FP, Dep. at 17, 22)).

60. FP engaged the services of Stevens Ecology, Dr. Timothy Barber of Environ, and Eden Laboratories, to test the biodegradability of FP's ECM Plastic products. (CCX 810 (FP, Dep. at 57-60, 87, 163); Poth, Tr. 1436, 1475-1479).

61. In 2013, approximately 25% to 30% of FP's total revenues were derived from FP's biodegradable product lines. Because FP was not profitable in 2013, the biodegradable products did not produce a significant amount of profit for FP in 2013. (CCX 810 (FP, Dep. at 211)).

ISLANDS PLASTICS BAGS, INC.

62. Island Plastics Bags, Inc. ("IPB") manufactures and sells high density and low density polyethylene bags in various dimensions and gauges. In addition, IPB manufactures and sells plastic cutlery. (CCX 811 (IPB, Dep. at 9-10)).

63. Mr. Adrian Hong, general manager for Island Plastic Bags, is IPB's corporate designee. (CCX 811 (IPB, Dep. at 9, 109-110)).

64. IPB is a family business based near Honolulu, Hawaii and has been in business since 1992. (CCX 811 (IPB, Dep. at 9)).

65. IPB has a manufacturing plant in Hawaii and manufacturing partners in China. IPB bags and cutlery are manufactured in China then shipped to IPB's facility in Honolulu or Guam. From there, the products are sent to either distributors or retailers. (CCX 811 (IPB, Dep. at 10-11)).

66. IBP's major customers are distributors, including Triple F. These distributors then sell to other customers, including small shops, restaurants, bars, and grocery stores and grocery chains. (CCX 811 (IPB, Dep. at 56, 59, 66, 70)).

67. IPB first purchased the ECM Additive to manufacture bags in 2008 and has purchased it every year thereafter through 2014. (CCX 811 (IPB, Dep. at 12)).

KAPPUS PLASTIC COMPANY, INC.

68. Kappus Plastic Company, Inc. ("Kappus"), located in Hampton Township, New Jersey, manufactures calendered rigid vinyl sheeting – plastic sheeting that is primarily used in the credit card industry. (CCX 812 (Kappus, Dep. at 11)).

69. Kappus has been manufacturing since 1970. (CCX 812 (Kappus, Dep. at 12)).

70. Ms. Annette Gormly, the vice president of Kappus, is Kappus's corporate designee. (CCX 812 (Kappus, Dep. at 5, 8)).

71. Kappus's customers are primarily credit card companies or card manufacturers. Kappus does not manufacture credit cards on the plastic sheeting. (CCX 812 (Kappus, Dep. at 12)).

72. Kappus's customers are companies, banks, and department stores. (CCX 812 (Kappus, Dep. at 12)).

73. The credit card companies' end-use consumers fall into two categories: users of bank-issued credit cards and purchasers of gift cards sold by retailers at their counters. (CCX 812 (Kappus, Dep. at 12-13)).

74. Kappus purchased the ECM Additive between 2009 and 2013. Kappus's approximate annual revenue from 2009 to 2013 was less than $5 million. (CCX 812 (Kappus, Dep. at 13)).

75. Kappus manufactured a plastic product containing the ECM Additive called "BioRigidVinyl." (CCX 812 (Kappus, Dep. at 33-34)).

QUEST PLASTICS, INC.

76. Quest Plastics, Inc. ("Quest") is an injection molding company that primarily makes caps for aerosols, fragrances and cosmetic packaging. Quest takes thermoplastic raw material and converts it into products such as caps, closures, lipstick cases, and other custom molding. (CCX 817 (Quest, Dep. at 9-10)).

77. Mr. James Bean, the president and owner of Quest, is Quest's corporate designee. (CCX 817 (Quest, Dep. at 7, 11)).

78. Quest has been in business for 24 years and is currently located in Torrington, Connecticut. Quest has approximately 30 employees, most of whom work as machine operators or material handlers on the floor. (CCX 817 (Quest, Dep. at 10-12, 14-15)).

79. Quest's customers are mostly small companies in the cosmetics and fragrance industries. Quest deals with larger customers indirectly as a subcontractor of a subcontractor. (CCX 817 (Quest, Dep. at 19, 23)).

80. Quest sells its products primarily to companies in the eyelet industry that makes metal perfume caps. Quest makes the plastic liners that go inside those caps. (CCX 817 (Quest, Dep. at 18)).

81. Quest does not sell any products to consumers. Quest is "fairly removed" from the end-use customer. (CCX 817 (Quest, Dep. at 41-42)).

82. Quest's annual revenue for 2013 was $3.1 million. (CCX 817 (Quest, Dep. at 12)).

83. Quest purchased the ECM Additive to serve a customer, Technical Sourcing Solutions, which wanted to manufacture biodegradable golf tees. The customer initially contacted Quest to manufacture golf tees out of reprocessed styrene. The customer added the request for the biodegradable aspect subsequently. Quest has been manufacturing the golf tees since the beginning of 2013. Manufacturing the golf tees represents roughly $4,000 in revenue for Quest. (CCX 817 (Quest, Dep. at 19-22)).

3. Respondent's Fact Witnesses

a. Mr. Robert Sinclair

84. Mr. Robert Sinclair is the president, director, and chief executive officer of Respondent ECM BioFilms, Inc. ("ECM") or ("Respondent"). (Sinclair, Tr. 745).

85. Mr. Sinclair assumed leadership of ECM in 2000. He manages all daily operations of the company and is primarily responsible for communicating with clients concerning ECM's technology. (Sinclair, Tr. 745, 757; Sullivan, Tr. 699).

86. Mr. Sinclair earned his J.D. from Case Western Reserve University Law School, and his undergraduate degree from Dartmouth College. (Sinclair, Tr. 746).

87. Mr. Sinclair, although not a scientist, has familiarity with scientific issues and experiments. Mr. Sinclair took many classes in biology sciences while in college, developed resistant strains of bacteria for projects, and taught science for six years in the Cleveland and East Cleveland public school systems. (Sinclair, Tr. 760).

88. Mr. Sinclair is a member of the ASTM[2] D20 committee, the committee on plastics; is the chairman of the ASTM D20.92 subcommittee on plastic terminology; and is on the ASTM D20.96 subcommittee on bio-based and biodegradable plastics, the ASTM D20.95 subcommittee on plastic recyclability, and the ASTM E60 and ASTM E50 committees on sustainability and other environmental issues. (Sinclair, Tr. 778-779).

b. Mr. Kenneth Sullivan

89. Mr. Kenneth Charles Sullivan, Jr. is Chief Financial Officer ("CFO") of ECM. Mr. Sullivan has been the CFO of ECM since May of 2009 and is responsible for all the accounting, finance, and treasury functions at ECM. (Sullivan, Tr. 690-691).

c. Dr. Timothy Barber

90. Dr. Timothy Barber is presently employed at Environ International Corporation as a principal scientist and office manager. Dr. Barber has a B.S. in chemistry, with a focus in organic chemistry, from State University of New York at Binghamton and obtained a Ph.D. in marine science with a specialization in chemistry from the University of South Florida. Dr. Barber wrote a dissertation on the biogeochemistry of low-molecular-weight hydrocarbons in wetland environments. (Barber, Tr. 2004-2009).

91. Dr. Barber worked at the Florida Marine Research Institute as an analyst and then at Entix as a senior chemist before

[2] ASTM is an abbreviation for ASTM International formerly known as the American Society for Testing and Materials, a voluntary membership organization that develops standard test methods and specifications. (JX 4 at 2).

taking a position with McLaren/Hart-ChemRisk ("McLaren/Hart") in Cleveland, Ohio. At the Florida Marine Research Institute, Dr. Barber's responsibilities included collecting data, analyzing data, developing reports, and conducting laboratory work. At Entix, Dr. Barber's responsibilities included analyzing data, writing reports, and conducting fieldwork. (Barber, Tr. 2006-2007).

92. McLaren/Hart, which no longer exists, was an environmental consultancy that worked primarily for private industry. Dr. Barber was a consultant at McLaren/Hart assisting companies with pollution problems, developing work plans, collecting data, analyzing that information, and writing reports. (Barber, Tr. 2007).

93. Dr. Barber has written approximately thirty peer-reviewed articles on various topics related to anthropogenic or manmade chemicals in the environment, potential toxicity associated with those, as well as fate and transport, persistence, bioaccumulation and ecological risks of those chemicals. (Barber, Tr. 2011).

94. Dr. Barber is a member of the American Chemical Society, the Environmental Toxicology and Chemistry Organization, the International Society of Ecological Economics, and the International Society of Environmental Forensics. (Barber, Tr. 2012).

d. Mr. Thomas Poth

95. Mr. Thomas Poth owns and is the laboratory director of Eden Research Laboratories ("ERL"), formerly Zia Environmental Laboratories. ERL performs ASTM D5511 testing.[3] (Poth, Tr. 1437, 1447-1448).

96. Before starting ERL, Mr. Poth managed a laboratory called Assaigai Laboratory in Albuquerque, New Mexico and later managed a laboratory in Midland, Texas. In those roles, Mr. Poth oversaw sales, marketing, and laboratory testing. Mr. Poth then ran the science and engineering design department for RW

[3] ERL's ASTM tests are discussed *infra* F. 1046-1216.

Technologies, a company that developed water treatment systems using cutting-edge technology. (Poth, Tr. 1438-1439).

97. ERL works with businesses such as Adidas Group, Reebok, Pactiv, Saucony, and Georgia Pacific, and other, smaller companies. (Poth, Tr. 1443).

e. Mr. Alan Johnson

98. Mr. Alan Charles Johnson is the laboratory director of Northeast Laboratories ("NE Labs"), where he has worked since 1977 and is responsible for overseeing all laboratory operations. Mr. Johnson oversees all biodegradability testing, and often does some of the work himself. (Johnson, Tr. 1554, 1561).

99. NE Labs conducts biodegradation testing, and began doing so in 2005. (Johnson, Tr. 1560).

100. NE Labs performs ASTM D5511 and ASTM D5538 biodegradability testing.[4] (Johnson, Tr. 1561).

4. Complaint Counsel's Expert Witnesses

a. Dr. Thabet Tolaymat

101. Dr. Thabet Tolaymat has a B.S. degree and a Ph.D. in Environmental Engineering from the University of Florida. (CCX 893 (Tolaymat Expert Report at 4)).

102. Dr. Tolaymat has been employed by the United States Environmental Protection Agency ("EPA") from 2004 to present as an environmental engineer and researcher in the fields of solid waste management, bioreactor landfills, waste containment performance, construction and demolition waste landfills, and the fate and transport of environmental pollutants. (CCX 893 (Tolaymat Expert Report at 4)).

103. Dr. Tolaymat's academic research and research for the EPA has focused primarily on waste disposal and landfills,

[4] NE Labs' ASTM tests are discussed *infra* F. 1217-1424.

particularly in evaluating the performance of solid waste containment units (municipal solid waste, hazardous waste and ash mono-fill landfills), bioreactor landfills, organic pollutants, co-disposal of solid waste and hazardous waste, and construction and demolition waste. (CCX 893 (Tolaymat Expert Report at 4)).

104. As part of his responsibilities for the EPA, Dr. Tolaymat provided expert advice regarding solid waste disposal for the World Bank and the United States Agency for International Development ("USAID"), as well as to the countries of Jordan, Taiwan, Russia, and the city of Hong Kong. (CCX 893 (Tolaymat Expert Report at 4-5)).

105. Dr. Tolaymat has authored over fifty journal publications and EPA reports, including peer-reviewed articles on landfill design and management and peer-reviewed articles on biodegradation testing under landfill conditions. (CCX 893 (Tolaymat Expert Report at 4-5); Tolaymat Tr. 115).

106. A significant part of Dr. Tolaymat's education, training, and experience has involved conducting and evaluating tests that purport to show biodegradation and/or replicate landfill conditions, including tests based on large bench scale solid waste decomposition (lysimeter) studies. (CCX 893 (Tolaymat Expert Report at 5)).

b. Dr. Stephen McCarthy

107. Dr. Stephen McCarthy has an undergraduate degree in textile chemistry from Southeastern Massachusetts University, a master's degree in chemical engineering from Princeton University, and a Ph.D. in polymer engineering from Case Western Reserve University. (CCX 891 (McCarthy Expert Report at 3)).

108. Dr. McCarthy has been a professor of plastics engineering at the University of Massachusetts Lowell for 30 years. There, he teaches graduate level courses in plastics engineering, including the mechanical behavior of polymers, and polymers and the environment. Dr. McCarthy has served as the director of the University's Bioplastics Institute and Medical Plastics Research Center, the director of the University's Institute

for Plastics Innovation, and the Graduate Coordinator for the Plastics Engineering Department. (CCX 891 (McCarthy Expert Report at 3-4); McCarthy, Tr. 359).

109. Dr. McCarthy is also the director at the University of Massachusetts Lowell's Biodegradable Polymer Research Center, where he coordinates and supervises research on biodegradable polymers. His research has led to seven patents related to polymers or plastics engineering. (CCX 891 (McCarthy Expert Report at 4)).

110. Dr. McCarthy is the editor of the *Journal of Polymers and the Environment*, the official journal for the BioEnvironmental Polymer Society, which promotes research to develop degradable polymers. He has authored or co-authored more than a hundred publications related to polymer or plastics engineering, including peer-reviewed articles specifically on biodegradable blends. (CCX 891 (McCarthy Expert Report at 4); McCarthy, Tr. 370).

111. Dr. McCarthy is a member of the American Society for Testing and Materials (now known as ASTM International, Inc.) and has belonged to other professional associations related to biodegradable polymers and plastics engineering, including the Bio/Environmentally Degradable Polymer Society, Society of Plastics Engineers, Biomaterials Society, American Chemical Society, and the Materials Research Society. (CCX 891 (McCarthy Expert Report at 4-5)).

c. Dr. Shane Frederick

112. Dr. Shane Frederick received a Ph.D. in decision sciences from Carnegie Mellon University. (CCX 890 (Frederick Expert Report at 3)).

113. Dr. Frederick is a professor at Yale University's School of Management, where he has taught courses in consumer behavior, behavioral economics, and marketing. He has worked as a research assistant in the Psychology Department at Princeton University and was a lecturer at the Woodrow Wilson School of Public and International Affairs. (CCX 890 (Frederick Expert Report at 3)).

114. Dr. Frederick has studied and published extensively concerning judgment and decision-making, with a focus on the role of cognitive abilities on preferences, preference measurements, and cognitive biases. He has published extensively in peer-reviewed journals, including: *Journal of Marketing Research*, *Journal of Consumer Research*, *Journal of Consumer Psychology, Management Science, Psychological Science*, *Journal of Experimental Psychology: General & Organizational Behavior and Human Decision Processes*. In addition, Dr. Frederick is on the editorial board of the *Journal of Organizational Behavior and Human Decision Processes, and Economic Psychology*, and an associate editor at Management Science. (CCX 890 (Frederick Expert Report at 3)).

115. Dr. Frederick's work involves conducting and evaluating survey research, including internet-based research tools such as Google Consumer Surveys and Amazon Mechanical Turk. Dr. Frederick has conducted hundreds of studies using both paper and pencil and web-based survey tools. (CCX 890 (Frederick Expert Report at 3-4)).

116. Dr. Frederick is affiliated with Yale's Center for Consumer Insights, which partners with corporations and academics to help understand the evolving dynamics of consumer behavior, and has advised corporations including Pepsico, Kimberly Clark, and AMC Networks on incorporating insights from consumer psychology. (CCX 890 (Frederick Expert Report at 4)).

d. Dr. Frederick Michel

117. Dr. Frederick C. Michel earned an undergraduate degree in chemical engineering and in biochemistry and a master's degree and a Ph.D. in chemical engineering from Michigan State University. Dr. Michel then did a postdoctoral research fellowship at the National Science Foundation Center for Microbial Ecology. (CCX 895 (Michel Rebuttal Expert Report at 3); Michel, Tr. 2831).

118. Dr. Michel is currently a tenured associate professor in the Department of Food, Agriculture and Biological Engineering

at the Ohio State University, with an adjunct appointment in the Department of Chemical and Biomolecular Engineering. (CCX 895 (Michel Rebuttal Expert Report at 3)).

119. For the past 25 years, Dr. Michel has conducted research on a wide range of environmental topics, including the biodegradation of plastics, bioplastics, biofoams and natural fibers in anaerobic digesters, composting systems and in soils. Dr. Michel has authored over 40 peer-reviewed publications and many other reports and papers in these areas. (CCX 895 (Michel Rebuttal Expert Report at 3)).

120. Dr. Michel serves as editor of the *Compost Science & Utilization Journal*, attends U.S. Composting Council meetings, and has consulted for the U.S. Composting Council for six or seven years. Dr. Michel was the co-editor for proceedings at the 2002 Symposium on Composting and Compost Utilization and the section editor for Test Methods for the Examination of Composting and Compost. (Michel, Tr. 2834, 2837, 2918-2921).

121. Dr. Michel is the head of the compost research group for Ohio Agricultural Research and Development Center-Food, Agricultural, and Biological Engineering. Dr. Michel has consulted for AllTreat Organic Composting, DuPont, a member of the Biodegradable Products Institute ("BPI"), Indian Summer Composting, Amylex, and International Paper, companies that sell compostable products. (Michel, Tr. 2918-2922).

5. Respondent's Expert Witnesses

a. Dr. Ranajit Sahu

122. Dr. Ranajit Sahu earned his undergraduate degree in mechanical engineering from the Indian Institute of Technology and his master's degree and Ph.D. in combustion from the California Institute of Technology. Within the coursework of these post-graduate programs, Dr. Sahu studied polymer science, specifically the applicability of organic chemistry and chemical engineering, and the manufacturing of polymers into useful articles. (Sahu, Tr. 1730-1734).

123. Dr. Sahu is a Qualified Environmental Professional certified by the Air and Waste Management Association and a Certified Environmental Manager certified by the State of Nevada. (Sahu, Tr. 1748, 1758).

124. Dr. Sahu has worked for Parsons Corporation, a large engineering and architectural firm, where he performed environmental consulting, often in the area of solid waste disposal in landfills, incinerators, and other disposal methods, and where he managed a testing group, which conducted field-testing, laboratory testing, third-party laboratory analysis, and data evaluation. (Sahu, Tr. 1735-1737).

125. Since December 1999, Dr. Sahu has been an independent consultant, providing a variety of consulting services in a wide range of fields. Dr. Sahu has extensive experience in the field of polymer science, including as an independent consultant working with various bathroom fixture manufacturers to assess the degradation and manufacturing waste of their polystyrene and styrene-based products, and as an independent contractor with fuel industry consortia. (Sahu, Tr. 1737-1741).

126. Dr. Sahu has conducted multiple projects dealing with waste containment in landfills, including municipal solid waste landfills and worked on multiple projects involving landfill gas extraction, treatment, and measurement. (Sahu, Tr. 1741-1744).

127. Dr. Sahu currently works with a small development company managing a major project involving the siting, construction and closure of a four million cubic yard landfill. (Sahu, Tr. 1744-1745).

128. Dr. Sahu has been retained and qualified as an expert witness in environmental matters in multiple administrative proceedings and several state and federal judicial proceedings. (Sahu, Tr. 1747).

129. Dr. Sahu has been a member of ASTM for three or four years, and currently serves on numerous committees. Dr. Sahu has advised ASTM on the interaction of the fuel mix with plastics and polymers in fuel systems. (Sahu, Tr. 1750).

130. Through his involvement with ASTM and his work as an independent consultant, Dr. Sahu is very familiar with a wide range of ASTM standards and protocols. (Sahu, Tr. 1750-1751).

b. Dr. Morton Barlaz

131. Dr. Morton Barlaz has an undergraduate degree in chemical engineering from the University of Michigan and a master's degree and Ph.D. in civil and environmental engineering from the University of Wisconsin. Dr. Barlaz's Ph.D. focused on the microbiology of solid waste decomposition in landfills. (Barlaz, Tr. 2168).

132. Dr. Barlaz has published approximately 115 peer-reviewed publications and one-half to two-thirds of those are associated with some aspect of biodegradation. (Barlaz, Tr. 2169-2170).

133. Dr. Barlaz is professor and head of the Department of Civil Construction and Environmental Engineering at North Carolina State University. (Barlaz, Tr. 2167).

134. Dr. Barlaz runs a research program for North Carolina State University in the areas of solid waste management, biodegradation, decomposition, chemical and biological reactions in landfills, and the application of life cycle analysis to solid waste management systems. (Barlaz, Tr. 2168).

135. In his research program at North Carolina State University, Dr. Barlaz has conducted numerous tests on the biodegradation of various components of municipal solid waste, including: anaerobic biodegradability tests at reactor scale, vessels from one-half to two and a half gallons, measuring methane generation from municipal solid waste or specific components of municipal solid waste; and biochemical methane potential tests, which are tests of anaerobic biodegradability. (Barlaz, Tr. 2170-2171).

136. Dr. Barlaz has been hired by the EPA as an expert in the fields of waste management and biodegradation. (RX 853 (Barlaz Expert Report at 27-28)).

137. Dr. Barlaz is familiar with ASTM and its protocols, and has drafted a protocol for radiolabel testing of biodegradability that was ultimately adopted by ASTM. (Barlaz, Tr. 2172).

138. Dr. Barlaz recently completed a project funded by the Plastics Environmental Council to evaluate the effect of different inocula on biodegradation rates for the purpose of developing a protocol for biodegradability testing that is more flexible than the ASTM 5511 protocol. (Barlaz, Tr. 2172-2173).

139. Complaint Counsel's expert, Dr. Tolaymat, recognizes Dr. Barlaz as an authority in the field of biodegradability of municipal solid waste and landfill gas, has consulted Dr. Barlaz on a number of questions concerning landfill biodegradation and has accepted a number of Dr. Barlaz's recommendations to Dr. Tolaymat's work product for the EPA. (Tolaymat, Tr. 156, 184, 233-234).

c. Dr. Ryan Burnette

140. Dr. Ryan Burnette earned his undergraduate degree in biochemistry and two minors in chemistry and environmental sciences and his Ph.D. in biochemistry and molecular biology from Virginia Polytechnic Institute and State University. Dr. Burnette's doctoral dissertation focused on signal transduction via enzymatic pathways with response to environmental stimulus, how organisms respond to their environment, the signaling cascades, the small molecules, the enzymes involved in that signal transduction pathway, applied across a variety of organisms. (Burnette, Tr. 2360-2361).

141. Dr. Burnette has worked with numerous pre-eminent microbiologists in the field of anaerobic microbiology and much of his own research involves anaerobic microorganisms. (Burnette, Tr. 2365-2366).

142. Dr. Burnette has worked for Hatcher-Sayre, Inc., an environmental consulting firm, as an environmental scientist testing soil samples, landfills, groundwater, and water. (Burnette, Tr. 2366).

143. Dr. Burnette is currently the vice president of the Biological Safety Division at WIRB-Copernicus Group ("WCG"), a clinical services organization that provides support to a variety of biopharmaceutical and academic research programs. Dr. Burnette and the WCG assist customers with the design of laboratories, containment, disinfection, decontamination, and infection prevention. (Burnette, Tr. 2367-2368).

d. Dr. David Stewart

144. Dr. David Stewart received an undergraduate degree in psychology from the University of Louisiana at Monroe, then Northeast Louisiana University, and earned a master's degree in general psychology from Baylor University and a Ph.D. in personality and social psychology from Baylor University. (Stewart, Tr. 2494-2495).

145. Dr. Stewart is currently the president's professor of Marketing and Business Law at Loyola Marymount University where he teaches advertising and promotion management, marketing strategy, and introductory MBA marketing. (Stewart, Tr. 2492, 2496).

146. Dr. Stewart has taught extensively in the field of conduct and methodology of surveys, teaching marketing research at the undergraduate, graduate, and doctoral levels, and has taught courses on research methodology, psychometrics, and experimental design. (Stewart, Tr. 2498-2499).

147. Prior to his work in education, Dr. Stewart was a research manager for Needham, Harper & Steers Advertising in Chicago (now DDB Chicago). In that capacity, Dr. Stewart provided internal consultation services on research design, conducted an annual omnibus lifestyle survey of consumers in the United States, and tested creative content prior to its presentation to clients. (Stewart, Tr. 2499-2500).

148. Dr. Stewart has served as the editor of the *Journal of Marketing* and the *Journal of the Academy of Marketing Science* and is currently serving as the editor of the *Journal of Public Policy and Marketing*. As editor, Dr. Stewart has reviewed those papers and the survey methodology used in their preparation.

Approximately half of the papers submitted to those three journals use survey methodology as a basis for empirical presentation. (Stewart, Tr. 2500-2501).

149. Dr. Stewart has been published in more than 200 peer-reviewed journals, proceedings volumes, and book chapters, over half of which contained survey research. (Stewart, Tr. 2501).

150. Dr. Stewart is a member of the following academic and trade associations: The American Marketing Association; The American Statistical Association; INFORMS (management science professional organization); The Association for Consumer Research; The Society for Consumer Psychology; The Classification Society; The Society for Personality and Social Psychology; and The Academy of Management. He is a past president of the Society for Consumer Psychology and of the Academic Council for the American Marketing Association. (Stewart, Tr. 2500-2502).

151. In the 1990s, Dr. Stewart served two, three-year terms as a member of the joint professional advisory committee to the United States Census, and in that role advised the Census Bureau in the design of its various data collection activities, including the census. (Stewart, Tr. 2503-2504).

B. Background On Ecm And Ecm's Product And Sales

1. Respondent ECM BioFilms, Inc. and the ECM Additive

152. Respondent ECM BioFilms, Inc. is an Ohio-based corporation, started by Patrick Riley of Micro-Tech Research, Inc. ("Micro-Tech") in 1998. Its principal place of business is listed as Victoria Place, Suite 225, 100 South Park Place, Painesville, OH 44077. (Answer ¶ 1; Sinclair, Tr. 747, 756-757).

153. Micro-Tech owns the ECM Additive technology, and ECM licenses the technology from Micro-Tech. (JX 3).

154. On average, ECM has employed six employees. (CCX 819 (Sinclair, Dep. 327-328)).

155. ECM's employees include Robert Sinclair (president and CEO), Kenneth Sullivan (CFO), and one or two administrative employees and one or two sales people, including Tom Nealis, director of sales. (Sullivan, Tr. 698-700).

156. ECM manufactures, advertises, offers for sale, sells, and distributes additives for plastics,[5] including "MasterBatch Pellets." (Answer ¶ 2; JX 3; JX 4).

157. "MasterBatch" is a concentrate of additives dispersed within a carrier polymer, which is then blended into the base polymer or resin intended to be modified. (JX 4).

158. "ECM Additive" means the product, including "MasterBatch Pellets," that ECM manufactures and sells to plastic manufacturers and distributors. (JX 3; JX 4).

159. The ECM Additive is biodegradable. (JX 3).

160. The formula for the ECM Additive is a trade secret. ECM chose not to patent the ECM Additive because scientists had convinced ECM that it could not be reverse-engineered. (Sinclair, Tr. 777-778).

161. Analytical laboratories attempted to determine the specific ingredients of the ECM Additive, but none has identified the correct formula. (Sinclair, Tr. 777-778; RX 563).

162. Plastics and/or plastic products that contain an ECM Additive are known as "ECM Plastic(s)." (JX 3; JX 4).

163. ECM sells only plastic additive pellets and no other products. (Sinclair, Tr. 766).

2. ECM Supply Chain

164. ECM sells the ECM Additive exclusively to companies that manufacture plastic (or companies that have plastic manufactured for them) and to some distributors who sell the

[5] Detailed findings on plastics and polymers are *infra* F. 173-182.

additive to plastic manufacturers ("ECM's Customers"). (Sullivan, Tr. 695-696; Sinclair, Tr. 758-759).

165. ECM's Customers are plastics manufacturers who sell to multiple other, second-layer manufacturers and/or distributors. ECM Plastics will often pass through at least two

levels in the supply chain, and as many as four or five layers, before ever reaching an end-use consumer. (Sinclair, Tr. 785-786; CCX 811 (Hong, Dep. at 10-11, 112); Sullivan, Tr. 707-708; RX 471).

166. ECM's Customers purchase the ECM Additive in either sixty-five kilogram (65kg) drums or five hundred kilogram (500kg) pallet boxes. (Sinclair, Tr. 764-765).

167. Respondent does not dispute that ECM has sold its product to approximately 300 Customers. (*See* CCFF 23; RRCCFF 23).

168. The ECM Additive is an industrial product used by plastic manufacturers only and is not sold to the general public. (Sullivan, Tr. 695-696, 703-704, 707; Sinclair, Tr. 758-759, 764-767).

169. ECM has no storefront or brick and mortar office. (Sinclair, Tr. 765-766).

170. It can be difficult to determine who is the end-use consumer of some ECM Plastics. For example, it is unclear when a company such as Amazon ships a product in a box containing an ECM Plastic air-cushioned pillow, whether the end-use consumer of the ECM Plastic is Amazon or the recipient of the product from Amazon in a box that contains the air-cushioned pillow. (Sinclair, Tr. 785-786).

171. Some of ECM's plastic manufacturer customers use the ECM Additive to make products for purchase by retailers that sell consumer products, such as grocery stores and restaurants. Other ECM plastic manufacturer customers only make the plastic (such as plastic film), which they sell to other product and package manufacturers, who in turn sell to packagers, retailers, or end-use

consumers. (F. 11-12, 19, 21, 25, 31, 40-41, 51, 56-59, 65-67, 68, 71-73, 83; CCX 818 (Sinclair, Dep. at 217); *see also* CCX 800 (BER, Dep. at 10-11)).

172. ECM does not advertise or sell to consumers. (Sullivan, Tr. 707; F. 164-166, 168; *see also* F. 207, 210).

3. Plastics

173. Plastic is a generic term used to describe high-molecular weight polymers. (CCX 891 (McCarthy Expert Report at 10)).

174. A polymer is a substance that has a molecular structure consisting chiefly or entirely of a large number of similar units (monomers) bonded together. (JX 4; RX 458).

175. Plastic additives are materials added to a plastic polymer to produce a desired change in material properties or characteristics. (JX 4).

176. Bioplastic is a type of plastic derived from biological substances rather than petroleum, generally said to be biodegradable. (JX 4).

177. There are various plastics, but synthetic (laboratory-made), petroleum-based plastics are by far the most common. (CCX 891 (McCarthy Expert Report 10); (McCarthy, Tr. 397) (stating that petroleum-based plastics make up the bulk of the plastics used today)).

178. Plastics derived from petrochemicals are strong, durable, and inexpensive to manufacture, which make them ideally suited for commercial applications. These petroleum-based plastics ("conventional plastics") represent over 90% of the commercial plastic market. (CCX 891 (McCarthy Expert Report at 10); McCarthy, Tr. 397 (stating that petroleum-based plastics make up the bulk of the plastics used today)).

179. Conventional plastics refers to polyolefin plastics that are untreated and not intended to be biodegradable. (JX 4).

180. The most common types of conventional plastics are high-molecular weight polyethylene ("PE"), used to manufacture plastic bags, packaging material, and bottles; and polyurethane ("PUR"), used in medical and industrial applications such as adhesives and paint. Also common is polypropylene ("PP"), used for disposable cups, clothing, storage containers, and DVD covers; and polystyrene ("PS"), which is used to make disposable cutlery and cups, foam packing peanuts, insulation, and fast food containers. (JX 3; CCX 891 (McCarthy Expert Report at 10-11); McCarthy, Tr. 397, 398 (listing examples of products made from different types of plastics)).

181. In North America, conventional plastics like PE or PP primarily come from domestic natural gas and are substances that contain varying formations of hydrocarbon bonds or polymers. (RX 458).

182. The characteristics that make conventional plastics commercially useful – strength, durability, synthetically derived from petrochemicals – make them highly resistant to biological attack. (CCX 891 (McCarthy Expert Report at 12); CCX 880 at 2; McCarthy, Tr. 397-99; Burnette, Tr. 2432-2433).

4. ECM Plastics

183. Plastic manufacturers blend the ECM Additive or MasterBatch Pellets into the base polymer or resin intended to be modified. (JX 4).

184. ECM offers a "load rate" of 70% in its pellets, meaning that every pellet will contain approximately 70% of the active biodegradable formula, along with 30% conventional polymer resin. (CCX 818 (Sinclair, Dep. 118-120)).

185. ECM directs plastics manufacturers to blend the ECM pellets into the manufacturer's plastics at a 1% rate by weight, to obtain a uniform distribution of the pellet throughout the plastic and at a level that ensures maximum utility without compromising the plastic's integrity. (Sinclair, Tr. 765, 775-776, 783, 787-788, 790; CCX 20; RX 137).

186. Blending of the ECM Additive requires no additional equipment from plastics manufacturers, so long as the manufacturer is already equipped to blend other additives. (RX 137).

187. For all plastics properly manufactured with the ECM Additive, at least 1% of the final plastic will include the ECM Additive based on weight. (Sinclair, Tr. 783; RX 678).

188. Like many other plastic additives (*e.g.*, coloring agents), manufacturers introduce the ECM Additive into the plastic during the initial blending process. (Sinclair, Tr. 797; RX 135).

189. Plastics are commonly manufactured using one of several techniques, including extrusion molding, injection molding, or blow molding. (Sahu, Tr. 1816-1817; RX 656).

190. Extrusion molding involves a heated plastic compound continuously injected through a long die cast in the desired shape. (Sahu, Tr. 1816; RX 783).

191. There are many different types of plastic polymers, but where ECM Additives are used, the additive is intended to be mixed uniformly throughout the plastic polymer through a heated blending process, as a coloring additive would be. (Sahu, Tr. 1813-1814; RX 520).

192. ECM's customers manufacture many plastic polymers, but the bulk of the plastics incorporating ECM's technology consist of polypropylene ("PP"), polystyrene ("PS"), and polyethylenes ("PE"). (RX 522).

193. Over seventy percent of ECM Plastics are PE film or meshing plastics. Companies frequently use ECM's technology in plastics such as films (*e.g.*, grocery "t-shirt" bags, packaging cushions, etc.). (RX 520; RX 471; RX 849).

194. Manufacturing some plastics with the ECM Additive can require more process modifications than others, so ECM works with potential customers to prevent scorching and other manufacturing problems. (Sinclair, Tr. 762).

195. Although the process for manufacturing plastics with the ECM Additive is an involved process, most ECM customers can accomplish it quite readily. (Sinclair, Tr. 762).

C. ECM's Claims

1. Background

196. Americans generate about 32 million tons of plastic waste every year, more than half of which ends up in landfills. (JX 3 at 2).

197. Landfills are disposal sites where solid waste is buried between containment layers consisting of soil and other materials to eliminate contamination of the surrounding land. (JX 4 at 4).

198. Municipal Solid Waste ("MSW") is waste consisting of everyday items discarded by the public, including, *e.g.*, product packaging, grass clippings, furniture, clothing, food scraps, newspapers, etc., but excluding hazardous and commercial waste. (JX 4 at 5).

199. Landfills continue to be the dominant method for managing MSW in the United States. (JX 3 at 2).

200. Due to their recalcitrant nature, plastics pose a growing disposal and environmental pollution problem. (JX 3 at 3).

201. In response to demand, various materials have been introduced to improve the biodegradability of plastics. These include conventional plastics amended with additives meant to enhance biodegradability (*e.g.*, photodegradable, oxo-degradable, and biodegradable additives), bio-based plastics, and natural fiber composites. (JX 3 at 2-3).

202. ECM's competitors include other additive companies, replacement resin companies, and oxo-degradable companies. (Sinclair, Tr. 775-777).

203. There are competing technologies available, such as bioplastics, which are biodegradable plastic polymers or resins

derived from biological substances instead of petroleum. (Sahu, Tr. 1758; RX 748; RX 678).

204. However, bioplastic technologies come at a substantial cost, (Sullivan, Tr. 697; Sinclair, Tr. 768; RX 335), and bioplastics are ordinarily not suitable for strong plastics that are meant for applications that require endurance and lack of malleability. (Sahu, Tr. 1821- 1824).

205. ECM's Customers are motivated to produce biodegradable plastics to meet what they perceive to be their customers' demand for such products. (CCX 822 (ANS, Dep. at 12-13) ("[m]y customers would call me, [and ask,] do you have [a] biodegradable bag, do you have a green bag[?]"); CCX 809 (Flexible, Dep. at 72) ("There is a lot of backlash against plastic bags. A lot of people don't like plastic bags."); CCX 800 (BER, Dep. at 18) ("[Customers] were looking for a product they could mark as degradable to say that they were being, you know, environmentally sensitive. It's very important in their packaging, that they could…print it right on the package, you know, biodegradable."); CCX 822 (ANS, Dep. at 13) ("People . . . don't want to pollute the environment and this [biodegradable plastics] is what they choose to buy.")).

2. ECM's Marketing and Sales Process

206. ECM markets the ECM Additive to potential Customers through its website, flyers, brochures, and sales presentations ("Marketing Materials"). (Sullivan, Tr. 700, 735-736).

207. ECM's website, which is its principal advertising tool, is geared toward plastics manufacturers and people in the plastics industry. ECM does not advertise to end-use consumers. (Sullivan, Tr. 707).

208. The ECM Additive cannot be purchased over the Internet. (Sinclair, Tr. 766).

209. ECM's advertising budget is approximately $12,000 per year, which covers periodic updates to the website and other Marketing Materials, as well as the occasional purchase of

promotional "give aways" to Customers or shareholders. (Sullivan, Tr. 700).

210. ECM does not do nationwide advertising or advertise in trade journals, or do any "consumer-type" advertising. (Sullivan, Tr. 700-701).

211. In most cases, ECM's potential Customers initiate the first contact with ECM. (Sinclair, Tr. 761).

212. ECM employs a sales manager, Tom Nealis, who has the title of director of sales. However, ECM employs no active sales force. (Sullivan, Tr. 698-700, 761).

213. The process by which a prospective Customer becomes an actual Customer commonly begins with website inquiries submitted by plastics manufacturers (or companies that subcontract the manufacturing to others). The ECM website provides a standard "web inquiry" form that is automatically emailed to ECM. (RX 139 at 2; Sullivan, Tr. 701-702).

214. A potential Customer contact is generally first handled by Mr. Nealis of ECM, who provides the potential customer basic information, such as pricing, and sales literature, and addresses other initial issues. As the sales process comes to involve the technical issues, the potential customer is directed to Mr. Sinclair. (RX 13; Sinclair, Tr. 761; Sullivan, Tr. 701-702).

215. Mr. Sinclair may also respond to potential Customer web inquiries. (RX 139).

216. As the sales process proceeds, the potential Customer will run some sample plastics incorporating the ECM Additive through its manufacturing process, to test whether it can properly manufacture plastics with the ECM Additive. ECM provides samples of the ECM Additive for this purpose. (Sinclair, Tr. 762; Sullivan, Tr. 703-705).

217. As part of the sales process, the potential Customer will ordinarily test ECM Plastics against plastics manufactured without the ECM Additive, to make sure that incorporating the ECM Additive will not adversely affect the plastic product's

appearance, strength, or brittleness, or otherwise change the attributes of the plastic product that the potential Customer produces. (Sullivan, Tr. 703, 709; Sinclair, Tr. 762-763).

218. Mr. Alan Poje of ECM advised Customers on plastics extrusion (the mechanics of adjusting the manufacturing process to incorporate the ECM Additive). (JX 3 at 4).

219. ECM Customers perform product performance testing on their finished ECM Additive-infused plastic before ordering the ECM Additive, to be sure that incorporating the ECM Additive does not change other attributes of their product. (Sullivan, Tr. 704-705).

220. ECM Customers perform functionality and qualitative testing, comparing the ECM Additive-infused plastic with their original product. Functionality and qualitative tests will determine whether the plastic containing the ECM Additive is functioning up to the necessary specifications and that there has been no specification deterioration. (Sinclair, Tr. 762-763).

221. Some ECM Customers have conducted biodegradability testing through outside laboratories. (Poth, Tr. 1481; Johnson, Tr. 1576-1577).

222. On average, for a first-time sale, the process from initial contact with a potential Customer to that business becoming an actual Customer of ECM takes six months to a year, and may sometimes take several years. (Sinclair, Tr. 767).

223. Orders for the ECM Additive are completed over the phone and followed-up with a confirmation fax or email. (Sinclair, Tr. 766).

224. Customers place orders directly with ECM and the product is shipped directly from the ECM manufacturing site in Carpentersville, Illinois. (Sinclair, Tr. 765).

225. Mr. Sinclair often provides potential customers with information and answers their questions as well. (RX 93; RX 110; RX 122).

226. Mr. Sinclair will often work with manufacturers' marketing people to educate them on ECM's product and to help them "position" the manufactured plastic product with the manufacturers' customers. (Sinclair, Tr. 763-764).

227. ECM regularly corresponds with customers by email or phone to provide them with any information they require. (*E.g.*, RX 113, RX 115; RX 117-118; RX 126-129; RX 132-135).

228. ECM offered, as a marketing tool to its potential Customers, to meet with potential Customer's customers, to answer questions. (CCX 813 (Nealis, Dep. at 49)).

229. Prior to processing an order, ECM double-checks that its customer understands that the proper loading rate is one percent (1%) by weight. (Sinclair, Tr. 765).

230. ECM provides its Customers with manufacturing instructions to ensure that the product made with the ECM Additive is distributed throughout the plastic and that the ECM Additive is not scorched. (Sinclair, Tr. 762, 783, 787-790).

231. ECM Customers are normally long-term accounts, as opposed to one-time purchasers, that purchase again from ECM, as needed to meet demand from the Customers' customers for biodegradable plastics. (Sullivan, Tr. 705-706).

3. "Biodegradable" and "Biodegradable in a Landfill"

232. ECM claims that its additive technology renders plastic products "biodegradable." (JX 3 at 3).

233. ECM tells its Customers that adding the ECM Additive to their plastics will render their plastic products "biodegradable" without negatively affecting product performance. (Sinclair, Tr. 767).

234. ECM's website states that ECM's additive technology "renders . . . plastic products biodegradable . . . ." (CCX 3; CCX 15; CCX 19 (ECM website screenshots); CCX 20 (ECM website screenshots); CCX 24 (ECM website screenshots); CCX 25 (ECM website screenshots)).

235. Each page of ECM's website, ecmbiofilms.com, states at the top: "Additives for Manufacturing Biodegradable Plastic Packaging and Products," with a description of the additive technology. (CCX 22; CCX 19; CCX 24).

236. ECM has distributed brochures aimed at "green business," promising that its technology yields "biodegradable" plastic products that are "priced competitively with, and have the same mechanical characteristics as, traditional non-degradable products." (JX 3 at 3).

237. ECM claims that plastics treated with the ECM Additive will "biodegrade" in a landfill. (JX 3 at 3; CCX 3; CCX 6; CCX 7 at 7; CCX 11; CCX 12; CCX 15; CCX 19 at 5; CCX 242 at 15; CCX 276; CCX 372).

238. On October 12, 2012, the FTC published revisions to the FTC's Guides For The Use Of Environmental Marketing Claims with regard to "degradable" claims ("Green Guides"). The Green Guides added the following: "It is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year." (16 C.F.R. § 260.8(c)).

239. Prior to issuance of the revised Green Guides in October 2012, ECM's logo depicted a green tree, with the name "ECM" in the "tree" and the word "biodegradable" below at the base of the "tree." (CCX 8; *see* CCX 3; CCX 259A). Below is a representation of this ECM logo:

240. Mr. Sinclair does not know of any ECM Customer who believes that ECM Plastics completely decompose into elements found in nature within one year of customary disposal. (Sinclair, Tr. 785).

241. An implied claim that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year, is not reasonably clear or conspicuous on the face of the Marketing Materials claiming that ECM Plastics are "biodegradable," and/or "biodegradable" in a "landfill." A confident conclusion cannot be drawn that a significant minority of reasonable ECM Customers or other reasonable consumers would interpret these claims of ECM to convey the message that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. (F. 234-237).

242. An implied claim that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year, is not reasonably clear or conspicuous on the face of the ECM logo. A confident conclusion cannot be drawn that a significant minority of reasonable ECM Customers or other reasonable consumers would interpret ECM's logo to convey the message that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. (F. 239).

243. Based on a facial analysis alone, and considering the language and images of ECM's "biodegradable" logo, the overall net impression of the logo is that ECM Plastics are "biodegradable," and the logo is not reasonably interpreted to be claiming that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. (F. 239).

244. The claim that ECM intended to convey with the logo is that plastics made with the ECM product are biodegradable. (CCX 819 (Sinclair, Dep. at 432)).

4. Complete Biodegradation in a Landfill Within "9 Months to 5 Years" and "In Some Period Greater Than a Year"

245. Prior to the revision to the Green Guides in October 2012 (*see* F. 238), ECM's Marketing Materials included express representations that plastics treated with the ECM Additive will "fully biodegrade," in a "landfill," in a period of "9 months to 5 years." For example, a one-page flyer, CCX 3, appeared as follows:

MASTERBATCH PELLETS

ECM BioFilms, Inc.

Manufacturer of Additives That Make Standard Plastic Resins Biodegradable

ECM BioFilms, Inc. sells additives to plastic product manufacturers which allow them to offer their customers biodegradable plastic products that can be priced competitively with, and have the same mechanical characteristics as, their traditional, non-degradable products.

The revolutionary additive technology, when combined as a one-percent load to the most widely-used plastic resins, renders the finished plastic products biodegradable while maintaining their other desired characteristics.

Plastic products made with ECM additives

- **Fully biodegrade in 9 months to 5 years.**
- **Fully biodegrade wherever they are disposed of where other things are biodegrading (anaerobically and aerobically):**
  - In Landfills,
  - In Compost (backyard as well as commercial facilities),
  - Buried in the ground or littered,
  - Agricultural and erosion-control settings.
- **Are recyclable.**
- **Can be made with recycled resins.**
- **Do not use heat, light or mechanical stress to break them down.**
- **Do not require special handling (unlike PLA and oxo-degradable products).**
- **Do not contain heavy metals (unlike most oxo-degradable products).**

Additives for Manufacturing Biodegradable Plastic Packaging and Products

Plastic Bag Film Samples Buried in Same Soil for a Month

Without ECM | With ECM

The process continues until the plastic products become part of the organic components of the soil just like biodegraded sticks or other pieces of wood become part of the soil..

ECM BIOFILMS

ECM BioFilms, Inc.
Victoria Place – Suite 225
100 South Park Place
Painesville, OH 44077, U.S.A.

Website: www.ecmbiofilms.com

For Sales or Information, contact:

Phone: 440-350-1400
Fax: 440-350-1444
E-mail: sales@ecmbiofilms.com
U.S. Toll Free: 888-220-2792

ECM

Plastic products bearing this logo are wholly biodegradable. Insist on it for the products you use.

CONFIDENTIAL

ECM-FTC-000017
CCX - 3

(CCX 3; *see also* CCX 5; CCX 6; CCX 7 at 6; CCX 10, CCX 11; CCX 19 at 5; CCX 24 at 6; CCX 25 at 104, 117, 203, 208; CCX 259A; *see also* CCX 809 (Flexible, Dep. at 20); *see also* CCX 822 (ANS, Dep. at 13); CCX 812 (Kappus, Dep. at 14)).

246. Based on the express language used in ECM's Marketing Materials prior to October 2012, set forth in F. 245 above, and having viewed these Marketing Materials in their entirety and considered the language, images, and the interaction of all the different elements in these materials, the overall net impression is that plastics treated with the ECM Additive will fully biodegrade, in a landfill, within a time period ranging from 9 months to 5 years. (F. 245; CCX 3; CCX 5; CCX 6; CCX 7; CCX 10; CCX 11; CCX 19; CCX 24; CCX 25; CCX 259A).

247. ECM admits that it previously represented to its Customers that the ECM Additive would cause plastics to biodegrade in 9 months to 5 years. (Sinclair, Tr. 768).

248. At least some of ECM's Marketing Materials included language advising that the rate of biodegradation was dependent on various factors, such as soil conditions and the availability of microbes in the soil. ECM's "Technology Page," immediately after claiming that ECM Plastics "break down in approximately 9 month[s] to 5 years in nearly all landfills . . . ," states: "All sorts of factors determine the amount of microbes available in the soil and the soil conditions determine the rate of degradation. The plastic products made with ECM technology basically rely on the microbes in the soil . . . ." (CCX 6; CCX 11 at 2).

249. Based on the overall net impression, the language described in F. 248, in context, represents that various factors affect the point in time at which full biodegradation will occur within the 9 months to 5 years' time range. This language does not materially modify, qualify, or disclaim the claim that the period of "9 months to 5 years" was the applicable time range. Thus, such language does not alter the overall net impression conveyed by Respondent that ECM Plastics will fully biodegrade, including in a landfill, within 9 months to 5 years. (F. 246; Sullivan, Tr. 718 (acknowledging that the ECM email stating ECM Plastics "will typically biodegrade in nine months to five years upon their disposal depending on the conditions within the

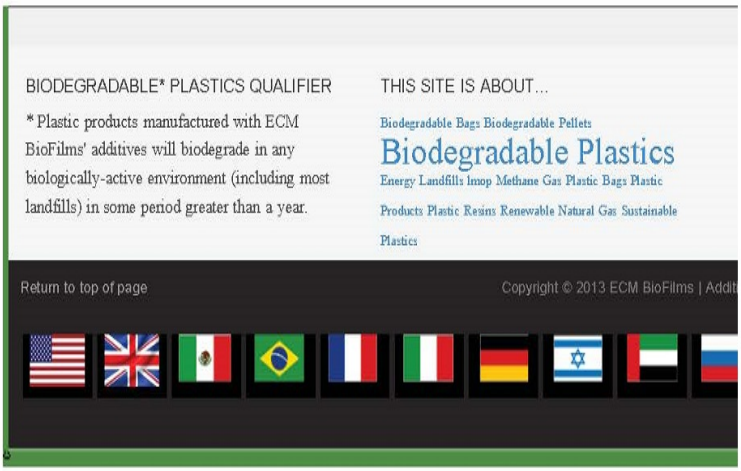
environment they are disposed," means "exactly" what is says, that "it will – it would be in that nine month to five-year period. . . . It does not say 'longer' than that period.").

250. ECM advised its Customer D&W Fine Pack that the time period of 9 months to 5 years for biodegradation represented a "bell curve," that depended on conditions. (CCX 802 (Leiti, Dep. at 71-73)).

251. ECM understood the revised Green Guides, issued in October 2012, to require a product to fully biodegrade within one year in order to make an "unqualified" "biodegradable" claim. Because ECM Plastics would not fully biodegrade in a landfill within one year, ECM determined that it had to "qualify" its claim to satisfy the revised Green Guides. (Sinclair, Tr. 771).

252. In response to the issuance of the revised Green Guides in October 2012, ECM began revising its Marketing Materials to omit references to a biodegradation rate of "9 months to 5 years" and undertook to revise its biodegradability claims in an effort to meet the guidelines in the revised Green Guides. (Sinclair, Tr. 769-770; JX 3 at 3).

253. ECM's revised Marketing Materials placed an asterisk wherever the word "biodegradable," appeared, which provided the following text: "Plastic products manufactured with [the ECM Additive] will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." An example of this revision is reprinted below:



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(CCX 20).

254. ECM's website, as revised after issuance of the revised Green Guides, included the following language:

> The basic concept is that biodegradation is a natural process that occurs around the world but at various speeds due to various conditions. Plastics with our additives behave like sticks, branches or trunks of trees. Due to this fact, we do not guarantee any particular time because the time depends on the same factors that the biodegradation of woods and most other organic materials on earth depend – ambient biota and other environmental conditions. Under specific composting conditions with additional accelerants sprayed on them, some customers have reported biodegradation in as little as a couple of months. Under the more usual, commercial composting conditions using high heat processes, a time frame of around some period greater than a year is a reasonable expectation.

(RX 681 at 61).

255. An implied claim that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year is not reasonably clear or conspicuous on the face of ECM's claim, as set forth in ECM's Marketing Materials revised after publication of the revised Green Guides, that: "Plastic products manufactured with [the ECM Additive] will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." It cannot be concluded with confidence that a significant minority of reasonable ECM Customers or other reasonable consumers viewing this claim would interpret the claim to convey the message that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. F. 253.

256. ECM also revised its logo (F. 239) after publication of the revised Green Guides in October 2012, by placing the following text directly underneath the word "biodegradable": "Plastic products manufactured with [the ECM Additive] will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." (CCX 13). A depiction of the revised logo is set forth below:

257. An implied claim that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year is not reasonably clear or conspicuous on the face of the ECM logo, as revised after publication of the revised Green Guides. A review of the revised ECM logo, considering all the elements, does not lead to a confident conclusion that a significant minority of reasonable ECM Customers or other reasonable consumers would interpret the statement in the logo that ECM

Plastics will biodegrade including in most landfills, "in some period greater than a year," to convey the message that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. (F. 256).

258. Based on a facial analysis alone, and considering the language and images of ECM's "biodegradable" logo as revised after issuance of the revised Green Guides in October 2012, the overall net impression of the logo is that ECM Plastics are "biodegradable" and will biodegrade, including in a landfill, in some period greater than a year, and the logo is not reasonably interpreted to be claiming that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year. (F. 256).

259. ECM permanently discontinued its claims of biodegradation within "9 months to 5 years," in approximately November or December 2013, when it removed such claims from its website. On a few occasions in 2013, Mr. Nealis of ECM mistakenly sent out older brochures that contained the "9 months to 5 years" claim. (CCX 819 (Sinclair Dep. at 275-276); Sinclair, Tr. 770-771; CCX 813 (Nealis, Dep. at 244-245)).

260. ECM intends to not make the "9 months to 5 years" claim again at any time in the future. (Sinclair, Tr. 771).

261. In October 2012, upon issuance of the revised Green Guides, ECM notified its Customers that, based on the new Green Guides, they should qualify their "biodegradable" claims, because the time frame of a year of less, in the revised Green Guides, did not "fit" their products. (Sinclair, Tr. 1610-1611).

262. Following publication of the revised Green Guides, ECM issued an email to its Customers which stated in part:

> If you have evidence that your products with our additives will fully biodegrade in one year or less in the environment where it will be customarily disposed you may still make an unqualified claim of "biodegradable" for those products. But for most of our customers' plastic products with our additives whose

> customary disposal is in a landfill, they will not be able to use that unqualified claim.

(RX 35-RX 77).

263. No customer has ever asked Mr. Nealis to provide a narrower time frame than some period greater than a year. (CCX 813 (Nealis, Dep. at 111)).

264. No customer has ever asked ECM what "some period greater than a year" means. (CCX 813 (Nealis, Dep. at 112)).

5. "Tests Prove" ECM's Claims

265. Prior to publication of the revised Green Guides in October 2012, based on the overall net impression of ECM's Marketing Materials, ECM claimed that independent tests, including ASTM D5511, proved that the ECM Additive caused ECM Plastics to fully biodegrade in a landfill in a period of 9 months to 5 years. CCX 6, titled, "Our Technology for the Biodegradation of Plastic Products," refers to specific ASTM testing and further includes the following language: "ECM engaged several renowned testing laboratories to independently establish the biodegradability of plastics made with ECM's additives. The tests concluded that the products were fully biodegradable under both aerobic and anaerobic conditions. . . . The plastic products made with our additives will break down in approximately 9 month[s] to 5 years in nearly all landfills . . . ." *See also* CCX 5 (referring to "9 months to 5 years" biodegradation rate and then stating: "[W]e certify the full biodegradation of most all plastic products manufactured with at least a one percent load of our additives. We can certify this situation due to the internal and external studies that have cost us hundreds of thousands of dollars. . . . We have had the various test data analyzed by independent scientists and their conclusions and some of the data have been sent to you in the presentation package and are what we base our certification on."). (CCX 5; CCX 6; *see also* CCX 10; CCX 11).

266. ECM issued a "Certificate of Biodegradability" to its Customers (F. 269). Every Customer that confirmed that it would manufacture its plastic in accordance with ECM's manufacturing

specifications would be issued ECM's Certificate of Biodegradability. (CCX 1; CCX 14; Sinclair, Tr. 783-784; *see also* CCX 455; CCX 727 at 6; CCX 800 (BER, Dep. at 29); CCX 802 (D&W, Dep. at 20-23); CCX 803 (DTE, Dep. at 25-26); CCX 804 (Eagle, Dep. at 23-24); CCX 809 (Flexible, Dep. at 40-41); CCX 810 (FP, Dep. at 33); CCX 811 (IPB, Dep. at 12-18); CCX 812 (Kappus, Dep. at 24-25); CCX 813 (Nealis, Dep. at 49); CCX 817 (Quest, Dep. at 29); CCX 822 (ANS, Dep. at 17-18).

267. ECM did not offer ECM's Certificate of Biodegradability to customers of ECM's Customers. (CCX 813 (Nealis, Dep. at 49)).

268. The purpose of the Certificate of Biodegradability was to show that ECM Plastics had been tested and are biodegradable. ECM's Customers wanted to see data from an outside lab. (CCX 818 (Sinclair, Dep. at 93); CCX 813 (Nealis, Dep. at 20)).

269. The form of the Certificate appears as follows:

CONFIDENTIAL

CERTIFICATE
of
the Biodegradability of Plastic Products Made by
[redacted]
that Incorporate the
ECM MasterBatch Pellet Technology

ECM Biodegradable

This is to certify that numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic materials.

A Degradable Plastic is defined (ASTM 1991) as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.

The biodegradation of the submitted plastic samples was tested using ASTM D5209-91, "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge", ASTM D5338.98, "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions", which is equivalent to CEN prEN 'WI 261085, and the ISO 14855 method, "Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions", ASTM 5511, "Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions." The results of these tests and the related biodegradation and ecological impact experiments in various environments are contained in the Ecological Assessment of ECM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable and safe for the environment.

This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been conducted since the publication of the Ecological Assessment, all of which use a one percent loading rate for the ECM MasterBatch Pellets rather than the higher additive levels used earlier, have been presented to [redacted], and may be used by it to validate its claims to the biodegradability and environmental safety of plastic products that it manufactures that are made consistent with the manufacturing guidelines for uses of ECM MasterBatch Pellets presented to it by ECM BioFilms, Inc.

Dated: January 16, 2007

Certified by: _____
Robert Sinclair, President
ECM BioFilms, Inc.

ECM-FTC-000015
CCX - 1

(CCX 1)

270. After issuance of the revised Green Guides in October 2012, ECM revised the Certificate of Biodegradability to incorporate the revised ECM logo (*see* F. 256) referring to biodegradation in "some period greater than a year." (CCX 14).

271. ECM's Certificate of Biodegradability defines a degradable plastic in the same way as biodegradability is defined by ASTM. (Sinclair, Tr. 785; CCX 1; CCX 14; F. 269).

272. ECM's "Certificate of Biodegradability" claims to "certify that numerous plastic samples, submitted by ECM Biofilms, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO [International Organisation for Standardization] and other such standardization bodies . . . ." Among the test methods cited was the ASTM D5511 test. (CCX 1; CCX 14).

273. ECM's Certificate of Biodegradability states that the tests "certif[y] that plastic products manufactured with ECM additives can be marketed as biodegradable" and the certificate itself can be "used by [the customer] to validate its claims to the biodegradability" of ECM Plastic. (CCX 1; CCX 14).

274. Based on the language and images of ECM's Certificate of Biodegradability, as it appeared prior to issuance of the revised Green Guides, the overall net impression of the Certificate of Biodegradability is that ECM Plastics are biodegradable and that testing by independent laboratories proves that ECM Plastics are biodegradable. (F. 269; CCX 1; *see also* RPFF 319 and RB at 26, 188 (admitting that Certificate of Biodegradability claims ECM Plastics are "biodegradable").

275. Implied claims that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year, and that independent testing proves such claim, are not reasonably clear or conspicuous on the face of ECM's Certificate of Biodegradability, including as revised after issuance of the revised Green Guides in October 2012. A review of ECM's Certificate of Biodegradability, including as revised, and considering all its elements, does not lead to a confident conclusion that a significant minority of reasonable ECM Customers or other reasonable consumers would interpret ECM's Certificate of Biodegradability, including as revised, to include the messages that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year, and/or that independent testing proves that ECM Plastics completely biodegrade in a landfill within one year. (F. 269-274).

276. Based on a facial analysis alone, and considering the language and images of ECM's Certificate of Biodegradability, including as revised after issuance of the revised Green Guides in October 2012 (to include revised ECM logo), ECM's Certificate of Biodegradability is not reasonably interpreted as claiming that ECM Plastics completely biodegrade into elements found in nature, in a landfill, within one year, and/or that independent testing proves that ECM Plastics completely biodegrade in a landfill within one year. (F. 258, 269-270).

277. ECM often provided the "McLaren/Hart" or "ChemRisk" assessment to its Customers. (JX 3 at 4; Sinclair, Tr. 1702-1703; *e.g.*, CCX 334; CCX 335; CCX 336; CCX 337; CCX 338; CCX 339).[6]

6. "Passing Down" of ECM's Claims

278. ECM advertises on its website, www.ecmbiofilms.com. (*E.g.*, CCX 25; CCX 725).

279. The ECM website is publicly available and has been visited by at least some end-use consumers. (CCX 326; CCX 819 (Sinclair, Dep. at 312-314)).

280. ECM has provided its Customers with its Marketing Materials, and its logo, and encouraged its Customers to use these materials for its Customers' marketing of ECM Plastics to their own customers. (CCX 816 (Poje, Dep. at 37); CCX 822 (ANS, Dep. at 20-21); CCX 350 (ECM providing flyers that "may be used for marketing"); CCX 364 ("You and your customers can use the attached logos…and their related promotional material."); CCX 368 (giving customer's "marketing department" permission to use ECM's flyer "as they see fit"); CCX 369 (recommending making sales "using the tools that we have given you"); CCX 370 (attaching "sales tools you may find helpful for your sales team");

[6] The ChemRisk or McLaren/Hart report refers to the February 1999 report commissioned by Microtech Research and prepared by ChemRisk, a service of McLaren/Hart, Inc., titled, "Ecological Assessment of ECM Plastic." (CCX 266E; Sinclair, Tr. 1702-1703).

CCX 373 (attaching "a good tool for your sales team"); CCX 387 (attaching marketing materials "for your sales team"); CCX 390 (attaching "flyer that might be useful for your sales people")).

281. In some instances, ECM would offer to provide, and/or would provide, guidance on advertising copy. (CCX 283 (offering to Customer to "work together on particular language that [downstream customer] would want"); CCX 307 (correcting advertising claim drafted by downstream customer Down-to-Earth); CCX 308 (suggesting specific copy for biodegradable claim on bags); CCX 309 (same); CCX 320 (offering to review information to place on packaging, and advising to include ECM web address on packaging); CCX 397 (approving Customer's claim that bags will decompose in 9 months to 5 years); CCX 562 (suggesting specific advertising language to place on bag made of ECM Plastic)).

282. When asked by Customers, Mr. Sinclair has provided opinions or feedback about labeling language being proposed for ECM Plastic products. (Sinclair, Tr. 786-787; RX 90; RX 117).

283. Most ECM Customers have their own specific individuals performing marketing functions. (Sinclair, Tr. 763).

284. ECM has provided its logo for use by ECM's Customers. Some Customers asked ECM for the logo to place on their product. (CCX 816 (Poje, Dep. at 52); *see, e.g.*, CCX 320 (ECM transmitting logo by email); *see also* CCX 316; CCX 319; CCX 320; CCX 358; CCX 359; CCX 361; CCX 364).

285. Respondent admits that the following exhibits introduced by Complaint Counsel represent photographs of ECM Plastic products that reach end-use consumers. These exhibits demonstrate that some ECM Customers placed generalized "biodegradable" claims that did not state any biodegradation rate, including the ECM "biodegradable" logo, on plastics made with the ECM Additive, including products that would reach end-use consumers, such as plastic dinnerware, straws, and "clam shell" carry-out containers, restaurant and grocery bags, trash bags, and shampoo and conditioner bottles. (CCX 97-100, 103-104, 107; 109-151; RB at 171-172 n.215).

286. Some of ECM's plastic manufacturer customers used a "9 months to 5 years" in a "landfill" claim in advertising to their own customers, frequently in language mirroring that in ECM Marketing Materials. (CCX 34 (Memo from AirPouch plastic film manufacturers to "Sales and Distributors" referring to ECM Additive and claiming biodegradation within 9 months to 5 years claims for AirPouch "Sales and Marketing Alert"); CCX 37 (website ad for BioPVC biodegradable plastic film referring to breakdown in a landfill within 9 months to 5 years); CCX 38 (Buckeye Packaging advertisement claiming biodegradable packaging materials will breakdown in a landfill within 9 months to 5 years); CCX 50 (Flambeau Industrial and Packaging Group landfill claim in ad for storage cases and boxes); CCX 57 (Kappus Plastic Company advertisement for BioRigid Vinyl stating it will breakdown within 9 months to 5 years); CCX 105 (Placson Films advertisement for films and bags that have "been tested to successfully biodegrade within 9 months to 5 years under most environmental conditions"); RX 418 (9 months to 5 years and landfill claims on FP International ad for Cello brand air cushions); CCX 565 (FP International advertisement for polystyrene loosefill claiming biodegradation "within 9 months to 60 months in the presence of other microorganisms, when present in a landfill or in soil"); *see also* CCX 812 (Kappus, Dep. at 22-23) (stating that Kappus printed ECM's information, and put the information on a letter to customers on Kappus letterhead, including the 9 months to 5 year time period for biodegradation); CCX 812 (Kappus, Dep. at 35-36) (stating that the Kappus advertisement for BioRigidVinyl claiming breakdown within 9 months to 5 years was based on ECM marketing materials)).

287. ECM Customer Eagle Film Extruders, Inc. ("Eagle Film") (F. 37-43) would forward ECM's Marketing Materials directly to its customers, so that they could contact ECM themselves. Eagle Film would direct its customers to contact Mr. Sinclair at ECM to answer questions. (CCX 804 (Eagle, Dep. at 21-22, 32)).

288. Customers of ECM Customer ANS Plastic Corporation ("ANS") (F. 9-13) contacted ECM directly. (CCX 822 (ANS, Dep. at 23-24)).

289. ANS manufactured plastic bags printed with the ECM logo, which customers of ANS, such as grocery stores or pet stores, would give to their customers. ANS estimates that it manufactured "millions" of such bags. (CCX 822 (ANS, Dep. at 26-27)).

290. ECM Customer Flexible Plastics, Inc. ("Flexible") (F. 44-52) asked for and received a copy of ECM's logo, and placed the logo on cases of plastic bags that Flexible sold to its veterinary supply customer. (CCX 809 (Flexible, Dep. at 24-28)).

291. When customers of Flexible had questions about the biodegradability of Flexible's bags, the standard practice was to send the customer to ECM's website. Flexible had sent a copy of some technical and pricing information it had received from ECM to its "white bag" distributors (*see* F. 51), which were all being made with the ECM Additive. Flexible did not distribute ECM Marketing Materials to its customers. (CCX 809 (Flexible, Dep. at 32-33, 38-40)).

292. ECM Customer Island Plastic Bags ("IPB"), a plastic bag manufacturer (F. 62-67), stated in an advertisement for IPB's "Bio Ultra Blend" trash liners, that it was using "ECM BioFilms' technology" which will cause the liners to "completely degrade [including in a landfill] in 9 months to 5 years depending on conditions." IPB further stated in an advertisement that "[t]ests by independent laboratories conclude that the films treated with the ECM additive are biodegradable under short and long-term conditions where the film is exposed to oxygen and over a longer period of time without oxygen depending on the amount of exposure to other biodegrading materials." (CCX 627; *see also* CCX 811 (IPB, Dep. at 40) (IPB provided ECM marketing materials containing claim of biodegradation in a landfill within 9 months to 5 years to downstream customer Down to Earth)).

293. IPB and a distributor, Triple F, met with Down to Earth ("DTE"), a grocery store chain (F. 32-36), regarding use of the ECM Additive for DTE's plastic grocery bags. IPB told DTE that ECM Plastics are biodegradable, and that biodegradation would occur within 9 months to 5 years. DTE was encouraged to visit ECM's website, which DTE did. DTE also received pricing sheets, a certificate, and general information concerning ECM

products and technology, as attachments to an email originating from ECM and forwarded to DTE. (CCX 803 (DTE, Dep. at 22-26)).

294. IPB informed DTE that IPB had been certified by ECM. DTE interpreted the sentence in the form certificate that "plastic samples submitted by ECM BioFilms, Inc. have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic materials," to mean that ECM had tested their materials using accepted industry standards. (CCX 803 (DTE Dep. at 26-28)).

295. DTE did not interpret ECM's Certificate of Biodegradability to be providing a time frame of 9 months to 5 years for biodegradation. (CCX 803 (DTE, Dep. at 32)).

296. DTE downloaded and reviewed the McLaren/Hart report (F. 277) from ECM's website, prior to deciding to purchase bags made from ECM Plastic. (CCX 803 (DTE, Dep. at 33-34)).

297. Beginning on April 22, 2009, DTE placed ECM's logo, along with a claim of complete biodegradation within 9 months to 5 years in a landfill, on its grocery bags, which are placed at the check-out counter for use by DTE's customers in packing their purchased groceries. (CCX 307 (DTE asking for logo and providing proposed language for bag); CCX 44; CCX 45; CCX 803 (DTE Dep. at 40-43, 45, 47-48; CCX 811 (IPB Dep. at 44-47 (describing artwork for DTE grocery bags)).

298. DTE sent its artwork for its plastic bags to ECM, noting "FYI." ECM did not recommend any changes with respect to the "9 months to 5 years" in a "landfill" claim. (CCX 803 (DTE, Dep. at 50-56)).

299. DTE advised ECM by email of the text that DTE intended to have printed on DTE's plastic bags, stating "I'd like to include the ECM logo (which I have) and a statement explaining the attributes of interest to consumers," including the information that the bag will "fully biodegrade in 9 months to 5 years, depending on the amount of oxygen they are exposed to . . . ."

DTE asked for ECM's comments or suggestions for the text. (CCX 307 at 2).

300. DTE's supplier, IPB (F. 62-67), manufactured ECM Plastic bags reflecting the "nine months to five years" claim for "50 to 100" different customers. In total, IPB alone manufactured "about 10 million" such bags. (CCX 811 (IPB, Tr. 57, 99)).

301. DTE purchased about 700,000 plastic bags reflecting the 9 months to 5 years claim, each year for approximately 5 years, for a total of 3.5 million bags. DTE has somewhere between 50,000 and 100,000 unique customers that would have received at least one of DTE's plastic bags. (CCX 803 (DTE, Dep. at 48-49)).

302. It is reasonable to infer that DTE's customers were exposed to the 9 months to five years claim. (F. 297, 300-301).

303. DTE used language from ECM Marketing Materials to prepare a press release in connection with DTE's "roll-out" of biodegradable plastic grocery bags on Earth Day, 2009, and provided a draft of the release to ECM and to IPB for review. DTE prepared the press release because it wanted people to know that DTE was doing its part to contribute to a more "environmentally sound operation." The press release included a link to ECM's website and noted that "[t]ests by independent laboratories concluded that [ECM Plastics] are biodegradable under short- and long-term conditions where the film is exposed to oxygen, and over a longer period of time without oxygen, depending on the amount of exposure to other biodegrading materials." (CCX 307; CCX 497; CCX 803 (DTE, Dep. at 64-66)).

304. DTE sent ECM and others, including IPB, an email attaching the draft press release referred to in F. 303 because the press release was making technical claims about ECM's technology, as to which DTE did not feel "expert enough." Mr. Poje of ECM responded to DTE by email, "I like it!" (CCX 803 (DTE, Dep. at 69-71); CCX 497).

305. Some of ECM's Customers provided the Certificate of Biodegradability to their downstream customers, including for the purpose of proving to their customers that the ECM Plastic is biodegradable. (CCX 822 (ANS, Dep. at 18; 28; CCX 800 (BER, Dep. at 30) ("Q. Why did you give [the certificate] to each customer that purchased the product? A. To certify that it was biodegradable . . . ."); CCX 800 (BER, Dep. at 18) ("Originally one of my customers asks how can you prove that my bag is biodegradable, they get the certificate…");

CCX 804 (Eagle, Dep. at 25-26) ("Q. And is this a certificate that you forward to your own customers who are interested in buying blown film containing the ECM additive? A. Yeah."); CCX 811 (IBP, Dep. at 18) ("Q. In fact, IPB regularly sent copies of the certificate to prospective customers of Island Plastic Bags. A. Yes. Q. IPB did that to provide prospective customers with assurance that ECM bags would in fact biodegrade. A. Yes."); CCX 809 (Flexible, Dep. at 50-51("[I]f somebody wants to see evidence that our bags are biodegradable, this is what I would provide to them."); CCX 34 ("Airpouch Sales & Marketing Alert" stating that "[s]ending this [certificate] to your customer should be your first response for validation"); CCX 257 (ECM Customer providing certificate to its customer); CCX 258 (same); CCX 261 (same); CCX 345 (Customer asking ECM for certificate because it "[h]elps me with sales."); CCX 351 (Customer asking ECM for certificate "hot rush back to me as my customer in California is going to drop our products without some sort of proof that our products [are] biodegradable")).

306. ECM Customer Kappus Plastic Company ("Kappus") (F. 68-75) did not provide its ECM Certificate of Biodegradability directly to any of Kappus' customers, but if a customer purchased from Kappus, Kappus would provide certification. (CCX 812 (Kappus, Dep. at 26-29, 45-46)).

307. A Certificate of Biodegradability, issued to SL Plastic Co. LTD, appeared on the website of the company "Champ," an apparent wholesaler of golf tees. (CCX 39 at 5).

308. Some ECM Customers have copied the language from the Certificate of Biodegradability verbatim in their own marketing materials. (CCX 812 (Kappus, Dep. at 22) ("We basically took the information that ECM had on their paperwork and moved it to our letterhead, transposed it on our letterhead . . ."); CCX 812 (Kappus, Dep. at 26-27) (explaining that most of the language in Kappus' product certification to customers was taken from ECM's marketing materials); CCX 62, CCX 458, CCX 459 (customer certifications with ECM certification language)).

309. ECM's logo has appeared on plastic bags manufactured by some of ECM's Customers. (CCX 822 (ANS, Dep. at 24); CCX 73-CCX 75; CCX 118; CCX 623 (restaurant bag with ECM logo); F. 297).

310. Plastic bag manufacturer and ECM Customer ANS (F. 9-13) estimates that it sold millions of bags with the ECM logo to ANS wholesale and distributor customers. (CCX 822 (ANS, Dep. at 26)).

311. No Kappus products produced with the ECM Additive contained any sort of biodegradable logo. (CCX 812 (Kappus, Dep. at 22)).

312. Kappus conveyed to its customers that it was selling a biodegradable product through a letter it submitted, on Kappus' letterhead, in which it reprinted information from ECM's materials, including the time frame of 9 months to 5 years. ECM was not mentioned. (CCX 812 (Kappus, Dep. at 22-23)).

D. Survey Evidence

1. Expert Qualifications and Findings

313. Complaint Counsel's expert, Dr. Frederick, has never before testified as an expert. (CCX 860 (Frederick Expert Report at 5 ¶ 9)).

314. Dr. Frederick is not familiar with standards applying to the evaluation of survey evidence in FTC proceedings, or any other federal administrative proceedings. (Frederick, Tr. 1185-1187).

315. Dr. Frederick does not believe there are any specific criteria that a survey must meet in order to be valid, and, although he believes there are aspects that make a survey better or worse, Dr. Frederick had no specific criterion in mind. (Frederick, Tr. 1185, 1187-1191; RX 858 (Frederick, Dep. at 186)).

316. Respondent's expert, Dr. Stewart, has served as an expert witness for the FTC multiple times, in cases including: *Kraft* (Docket No. 9298), *Novartis* (Docket No. 9279), and *POM Wonderful* (Docket No. 9344). Dr. Stewart was retained as an expert by the FTC in matters against *QVC* (Docket No. C-3955) and *John Beck* (FTC Matter No. 072 3138). Dr. Stewart has also been retained by various respondents in cases brought by the FTC, including *Pantron* (U.S. District Court Case No. CV88-6696 (C.D. Cal.), *Schering* (Docket No. 9232), and *Guaranty Life* (FTC Matter No. 092 3169). (Stewart, Tr. 2505-2508).

317. In most of the cases listed in F. 316, Dr. Stewart opined on surveys. In approximately half of those cases, Dr. Stewart designed a survey, and in many of those cases, Dr. Stewart gave rebuttal testimony concerning the opposing party's surveys. (Stewart, Tr. 2508-2509).

318. Complaint Counsel had emailed Dr. Stewart earlier in these proceedings, and expressed interest in him serving as Complaint Counsel's expert witness in this matter; however, Dr. Stewart had already been retained by Respondent. (Stewart, Tr. 2504-2505).

319. Dr. Stewart is unaware of a single instance in which his testimony or survey was not accepted by either the Administrative Law Judge ("ALJ") or the Commission. (Stewart, Tr. 2509).

320. In the *Kraft* decision, Dr. Stewart's survey was accepted by the ALJ and cited by the full Commission as supportive of its decision. (Stewart, Tr. 2506).

321. Dr. Stewart has served as a survey expert in federal court "a couple of dozen times" and in none of those cases has his survey been deemed to be unreliable or been rejected by the court. (Stewart, Tr. 2520-2521).

322. Dr. Stewart is highly qualified in the field of consumer surveys. (F. 144-151, 316-321).

323. Weighing the qualifications of Dr. Stewart and of Dr. Frederick, Dr. Stewart is much more qualified in the field of designing, implementing, reviewing, and evaluating consumer surveys than Dr. Frederick, and Dr. Stewart's opinions are entitled to greater weight. (F. 117-121, 144-151, 313-321).

324. Having reviewed, evaluated, and weighed the opinions of both Dr. Stewart and Dr. Frederick, and the bases therefor, Dr. Stewart's opinions are well supported and are more well reasoned, credible, and persuasive than the opposing opinions of Dr. Frederick.

2. Survey Evidence Generally

325. In Dr. Stewart's experience, having served as an expert witness for the FTC, the FTC accepts and applies the standards that are articulated in most professional organizations, as well as in the Manual for Complex Litigation. (Stewart, Tr. 2525).

326. While in his expert report Dr. Stewart references principles for acceptable survey research as outlined in the Manual for Complex Litigation, these standards represent a much broader set of understood and accepted principles. The broadly

understood and accepted principles for accepting survey research include that: 1) the population was properly chosen and defined; 2) the sample chosen was representative of that population; 3) the data gathered was accurately reported; 4) the data was analyzed in accordance with accepted statistical principles; 5) the questions asked were clear and not leading; 6) the survey was conducted by qualified persons following proper interview procedures; and 7) the process was conducted so as to ensure objectivity (the study was double blind). (Stewart, Tr. 2525, 2598-2599; RX 856 (Stewart Expert Report at 10)).

327. The subject of public perception of biodegradation and biodegradation of plastics as a field of consumer survey research has not been researched extensively. (Stewart, Tr. 2510-2511).

328. Given the current understanding and state of knowledge with respect to consumer perception of biodegradation, open-ended questions, that allow consumers to offer responses in their own words, are "much more suitable, much more appropriate, much more informative, than closed-ended questions." (Stewart, Tr. 2510, 2516).

329. When beginning consumer perception work in a new area, open-ended questions are essential. (Stewart, Tr. 2509-2510, 2516-2518; RX 856 (Stewart Expert Report at 7)).

330. Given the limited amount of research work done in the field of public perception of biodegradation and biodegradation of plastics, it is very important to allow consumers to express themselves in their own words, and to fully describe their beliefs in detail. This can only be done through a personal interview, either in person or by telephone, and the use of open-ended questions. (Stewart, Tr. 2510-2511).

331. Open-ended questions with a personal interviewer, either face to face or by telephone, affords the opportunity to explore in depth what people's perceptions are. (Stewart, Tr. 2510).

332. One reason why surveyors need to perform more work involving open-ended questions and interviews early in the exploration of a topic such as biodegradation is so that surveyors can be sure that when they do finally design closed-ended

questions, they give people the full array of response options. (Stewart, Tr. 2517).

333. Closed-ended questions are questions where a list of possible responses to a question are provided to the respondent, and where the respondent must choose only one from the responses that were provided, in order to give an answer to the question. (Stewart, Tr. 2513).

334. Close-ended questions inherently suggest greater homogeneity within a sample of respondents than may actually exist, because close-ended questions exist in a universe with only four or five possible responses. (Stewart, Tr. 2516-2617; RX 856 (Stewart Expert Report at 7)).

335. "Misleading homogeneity" occurs when a sample or a population is characterized "as being more alike, more similar, [or] more homogenous than is actually the case." (Stewart, Tr. 2518).

336. "Relevant population" means the group of people to whom the researcher wants to extrapolate the results of the survey. (Stewart, Tr. 2532).

337. Screening questions are a set of preliminary questions that are asked at the very beginning of a survey to determine whether or not a respondent should receive the substantive questionnaire or whether they should be excluded. An example of a screening question is asking whether a respondent is male or female, so that the researcher can assure that the respondents as a whole will be roughly 50% male and 50% female. (Stewart, Tr. 2534).

338. Screening questions are used for qualifying people and for assuring a more representative sample. (Stewart, Tr. 2541).

339. It is a big mistake to have no screening questions. Without screening questions, the surveyor cannot exclude people that are atypical and likely to introduce error into the results. (Stewart, Tr. 2537).

340. A survey on biodegradation that does not contain screening questions has the potential for introducing significant error into the survey, and calls into question the validity of the survey. (Stewart, Tr. 2537).

341. When asking people about the meaning of a term, such as "biodegradable," as a precursor it must first be assessed that the respondent has some knowledge base for responding to the question. Otherwise the response is random, or simply a guess, and is not meaningful. (Stewart, Tr. 2533-2534).

342. In the field of survey research, "sampling" means the process by which researchers select a subset of individuals from a larger population. In general, appropriate sampling procedures are designed to assure that the subset that researchers select are generally and broadly representative of the larger population. (Stewart, Tr. 2538).

343. The primary principle to guide the selection of a sample is to create and implement a sampling plan that will provide the researcher a representative sample, meaning a sample that is like the larger population to whom the researcher wishes to extrapolate the results. (Stewart, Tr. 2538).

344. A survey without screening questions is not capable of being analyzed for the general representativeness of the sample. (Stewart, Tr. 2537).

345. "Double blind" means that the interviewers and any of other personnel directly involved with collecting or "coding" the data[7] were not aware of the sponsor or purpose of the research, nor were the respondents aware of either the purpose or the sponsor of the research. (Stewart, Tr. 2553-2554).

346. Where a survey is double-blind, it is unlikely that a respondent or interviewer will seek to be helpful by offering a

[7] As set forth here at F. 390, "coding" of survey responses refers to the process by which responses are classified into response categories for the purpose of summary and analysis. (CCX 860 (Frederick Expert Report at 13-14 and n.12)).

response that they think is consistent with what the researcher is looking for. (Stewart, Tr. 2554).

347. A survey that is not double-blind calls into question the validity of that survey. (Stewart, Tr. 2554).

348. It is customary when coding responses to use coders who are "blind" to the purpose of the research. It is also customary to use multiple coders to provide a "reliability check" on the coding judgments. (RX 856 (Stewart Expert Report at 13)).

349. Blinding of coders is very important when coding open-ended questions because the coders are, in effect, transforming the data into categories of responses. This is the essence of data analysis. (Stewart, Tr. 2557).

350. To the degree that the coders have a prior understanding of what the researcher is looking for, that prior understanding can influence what codes the coders arrive at and how they code the data. (Stewart, Tr. 2557)

351. Leading questions, questions that ask a question and suggest an answer, are not appropriate. (Stewart, Tr. 2567).

352. Validity of a survey refers to accuracy, *i.e.*, does the survey accurately measure what it is intended to measure. (Frederick, Tr. 1042).

3. The Google Survey

a. Generally

353. Complaint Counsel's expert, Dr. Frederick, elected to conduct his own research for this proceeding in order to "test the robustness of the APCO and Synovate results" (*see* F. 455-497) and also to "gain further insight into consumer perception concerning biodegradable claims." (CCX 860 (Frederick Expert Report at 11)).

354. For his survey research for this litigation, Dr. Frederick decided to use a survey product offered by "Google Consumer Surveys." (Frederick, Tr. 1060; CCX 867 at 1).

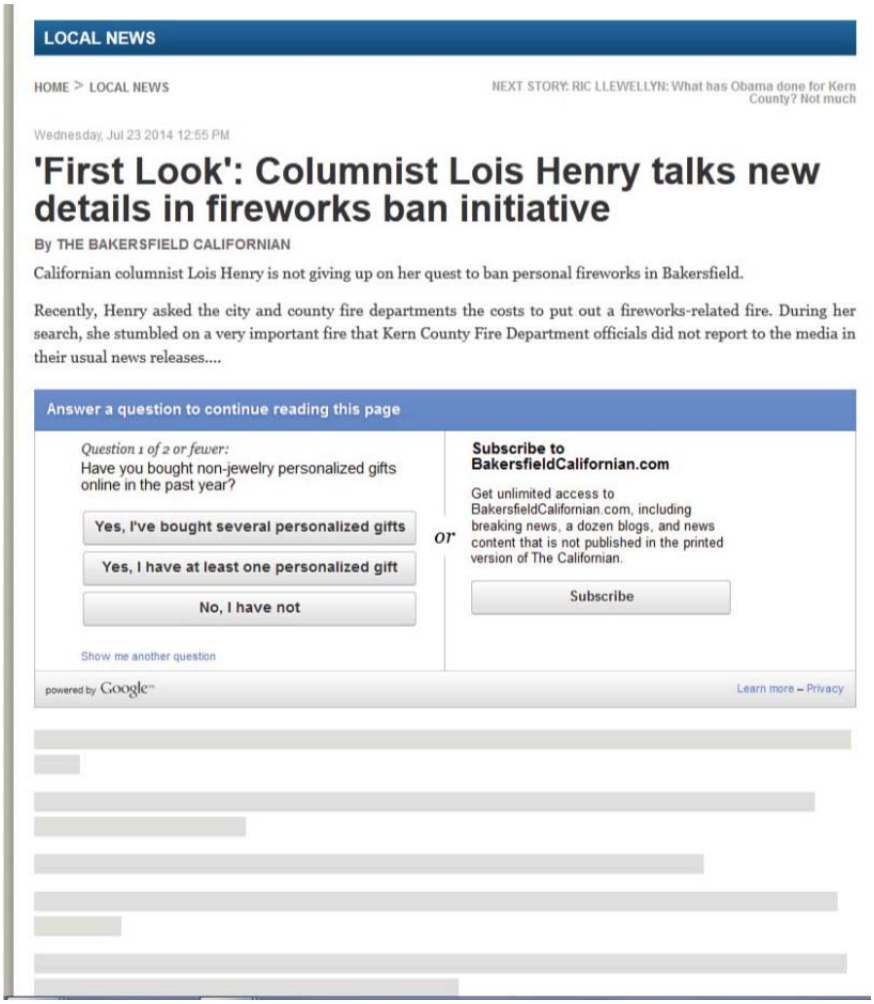
355. Respondent's expert, Dr. Stewart, reviewed, among other things, Dr. Frederick's report and the raw data from Dr. Frederick's Google survey, showing original responses and how the response were coded, which had been produced to Respondent. (RX 856 (Stewart Expert Report at 6); Frederick, Tr. 1133-1134; CCX 863).

356. Google Consumer Surveys markets its survey product as a new approach to "market research" and as a tool for those who "need to pre-test a marketing campaign, prioritize new product initiatives, or even gauge a reaction about a recent event. . . . Now, with Google Consumer Surveys, you can easily conduct market research or even automatically track your brand to inform important business decisions." (CCX 867).

357. In a Google survey, an internet user will encounter a "pop-up" survey question when attempting to access content on a website. The user is blocked from access to the desired content unless the user answers the survey question or pays for access to the content without answering the survey question. (CCX 860 (Frederick Expert Report at 12); Frederick, Tr. 1062-1064; CCX 976).

358. A single question survey, such as that described in F. 357, is called a "micro-survey." (Frederick, Tr. 1062).

359. Below is a representative image of how a Google survey question is presented to a website visitor seeking certain content. (CCX 860 (Frederick Expert Report at 12); Frederick, Tr. 1062-1064; CCX 976).



360. Google has contracts with internet content providers to present survey questions to internet users who would otherwise be blocked from accessing their content. (Frederick, Tr. 1062-1063).

361. Dr. Stewart is not aware of any article relying on Google Consumer Survey data that has been accepted by a peer-reviewed journal. (Stewart, Tr. 2679-2680).

362. The article titled, "*The Limits of Attraction*," published in the peer-reviewed journal, *Journal of Marketing Research*, and authored in part by Dr. Frederick, cites, but does not rely upon, Google Consumer Surveys. The sole reference is in a footnote and the reference was neither supportive nor non-supportive of what was actually contained in "*The Limits of Attraction*" article.

The article does not rely on Google Consumer Survey data at all. (CCX 977; Stewart, Tr. 2680-2682, 2807-2808).

363. While market research professionals recognize that Google is making an effort to enter the survey research business with the Google Consumer Surveys product, it is an untested product. (Stewart, Tr. 2683).

b. Dr. Frederick's choice to use a Google Consumer Survey

364. The FTC paid Dr. Frederick a flat fee of $40,000 to be an expert witness in this case. The less Dr. Frederick had to pay for a survey, on assistants, and on costs, the more money he would net as compensation for his work in this case. (Frederick, Tr. 1201).

365. An important factor in Dr. Frederick's choice to use a Google Consumer Survey was cost. He chose a Google Consumer Survey over other internet survey methods because a Google Consumer Survey was less expensive. The other factor important to Dr. Frederick was his familiarity with Google Consumer Surveys. (Frederick, Tr. 1206; RX 858 (Frederick, Dep. at 123)).

366. In total, Dr. Frederick's Google survey cost an estimated $2,000 for the survey and another approximately $5,400 for assistants, for a total of $7,400. By way of comparison, Dr. Stewart's telephone survey for this proceeding cost approximately $37,500. (Frederick, Tr. 1203; Stewart, Tr. 2648; RX 856 (Stewart Expert Report at 5, 23)).

367. Some survey organizations such as Synovate (*see* F. 480) maintain a panel of individuals, who will receive an email requesting participation in a survey, and a link to the survey site. The participants are compensated for their participation. Dr. Frederick knew of, but chose not to perform, an internet panel survey for this proceeding. (Frederick, Tr. 1046, 1197, 1279-1280).

368. Dr. Frederick knew of, but chose not to perform for this proceeding, a survey based on an in-person interview. (Frederick, Tr. 1197).

369. When choosing to use a Google Consumer Survey for his research in this case, Dr. Frederick was unaware of any administrative litigation in which the FTC had relied upon Google Consumer Survey data as a basis for decision. (Frederick, Tr. 1191).

370. As of the date of Dr. Frederick's deposition in this case, Dr. Frederick had never actually seen a Google Consumer Survey question live on a website. (Frederick, Tr. 1320).

c. Questioning methodology

371. In Dr. Frederick's Google survey, no single person was ever presented with more than one question. (Frederick, Tr. 1223-1224).

372. It is very difficult to draw any inferences about the validity of research based on an answer to a single question, particularly when the researcher does not know anything about that particular respondent and cannot validate the response. Where there are multiple questions to the same respondent, the multiple responses can be compared, which allows the researcher to glean some sense of the totality of the respondent's perceptions. (Stewart, Tr. 2605).

373. When there is only one question asked of a survey respondent, a researcher cannot know really what the response means or indicates. (Stewart, Tr. 2605).

374. The perception of consumers with respect to the meaning of the term, "biodegradable," or "biodegradability," cannot be addressed with a single question. A good open-ended question might provide some dimension of consumer perception of the terms, but it will not provide other dimensions, such as nuances, dependencies, or context effects. (Stewart, Tr. 2606).

375. When there is only one question asked of a survey respondent, the researcher cannot know whether it is a sincere

response, and/or whether it is a response that would be subject to qualification if there had been a follow-up question. (Stewart, Tr. 2605-2606).

376. Google limits the number of characters in a survey question. (Frederick, Tr. 1214-1215).

377. In three separate instances, Dr. Frederick had to revise questions he wanted to ask survey respondents because his proposed questions contained too many characters according to Google. (Frederick, Tr. 1215).

378. Dr. Frederick used four types of questions for the Google survey: open-ended questions, binary questions, multichotomous questions, and hybrid questions. (Frederick, Tr. 1215-1216).

379. For Dr. Frederick's Google survey, with an open-ended question, a survey respondent can type in whatever he or she wants. In a binary question, the respondent can click either the "yes" button or the "no" button. In a multichotomous question, the respondent can choose one of five answers. In a hybrid question, respondents are restricted to providing a numeric answer. (Frederick, Tr. 1215-1216).

380. Some of Dr. Frederick's questions presented the ECM "biodegradable" logo; some questions used other "biodegradable" logos not belonging to ECM; and some questions used the word, "biodegradable," in the question, without associated images. (CCX 860 (Frederick Expert Report Appendix at 27-45)).

381. None of the Google survey questions asked the survey respondent how the respondent interpreted the word "biodegradable." None of the Google survey questions asked the survey respondent whether a claim of "biodegradable" communicated any message concerning the rate for complete biodegradation. In general, the majority of the questions asked, in varying ways, "how much time," or "how long" the respondent thinks, or estimates, that a "biodegradable" item will take to decompose. (CCX 860 (Frederick Expert Report Appendix at 27-45)).

d. Disinterest bias

382. Because questions in the Google survey are answered by survey respondents in exchange for access to internet-based content in which they may be interested, the questions are at best a distraction and barrier to survey respondents, whose objective is to access information, not to complete a survey. This type of disruptive questioning creates a disinterest bias. (RX 856 (Stewart Expert Report at 11)).

383. Disinterest bias refers to the fact that if people are uninterested in a survey, if they are disengaged, or, even worse, if the survey serves as an interruption for an activity in which they are more interested, those people will be likely to give insincere, random, and often nonsensical responses to simply get past what is essentially an interruption in what they were doing before being confronted by the survey. (Stewart, Tr. 2608-2609, 2611-2612; RX 856 (Stewart Expert Report at 11)).

384. The Greenbook Blog, which Dr. Stewart references on the phenomenon of disinterest bias, is a publication that is well-known in the practicing market research community and among well-read researchers. (Stewart, Tr. 2611; RX 856 (Stewart Expert Report at 11 n.7)).

385. A person who does not take a survey question seriously is more likely to answer that question insincerely, whimsically, or with just a guess. (Frederick, Tr. 1313-1314).

386. Incorporating "protest" responses into a data set affects the integrity of the data analysis. (Stewart, Tr. 2665-2666).

387. For the binary and multichotomous questions posed by Dr. Frederick in the Google survey, Dr. Frederick does not know whether any answers given by respondents were valid. Dr. Frederick believes that some respondents were actually just clicking buttons at random in order to get through the survey. (Frederick, Tr. 1220).

388. There is no way to know how many responses to Dr. Frederick's Google survey questions were "protest" or "bypass"

responses, because all the questions required a response before the respondent could access the desired internet content. (Stewart, Tr. 2666).

389. It cannot be inferred from the average number of seconds that a respondent took to answer the Google survey "pop-up" question that the respondent was taking the survey question seriously. Dr. Frederick acknowledged that numerous factors may cause respondents to take, on average, 20 seconds to answer their "pop-up" question, including performing other computer work in another window or on another screen, or taking a telephone call. Dr. Frederick cannot know what caused his survey respondents to wait 20 seconds before keying in a response to his survey questions. (Frederick, Tr. 1342-1344).

e. Coding methodology

390. Dr. Frederick defined "coding" of survey responses to refer to the process by which responses are classified into response categories for the purpose of summary and analysis. For example, for Dr. Frederick's Google survey, the open-ended questions about biodegradation times required that the responses be coded into time categories. Thus, for open-ended questions about biodegradation times, Dr. Frederick would "code" responses such as "3 months," "6 months," "between 5 and 9 months," "a little less than a year," and "1 year" as "instances of the category 'one year or less.'" (CCX 860 (Frederick Expert Report at 13-14 and n.12)).

391. According to Dr. Frederick, a degree of judgment is required in order to code responses. (Frederick, Tr. 1283).

392. Dr. Frederick used a "bright-line" rule that "any response containing both a numeric specification and an accompanying temporal unit" was coded, and other responses were not coded. (CCX 860 (Frederick Expert Report at 12 n.7); CCX 865 (Frederick Rebuttal Expert Report at 6); Frederick, Tr. 1128).

393. In tabulating the Google survey data, Dr. Frederick coded only those responses that reported a time interval regarding biodegradation. Dr. Frederick excluded responses that did not fit

his bright-line numeric rule because those responses could not be accurately translated in a specific estimate of biodegradation time. Thus, Google survey responses such as "it depends," or "I don't know," to questions about biodegradation rates were eliminated from Dr. Frederick's calculations of his Google survey results. (CCX 865 (Frederick Rebuttal Expert Report at 6); Frederick, Tr. 1122-1128; Stewart, Tr. 2809-2810).

394. In Dr. Frederick's expert report, and in the appendix to the report that sets forth the results from the Google survey questions, the number of responses that were not coded is identified as a bracketed subscript reported to the right of the effective sample size (the number that were coded). For instance, "N= 408[73]" means that the reported statistics summarize 408 coded responses, and that uncoded responses exist for another 73 respondents. (CCX 860 (Frederick Expert Report at 12 n.7)).

395. Out of 29,000 total responses, only approximately 21,000 (approximately 72%) were coded. (CCX 860 (Frederick Expert Report at 12 n.7)).

396. It is not appropriate for a researcher not to code a response because that response does not fit into a desirable structure, or to "force-fit" responses into a pre-existing structure. Ignoring significant portions of data in computing statistics misrepresents the data. As Dr. Stewart stated: "[Y]ou don't report data statistics based only on what was convenient and fits your definition of an appropriate response. You need to report all of the data and the statistics accordingly." (Stewart, Tr. 2601-2602).

397. Ignoring some data is not reporting the data accurately. (Stewart, Tr. 2601).

398. Dr. Frederick's coding methodology, as described in F. 393, is particularly egregious because it reduces the denominator of the percentage results reported by Dr. Frederick, which has the effect of inflating the reported percentages. (RX 856 (Stewart Expert Report at 12)).

399. Dr. Frederick's strict numeric approach to coding responses is improper because it limits the range of responses

considered, and by definition creates greater homogeneity of responses than would be the case if the respondents were allowed more latitude in responding. (Stewart, Tr. 2606-2607).

400. The implications of Dr. Fredrick's failure to code a response suggesting that the respondent "does not know" the answer are: 1) that no one can know how many people who gave a response that Dr. Frederick coded might have actually not known an answer, but gave a response he or she thought valid to get through the survey wall; and 2) that to, the extent "don't know" is a perfectly reasonable response, the researcher needs to include those individuals who do not know into the total sample; the "don't know" responses cannot be ignored simply because they did not give the type of answer the researcher wanted. (Stewart, Tr. 2614; *see also* Stewart, Tr. 2668 (stating that if "I don't know" responses were included in data set, the distribution of the total responses "would be different because some of those people actually don't know, and so the fact they don't know will change the overall distribution even if there are a few people who say 'don't know' because they are less certain. But the overall distribution would be quite different.")).

401. Dr. Frederick chose to code responses, in answer to questions regarding biodegradation times, of "one nanosecond," "forever," "24 hours," "immediately," "17 days," "one hour," "one second," "a human lifetime," "10,100 years," "ten minutes," "122 minutes," "one minute," "one hour," "ten seconds," "276.5 days," "one second," "ten minutes," "minutes," "22 days," "72 hours," "30 minutes," "45 seconds," "a week," "90 minutes," "60 seconds," "a few days," and "one hour." (Frederick, Tr. 1302-1305; RX 951; *see* RX 856 (Stewart Expert Report at 12)).

402. Dr. Frederick chose to code, in answer to a question regarding biodegradation times, a response that stated, "never." (Frederick, Tr. 1302; RX 951).

403. The combination of coding nonsensical responses while eliminating plausible responses that did not fit Dr. Frederick's strict numerical rules had the effect of distorting the data. (RX 856 (Stewart Expert Report at 12)).

404. The Google survey data was not analyzed in accordance with accepted statistical principles. (F. 392-403; RX 856 (Stewart Expert Report at 12-13)).

405. Dr. Frederick and Mr. Andrew Meyer, Dr. Frederick's graduate student, coded almost all of the responses to the Google survey, with Dr. Frederick performing most of the coding. (Frederick, Tr. 1282-1285).

406. Both Dr. Frederick and Mr. Meyer knew that ECM was the Respondent in this case, that the FTC was also in the case, and that Dr. Frederick's research was going to be used in a case by the FTC against ECM. (Frederick, Tr. 1285-1286, 1289-1290, 1316-1317; RX 858 (Frederick, Dep. at 176)).

407. Dr. Frederick's coding process was not double-blinded; the people involved in the actual coding were not blind to what results might have been desired or expected by Complaint Counsel and/or the FTC. (Stewart, Tr. 2604; F. 405-406).

408. Dr. Frederick's failure to use blind coders for his Google survey deviates from customary practice and may infect the survey with bias. (RX 856 (Stewart Expert Report at 12-13)).

f. Representativeness of sample

409. Google Consumer Surveys seeks to infer respondents' demographic features, including gender, approximate age, geographic region, and whether the respondent resides in an urban, suburban, or rural area. With respect to age and gender, Google infers demographic information based on the respondent's browsing history as recorded in a DoubleClick advertising cookie. (CCX 874 at 3; CCX 868 at 3).

410. Google infers the respondent's location based on the computer's internet protocol ("IP") address, and then uses this information to further infer the respondent's income and urban density "by mapping the location to census tracts and using the census data to infer income and urban density." (CCX 868 at 3; *see also* CCX 874 at 3).

411. Google provides only indirect circumstantial evidence or information on survey respondent's demographics. Google draws inferences about demographics, such as gender and age, based on the respondent's IP address and "cookies" as well as other information indicating the respondent's website visits. (Frederick, Tr. 1229-1230).

412. Dr. Frederick does not know which websites among Google's contracted internet content providers featured his survey questions. (Frederick, Tr. 1208).

413. Dr. Frederick did not choose the websites, or the number of websites, on which his questions were posted. (Frederick, Tr. 1213).

414. Dr. Frederick declined to pay the additional fee to include two-part questions that would have provided direct information about the respondent population. (Frederick, Tr. 1230-1231).

415. Dr. Frederick rejected the option of including screening questions for his Google survey, which are questions used for qualifying people and assuring a more representative sample. (Frederick, Tr. 1224; F. 338).

416. It is difficult for Google to draw accurate inferences about demographics for several reasons. Google's inferred demographics can be wrong, for example, when multiple members of a household visit websites from a single computer. In addition, cookies can be deleted and website history may be insufficient. (Frederick, Tr. 1229-1230).

417. According to an assessment of Google Consumer Surveys published by the Pew Research Center in November 2012: "For approximately 30-40% of [GCS] users, demographic information is not available – either because their cookies are turned off but more often because the [GCS] algorithm cannot determine a trend from the websites visited as recorded in their DoubleClick advertising cookie that would suggest what gender or age they are." (CCX 874 at 3).

418. If a family of four shares one computer, and one of those users answers a Google Consumer Survey question, neither Google nor the surveyor can know which of those four users answered the survey question. (Frederick, Tr. 1337-1338).

419. A valid IP address of a survey respondent can only tell Google the location, but not the age, nationality, or gender of the person who answered the survey question. (Frederick, Tr. 1239).

420. The Google survey population is not defined by an age and there is no lower bound. (Stewart, Tr. 2600).

421. Dr. Frederick does not know whether people can access a Google Consumer Survey on a mobile device. (Frederick, Tr. 1329).

422. Dr. Frederick does not know what percentage of global internet users use a mobile device as their primary or exclusive means of using the Internet. (Frederick, Tr. 1331).

423. Dr. Frederick does not know what percentage of internet users block cookies or what percentage of internet users mask their identities online. (Frederick, Tr. 1335).

424. Dr. Frederick does not know what percentage of internet users rely on Google Chrome's feature that allows you to browse privately. (Frederick, Tr. 1334-1335).

425. Dr. Frederick's Google survey failed to properly choose and define a population, because it is not clear what the population was that he was analyzing. Rather, the population is defined in terms of who participated in the survey, which is not an appropriate way to define a population. (Stewart, Tr. 2600).

426. There is no way to know whether Dr. Frederick's Google survey population was representative or not. Dr. Frederick did not collect demographic information. All that is known about the population is that they happened to go to a set of undefined, unidentified websites. (Stewart, Tr. 2600-2601).

427. There is no way to ascertain the degree to which the sample of respondents surveyed in the Google survey is

representative of any identifiable population; the sample itself is unknown and unknowable, because there is no verification of respondents with the Google survey; rather, information on respondents is merely inferred by Google from information associated with or that resides on a computer. (RX 856 (Stewart Expert Report at 10-11); Frederick, Tr. 1228-1229).

428. The opinion in Dr. Frederick's expert report on page 12 that Google Consumer Surveys "tend to yield similar results to other internet panels," relied on the opinions of Nate Silver, of the New York Times' *FiveThirtyEight* blog, and also references an article co-authored by Google. However, Dr. Frederick was not aware of Mr. Silver's blog post, or the cited Google article, when he drafted his expert report. (CCX 860 (Frederick Expert Report at 12-13); Frederick, Tr. 1195-1196).

429. Complaint Counsel drafted three of the four references on page 7 of Dr. Frederick's expert report, namely the Google Consumer Surveys Product Overview reference, the Google article reference, and the Nate Silver reference. (Frederick, Tr. 1195).

430. Complaint Counsel drafted the "*see*" reference to Nate Silver's blog on page 13 of Dr. Frederick's expert report: "*See* N. Silver, *FiveThirtyEight*, The New York Times (Nov. 10, 2012) ('Perhaps it won't be long before Google, not Gallup, is the most trusted name in polling.')." Complaint Counsel also drafted the statement on page 12 of Dr. Frederick's report that, in predicting the results of the 2012 Presidential Election, Google survey results "best[ed] better-known rivals such as Gallup, CNN, and Rasmussen." (CCX 860 (Frederick Expert Report at 12-13); Frederick, Tr. 1195-1196).

g. Conclusions as to the Google Survey

431. Dr. Frederick's Google survey does not meet generally accepted standards for survey research. (F. 326; Stewart, Tr. 2598; RX 856 (Stewart Expert Report at 10)).

432. The Google survey conducted for this litigation cannot be characterized as a valid survey. It was the asking of one question of an individual who happened to come to a particular

website. The Google survey does not meet the typical definitions of a survey as would be used in the marketing and survey profession. (Stewart, Tr. 2596).

433. At least one purpose of Dr. Frederick's Google survey was to demonstrate that, despite its flaws, the APCO survey (F. 455-479) produced valid and reliable results. To this extent, the Google survey was not intended to be an objective analysis of what people believe about biodegradability. (Stewart, Tr. 2616; RX 856 (Stewart Expert Report at 8 n. 4)).

434. Dr. Frederick's Google survey is not reliable and is not valid, and the results cannot be relied upon to draw any conclusions, including about consumer interpretation of "biodegradable" claims, the validity of any other surveys, or for any other purpose. (Stewart, Tr. 2604; F. 355-434).

h. Relevant survey questions and results

435. Dr. Frederick's assertion that 20%-52% of consumers "infer" that plastic products labeled "biodegradable" "will biodegrade within a year . . . ." is based on the responses to 12 open-ended questions that Dr. Frederick crafted for the Google survey, designated as questions 3A –3K. [8] (CCX 860 (Frederick Expert Report at 16, Appendix at 30-33)).

436. Google survey questions 3A-3K (F. 438-447) do not inquire whether a plastic product labeled "biodegradable," including a plastic product carrying the ECM "biodegradable" logo, conveys any message as to an amount of time for complete biodegradation, and/or if so, what amount of time is communicated. Questions 3A-3K did not ask the respondents what they believe is meant by "biodegradable." (CCX 860 (Frederick Expert Report Appendix at 30-33)).

437. Questions 3A-3K of the Google survey (F. 438-447) ask, in varying ways, for respondents to provide their "best estimate of

[8] There appear to be two questions labeled 3G in Dr. Frederick's Google survey. *See* CCX 860 (Frederick Expert Report Appendix at 31). The first question 3G will be referred to herein as question 3G(1). The second question 3G will be referred to herein as question 3G(2).

the amount of time," or to report "how long," or "how much time" they think that, a plastic product that is labeled "biodegradable" "would" or "will take" to decompose or biodegrade. In this regard, the questions asked by Dr. Frederick were leading because the questions assumed that the term "biodegradable" necessarily denotes a length of time, and assessed only what time period the respondent estimates, believes, or thinks is appropriate. (CCX 860 (Frederick Expert Report Appendix at 30-33)).

438. Question 3A of the Google survey asked, "Suppose a plastic package is labeled biodegradable. How long do you think it will take to biodegrade?" According to Dr. Frederick's calculations, 31% of respondents selected within one year. (CCX 860 (Frederick Expert Report Appendix at 30)).

439. Question 3B of the Google survey asked the respondent to report "[h]ow much time" the respondent thinks a plastic package labeled "biodegradable" would take to biodegrade. Dr. Frederick calculated that 28% of respondents indicated within one year. (CCX 860 (Frederick Expert Report Appendix at 30)).

440. Question 3C of the Google survey asked, "If a plastic package is labeled 'biodegradable,' how long will it take to decompose?" According to Dr. Frederick's calculations, 44% of respondents selected within one year. (CCX 860 (Frederick Expert Report Appendix at 30)).

441. Questions 3D-3F of the Google survey displayed an image along with the word "biodegradable," such as the following,

and asked if the respondent saw the symbol on a plastic water bottle, "how long" it would take to "decompose." Dr. Frederick calculated that 52% (3D), 50% (3E), and 45% (3F) of respondents, respectively, reported less than one year. (CCX 860 (Frederick Expert Report Appendix at 30)).

442. Question 3G(1) of the Google survey displayed an image along with the words "biodegradable & compostable," as follows,

and asked, "if you saw this label on a plastic water bottle, how long would it take to decompose?" Dr. Frederick calculated that 47% of respondents indicated within one year. (CCX 860 (Frederick Expert Report Appendix at 30); *see also* question 3G(2) (asking, "If you saw this label on a plastic water bottle, how long do you think it would take to decompose?" According to Dr. Frederick's calculations, 52% of respondents replied within one year).

443. Questions 3H, 3I, 3J, 3K of the Google survey included images of ECM's "biodegradable" logo. These images were digitally edited or altered ("photoshopped") and created electronically by superimposing the ECM logo onto other electronic images. (CCX 860 (Frederick Expert Report Appendix at 31-33); Frederick, Tr. 1265, 1316).

444. Google survey question 3H presented the image of a plastic container photoshopped to display the ECM "biodegradable" logo, as follows,

and asked the respondent: "What is your best estimate of the amount of time it would take for this container to biodegrade? Dr. Frederick calculated that 22% of respondents indicated less than one year. (CCX 860 (Frederick Expert Report Appendix at 31); Frederick Tr. 1265).

445. When question 3J of the Google survey was revised to read, "What is your best estimate of the amount of time it would take for this container (which bears the symbol 'ECM biodegradable') to biodegrade," as calculated by Dr. Frederick,

34% indicated less than one year. (CCX 860 (Frederick Expert Report Appendix at 32)).

446. Google survey question 3I showed the image of a plastic bag photoshopped to display a large ECM logo, as follows,

and asked, "What is your best estimate of the amount of time it would take for this plastic bag to biodegrade?" According to Dr. Frederick's calculations, 20% indicated less than one year. (CCX 860 (Frederick Expert Report Appendix at 33)).

447. Google survey question 3K showed the image of a plastic bag photoshopped to display a large ECM logo, as shown above in F. 446, and asked, "What is your best estimate of the amount of time it would take for this plastic bag (which bears the symbol 'ECM biodegradable') to biodegrade?" Dr. Frederick calculated that 38% of respondents estimated less than one year. (CCX 860 (Frederick Expert Appendix Report at 33)).

448. Question 3Q of the Google survey asked: "Suppose a plastic page is labeled biodegradable, and is claimed to biodegrade in "*nine months to five years.*" What is your best estimate of the amount of time it will take to biodegrade?" Dr. Frederick coded 345 responses and did not code 138 responses. According to Dr. Frederick's calculations, 6% responded less than one year, and 7% responded, one year. (CCX 860 (Frederick Expert Report at 17, Appendix at 35) (italics in original)).

449. Question 3R of the Google survey asked: "Suppose a plastic package is labeled biodegradable, and is claimed to biodegrade in "*some period greater than a year*. What is your best estimate of the amount of time it will take to biodegrade?" Dr. Frederick coded 296 responses and did not code 183 responses. Based on Dr. Frederick's calculations, 6% responded less than one year, and 7 percent responded, one year. (CCX 860 (Frederick Expert Report at 17, Appendix 35) (italics in original)).

450. Dr. Frederick's opinion that "a substantial minority of respondents believe that a product bearing a 'biodegradable' label . . . will break down into elements found in nature" is stated to be based on the responses to Questions 6, 7 and 8A-8F of the Google survey. The Google survey did not have any questions designated 8D, 8E or 8F. (CCX 860 (Frederick Expert Report at 16); CCX 860 (Frederick Expert Report Appendix at 37-39)).

451. Questions 6, 7, 8A-8C, 9B and 9C of the Google survey asked variations of the question whether a container that is labeled biodegradable will "break down completely into elements found in nature," and offered a "yes" or "no" response. When the question also displayed a plastic container with the ECM logo, according to Dr. Frederick, 37% responded "yes." When the question displayed a plastic bag with the image of the ECM biodegradable logo, the "yes" response rate was 42%. When the question displayed the image of the ECM biodegradable logo, and further stated in the question that the container "bears the symbol 'ECM biodegradable,'" the "yes" response rate was 39% for a plastic container and 45% for a plastic bag. (CCX 860 (Frederick Expert Report Appendix at 37-41)).

452. In support of his opinion that a significant minority of consumers "understand" that a "biodegradable" product will biodegrade in a landfill, Dr. Frederick relies in part on questions 10B and 13B of the Google survey. (CCX 860 (Frederick Expert Report at 13)).

453. Question 10B of the Google survey presented a plastic bag photoshopped with a large ECM biodegradable logo, as follows,

and asked, "Will this plastic bag biodegrade in a landfill?" According to Dr. Frederick, 42% responded, "yes." (CCX 860 (Frederick Expert Report Appendix at 43)).

454. Question 13B of the Google survey displayed the image of the ECM biodegradable logo and asked, "Will a plastic product bearing the logo below biodegrade in a landfill?" Dr. Frederick calculated that 63% responded, "yes." (CCX 860 (Frederick Expert Report Appendix at 44)).

4. The APCO Survey

455. In 2006, the American Plastics Council ("APCO") commissioned an approximately 1000-respondent telephone survey regarding consumer perceptions about the terms "biodegradable" and "compostable" (the "APCO" survey). (RX 596; *see also* Frederick, Tr. 1037; CCX 860 (Frederick Expert Report at 7)).

456. The form of questions used in the APCO survey was premature given the state of knowledge of the topics covered by the APCO survey. (Stewart, Tr. 2513).

457. The response options given in the APCO survey were incomplete. (Stewart, Tr. 2513).

458. Dr. Frederick's opinions in this case rely in part on the APCO survey. (*See* CCX 860 (Frederick Expert Report at 9)).

459. With respect to the matters upon which Dr. Frederick was asked to opine for this litigation, the most pertinent question in the APCO survey was APCO question 4. APCO question 4 asked:

> If a package is labeled "biodegradable," what should be the maximum amount of time that it should take for that package to decompose?

(CCX 860 (Frederick Expert Report at 9); *see also* Frederick Tr. at 1044 (identifying APCO question 4 as "the most pertinent question" because it directly asked "how much time people think things take to biodegrade")).

460. APCO question 4 does not inquire whether the label "biodegradable" *convey*s any message as to whether the item will decompose in a particular amount of time, and/or if so, what specific amount of time is *conveyed*. Rather, the question asks only for the respondent's opinion of the "maximum amount of time" a "biodegradable" package "should take" to decompose. (F. 459).

461. APCO question 4, like all other questions in the APCO survey, was a "closed-ended" question, in that "there was a list of possible responses that were presented to the respondent, and the respondent needed to choose from one of the responses that was presented in order to give an answer." (F. 333, 459, 462).

462. APCO question 4 provided respondents with 6 substantive answer options: "One month or less," "Three months," "Six months," "One year," "Two to four years," or "Five years or more." (RX 597 at 2).

463. The responses to APCO question 4 were:

One month or less	19.2%
Three months	6.6%
Six months	8.3%
One year	26.1%
Two to four years	4.7%
Five years or more	16.5%
Other	0.5%
Unsure (not read)	17.4%
Refused (not read)	0.7%

(RX 597 at 2).

464. To support his opinion that a significant minority of consumers understand that a "biodegradable" product will biodegrade in a landfill, Dr. Frederick relies in part on the responses to APCO question 2, set forth in F. 465, below. (CCX 860 (Frederick Expert Report at 13, 53)).

465. APCO question 2 and its responses are set forth below:

From what you know, if something is labeled 'biodegradable,' does that mean it will decompose in:

	Yes	No	Unsure
The natural environment	86%	8%	6%
A landfill	83%	11%	6%
Your backyard	80%	15%	5%

(CCX 860 (Frederick Expert Report at 13, 53)).

466. The APCO survey uses closed-ended questions, which are unhelpful and misleading when there are many possible answers, qualifications, and contextual nuances. (Stewart, Tr. 2512-2513; RX 856 (Stewart Expert Report at 7); RX 858 (Frederick, Dep. at 35-36, 165)).

467. APCO question 4 is flawed because, with four of the six time period response options being one year or less, the response categories carry the "strong suggestion that the experimenter expects these are the responses that people are going to give . . . causing people to give those responses in greater numbers than they would if the question used a different design." (Frederick, Tr. 1045).

468. APCO question 4 presents an example of the misleading homogeneity inherent in closed-ended questions. For the question: "what should be the maximum amount of time that it should take for that package to decompose," F. 459, four of the six time period response options are a year or less, while only two time period response options are longer than two years. (RX 856 (Stewart Expert Report at 7-8); Frederick, Tr. 1045; F. 463).

469. Dr. Frederick agrees with Dr. Stewart that the biggest problem with question 4 of the APCO survey "is the allocation of response options" described in F. 468. (RX 856 (Stewart Expert Report at 7-8); Frederick, Tr. 1045).

470. The response options in the APCO survey to questions about how long it should take for something to biodegrade were not balanced. (Stewart, Tr. 2514).

471. APCO survey question 4 is invalid as inherently biased because it offers many more opportunities to select an answer that reflects one year or less than reflect a longer time period. (Stewart, Tr. 2514-2415).

472. Two-thirds of the response options in the APCO survey to the question of how long it should take for something to biodegrade were one year or less, which predisposes people to select a short time frame than a longer time frame. (Stewart, Tr. 2514).

473. Random responses to APCO question 4 would result in 66% (two-thirds) of the responses falling into one of the four choices of one year or less. (RX 856 (Stewart Expert Report at 8)).

474. APCO survey question 4 created a sense of far greater homogeneity than actually exists. (Stewart, Tr. 2519).

475. The APCO survey afforded respondents no opportunity for any dependencies or contexts. (Stewart, Tr. 2519).

476. The APCO study has the potential to introduce bias because of the way in which response options were presented and because of the use of the word "should." Use of the word "should" in APCO question 4 could be interpreted by respondents "as referring to what would be desirable, as in, *'Wouldn't it be nice if* packages decomposed this quickly,' rather than assessing their judgment of how long such decomposition would, in fact, take." (Frederick, Tr. 1270; CCX 860 (Frederick Expert Report at 9-10)).

477. The APCO survey is invalid for the purpose of drawing conclusions about people's perceptions about how long biodegradation takes because it does not provide adequate opportunity for consumers to offer their perceptions of how long it would take for something to biodegrade, while at the same time providing response options that are biased in favor of the "one year" time period. (Stewart, Tr. 2514-2515; F. 455-463, 466-476).

478. Although Dr. Frederick's report opined that the APCO survey was "reasonably valid," he testified at trial that the APCO survey standing alone could not be deemed valid. (Frederick, Tr. 1042, 1173; CCX 860 (Frederick Expert Report at 8-9)).

479. Dr. Frederick's opinion that the APCO survey is "reasonably reliable and valid" despite its flaws, is unpersuasive and is rejected. (*See* CCX 860 (Frederick Expert Report at 7-10)).

5. The Synovate Survey

480. In 2010, the company EcoLogic engaged a survey firm, Synovate, to conduct a 2000-respondent internet panel survey (the "Synovate" survey). (CCX 94 at 1-2; Frederick, Tr. 1046-1047).

481. EcoLogic procured the Synovate survey in connection with the public comment period for the FTC's then-proposed revisions to the Green Guides (*See* F. 238). EcoLogic wanted to conduct consumer research into consumer comprehension of packaging that biodegrades in a landfill and/or composting environment, so that it could report findings and recommendations to the FTC. (CCX 94 at 1).

482. The Synovate survey is flawed because it inappropriately uses closed-ended questions when asking about biodegradation times. (Stewart, Tr. 2515; *see* F. 328-334).

483. Dr. Frederick's opinions in this case rely in part on the Synovate survey. (*See* CCX 860 (Frederick Expert Report at 10)).

484. With respect to the matters upon which Dr. Frederick was asked to opine for this litigation, the most pertinent question in the Synovate survey was Synovate question 19. (CCX 860 (Frederick Expert Report at 10)).

485. Synovate question 19 asked: "What do you believe is a reasonable amount of time for a 'biodegradable' plastic package to decompose in a landfill? Please select one." (CCX 860 (Frederick Expert Report at 11, 50)).

486. The responses to Synovate question 19 were:

Less than 1 year	25%
Less than 5 years	45%
Less than 10 years	17%
Less than 20 years	6%
Less than 40 years	3%
40 years or greater	4%

(CCX 860 (Frederick Expert Report at 11, 50)).

487. Synovate question 19 does not inquire whether a plastic package labeled "biodegradable" conveys any message as to whether the package will decompose within a particular amount of time, and/or if so, what specific amount of time is conveyed. (F. 485).

488. Synovate question 19 is flawed because, in asking what the respondent believes is a "reasonable" amount of time for a biodegradable plastic package to decompose, the question could be interpreted to be asking the respondent what he or she "would like to happen, what kind of product should be produced" or what is "a goal" to which "we should aspire." (Frederick, Tr. 1050; CCX 860 (Frederick Expert Report at 11)).

489. Synovate question 19 is flawed because it is a closed-ended question. (Frederick, Tr. 1049-1051, 1276-1277, 1280).

490. To support his opinion that a significant minority of consumers understand that a "biodegradable" product will biodegrade in a landfill, Dr. Frederick relies in part on the responses to Synovate question 5. Synovate question 5 and its responses are set forth below:

> If something is labeled "biodegradable," where will it decompose? If you are not sure, please take your best guess. [Select all that apply.]
>
> | | |
> |---|---|
> | In the open environment (land or water) as litter | 51% |
> | In a landfill | 72% |
> | When buried in our backyard | 43% |
> | In a home composting device | 46% |

In a commercial composting facility	51%
None of these	2%

(CCX 860 (Frederick Expert Report at 13, 48)).

491. Misleading homogeneity exists in the Synovate survey. The Synovate survey offers a limited number of responses; the time frames are listed in absolutes; and there are a relatively small number of those time frames. The bias in the response options is toward the longer end of the time frame, rather than the shorter end of the time frame, as in the APCO survey. (Stewart, Tr. 2519-2520; Frederick, Tr. 1049-1051).

492. Both Dr. Stewart and Dr. Frederick believe that the APCO and Synovate surveys are flawed. (Frederick, Tr. 1045, 1049-1051; Stewart, Tr. 2513-2517; RX 856 (Stewart Expert Report at 5-9)).

493. Dr. Frederick faults both the APCO and Synovate surveys for having closed-ended rather than open-ended questions. (Frederick, Tr. 1280).

494. Both the APCO and Synovate surveys have "serious limitations." (Stewart, Tr. 2593).

495. The Commission stated in the FTC's Green Guides Statement of Basis and Purpose, issued with the 2012 revision to the Green Guides that "[t]he Synovate study results suggest that respondents' answers may have been not only biased but also influenced by a tendency to avoid extreme answers" and that "[r]eliable real world conclusions cannot be drawn from the Synovate study." (http://www.ftc.gov/sites/default/files/attachments/(press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf at 121).

496. The Commission stated in the FTC's Green Guides Statement of Basis and Purpose issued with the 2012 revision to the Green Guides that both the APCO and Synovate surveys "may be faulted for lacking control groups and presenting the timeframe questions with close-ended, rather than open-ended, answers but they nevertheless are the only studies in the record." (http://www.ftc.gov/sites/default/files/attachments/press-

releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf at 121).

497. The APCO and Synovate surveys have little probative value beyond suggesting that there is variability in what consumers understand about biodegradability. (RX 856 (Stewart Expert Report at 9)).

6. The Stewart Survey

498. In the spring of 2014, in connection with his work on this case, Dr. Stewart performed a 400-participant landline telephone survey. (Stewart, Tr. 2494, 2687; RX 856 (Stewart Expert Report at 18, 20)).

499. Dr. Stewart chose to use 400 as a sample size because it is near the number (384) that is considered by researchers to be the point at which one reaches "diminishing returns" in terms of sample size. Increasing the sample size beyond 400 does not achieve greater statistical precision. Survey research generally uses samples of around 400. (Stewart, Tr. 2544-2545).

500. Dr. Stewart decided to conduct a telephone survey because he believed this would result in a more representative sample than that which would result from interviewing people in selected malls (a "mall intercept" survey). (Stewart, Tr. 2526-2527).

501. Dr. Stewart's survey was designed, *inter alia*, "to determine how representative consumers who purchase products made from or packaged in plastic perceive the meaning of the term 'biodegradability.'" (RX 856 (Stewart Expert Report at 15)).

502. Dr. Stewart's survey had the objective of understanding the perceptions of consumers as to the meaning of the term "biodegradable," complete with any contingencies, dependencies, or context effects that consumers might bring to bear. (Stewart, Tr. 2531).

a. Methodology

503. Dr. Stewart wrote the questions used in his survey. (Stewart, Tr. 2527, 2529).

504. Other than ECM's attorneys providing Dr. Stewart with the initial issue, "what does 'biodegradable' mean to consumers," it was entirely Dr. Stewart's responsibility to design, implement, and interpret the survey. (Stewart, Tr. 2528-2529).

505. Dr. Stewart designed the survey, the sampling plan, and the set of questions in his survey. (Stewart, Tr. 2552).

506. In terms of the validity of a survey, it is far better for a "protest response" (see F. 382-386) to be a hang up of the telephone – thus providing the researcher absolutely no data – than entering a protest response into a survey which actually becomes incorporated into the larger data set and is ultimately used in an analysis. (Stewart, Tr. 2665-2666).

507. Dr. Stewart coded every response to his survey. Dr. Stewart's codes classified the actual responses of the survey participants. (Stewart, Tr. 2810-2811).

508. Dr. Stewart assured that the design of his survey was "double-blind," meaning that the interviewers and other personnel directly involved with collecting or coding the data were not aware of the sponsor or purpose of the research, nor were the survey respondents aware of either the purpose or the sponsor of the research. (Stewart, Tr. 2553-2554).

509. Where a survey is double-blind, it is unlikely that a respondent or interviewer will seek to be helpful by offering a response that they think is consistent with what the researcher is looking for. (Stewart, Tr. 2554).

510. The totality of the questions asked in Dr. Stewart's survey provided a much brighter and richer picture of people's perceptions of biodegradability than if Dr. Stewart had asked only one question of each respondent. (Stewart, Tr. 2812-2813).

511. Dr. Stewart's survey used interviewers who could ask follow-up questions and use probes to obtain more complete answers from respondents. (Stewart, Tr. 2526).

512. The interviewers in Dr. Stewart's survey were live callers who were well-trained professional interviewers who were assisted in their work by "computer-assisted telephone interviewing technology" ("CATI"), which provides means by which the interviewers' work could be monitored and for capturing responses of the survey respondents. (Stewart, Tr. 2527, 2530-2531).

513. CATI is essentially hardware and software that is designed to create a structure to assist interviewers in the design and implementation of a telephone survey. CATI automates the dialing of telephone numbers so that it takes the control of what number is dialed away from the interviewer. (Stewart, Tr. 2530).

514. Once CATI reaches a telephonic connection with a potential respondent, CATI causes the interviewer's monitor to bring up one question at a time so that there is no opportunity for the interviewer to deviate from the order of questions. After recording a response from a respondent, the interviewer clicks a "continue" button that brings up the next question in the survey. (Stewart, Tr. 2530-2531).

515. Dr. Stewart's survey used a random digit dialing approach so that the telephone numbers were randomly selected, which helps assure a more representative sample. (Stewart, Tr. 2541).

516. One source Dr. Stewart used to obtain telephone numbers was Scientific Telephone Sampling, a firm that is in the business of generating samples for survey research. Scientific Telephone Sampling generated a random-digit dialing sample by taking listed phone numbers that are publicly available and by randomly changing the last two digits in order to create a true random sample of telephone numbers in the sense that the resulting sample includes unlisted numbers. (Stewart, Tr. 2545-2546).

517. Dr. Stewart obtained an "age-enhanced" supplementary sample from Survey Sampling, Incorporated ("Survey

Sampling"), a company that does preparation, analysis, and provision of names and telephone numbers for survey research, which provided a larger percentage of households known to contain younger consumers. (Stewart, Tr. 2546).

518. Dr. Stewart combined the random-digit dialing sample obtained from Scientific Telephone Sampling and the age-enhanced sample from Survey Sampling to create the final source of telephone numbers that were used for dialing for his survey. (Stewart, Tr. 2546).

519. Both Scientific Telephone Sampling and Survey Sampling are well-known and highly respected providers of sample lists in survey research. (Stewart, Tr. 2549).

520. Prior to asking any survey questions, interviewers clarified to potential respondents that the call was for research purposes and not for telemarketing. (RX 856 (Stewart Expert Report at 19)).

521. Dr. Stewart included screening questions in his survey in order to ensure that the respondents surveyed were representative of the relevant population. (Stewart, Tr. 2551; *see* F. 337-338).

522. Dr. Stewart defined the relevant population as adults in the United States, age 18 and older, who indicated that they had some general understanding of what the term "biodegradable" means. (Stewart, Tr. 2532).

523. Dr. Stewart chose to exclude from his survey people who indicated that they did not have a general understanding of the term "biodegradable," because it makes no sense to ask people the meaning of a term when they have already self-identified that they do not know what that term means. If people who had no general understanding of the term "biodegradable" were to participate in Dr. Stewart's survey, they would simply be guessing, offering random responses, and not be giving meaningful responses to the survey questions. (Stewart, Tr. 2533).

524. Dr. Stewart's survey's population excluded anyone who Dr. Stewart thought was atypically knowledgeable on the subject of biodegradation, such as a person who worked in the waste

industry. Screening to exclude those who may provide atypical answers to a survey is common. (Stewart, Tr. 2532-2533, 2536).

525. Non-probability sampling is where the researcher does not know in advance what the probability of selecting any one individual is, because a respondent can simply refuse to participate in the survey. Most of the work done by marketing researchers involves non-probability samples because people can decline to participate in the surveys. Dr. Stewart's sample in his survey was a non-probability sample because respondents could refuse to participate. (Stewart, Tr. 2540-2541).

526. Dr. Stewart's survey included screening questions asking about the respondent's age, gender, general employment status, and whether the respondent was knowledgeable or not about the term "biodegradable." (Stewart, Tr. 2535).

527. The gender and age screening questions in Dr. Stewart's survey were designed to assure that his survey had an adequate number of people of each gender and within each age category. (Stewart, Tr. 2535).

528. Dr. Stewart established "soft" quotas, or ranges, for the demographics in his survey to ensure that men and women, as well as various age categories, were well represented in the survey sample. (Stewart, Tr. 2551).

529. California Survey Research Services ("CSRS") programmed Dr. Stewart's questionnaire into the computer-assisted telephone interviewing technology under Dr. Stewart's direction. Dr. Stewart has relied upon CSRS in a variety of contexts for more than 20 years. (Stewart, Tr. 2528).

530. CSRS is a well-known firm specializing in telephone, mail, and internet surveys and has been in the business of conducting surveys for 30 years. (Stewart, Tr. 2552).

531. CSRS coded the responses to Dr. Stewart's survey. It would have been problematic for Dr. Stewart to code the answers to his survey because the fact that he knew the purpose of the research could influence how he coded the data. (Stewart, Tr. 2554-2555).

532. All of the interviewers who implemented Dr. Stewart's survey were trained in general interviewing techniques and also were specifically trained to the protocol that was used in Dr. Stewart's survey. Supervisory personnel trained the interviewers, answered the interviewers' questions, were on-site at the time the interviewing took place, and could therefore address any problems that arose during the survey. (Stewart, Tr. 2558-2559).

533. Supervisory personnel had the ability to randomly monitor the interviewing as it was taking place in real time, so that they could determine whether the interview was actually taking place and whether the protocol was actually being followed. The fact that supervisory personnel were able to listen to interviews in real time assures a higher degree of integrity and attention to instructions among the interviewers. (Stewart, Tr. 2558-2559).

534. The interviewers had an opportunity for debriefing to discuss any questions, problems, or issues that arose after they completed a practice interview. Interviewers' ability to participate in briefing ensures a higher quality and efficiency of the interviewing process and acts as a way to standardize the interviewers. (Stewart, Tr. 2560).

535. The coders in Dr. Stewart's survey reviewed the responses to the open-ended questions to determine the broad categories that would seem to capture the responses. The categories that best captured respondents' responses to open-ended questions in Dr. Stewart's survey became the "code book," which was approved by Dr. Stewart. (Stewart, Tr. 2564-2565).

536. All verbatim responses to Dr. Stewart's survey were coded independently by two coders and any disagreements were resolved in discussion. (Stewart, Tr. 2556-2557; RX 856 (Stewart Expert Report at 23)).

537. All but two of Dr. Stewart's survey questions were open-ended. (RX 856 (Stewart Expert Report at 20)).

538. Dr. Stewart's main questionnaire, which was the substantive questionnaire, used the "funnel approach." A funnel

approach starts with general open-ended questions and progresses to more specific open-ended questions, and finally to some closed-ended questions. (Stewart, Tr. 2566).

539. By allowing respondents to answer the survey questions in their own words, Dr. Stewart was able to identify any qualifications, dependencies, and contexts that might be present in a respondent's answer. (Stewart, Tr. 2562).

540. Dr. Stewart's screener questionnaire contained 6 questions, and his main questionnaire contained about 15 questions. (Stewart, Tr. 2569).

541. Not every respondent was asked every question in Dr. Stewart's main questionnaire. If a survey respondent disconnected the phone call during the survey, that respondent's answers were not counted and that respondent was recorded as a "terminate." (Stewart, Tr. 2569-2570).

542. Dr. Stewart designed and conducted his survey in accordance with well-established principles of survey research offered in litigation, as articulated in the *Manual for Complex Litigation*. (Stewart, Tr. 2522; RX 856 (Stewart Expert Report at 16)).

543. In Dr. Stewart's survey, 19% of respondents were aged 18-34, 23% of respondents were aged 35-49, 29% percent of respondents were aged 50-65, and 29% of respondents were aged 66 and older. (Stewart, Tr. 2572; RX 605 (Stewart Expert Report Appendix D at 3)).

544. In Dr. Stewart's survey, 201 respondents were female and 199 respondents were male. (Stewart, Tr. 2572; RX 605 (Stewart Expert Report Appendix D at 2)).

545. The work for Dr. Stewart's survey cost $37,500. (Stewart, Tr. 2648; RX 856 (Stewart Expert Report at 22)).

b. Relevant questions and responses

546. Question 1 of Dr. Stewart's survey asked: "When you hear the term 'biodegradable' what does that mean to you?"

Eighty-two percent of the survey respondents replied with something about disintegration, decomposition, or breakdown. The remaining 26% of survey respondents mentioned something about safety, but the majority of these respondents also mentioned something about breaking down or decomposition. (RX 856 (Stewart Expert Report at 24); Stewart, Tr. 2586).

547. Question 2 of Dr. Stewart's survey asked: "Is the fact that a product or package is biodegradable important to you?" Seventy-one percent answered yes, and 29% answered no. (RX 856 (Stewart Expert Report at 24)).

548. Question 4 of Dr. Stewart's survey asked: "If something is biodegradable, how long do you think it would take for it to decompose or decay?" This question elicited a very wide range of responses. (RX 856 (Stewart Expert Report at 25)).

549. The most common answer to question 4 of Dr. Stewart's survey, by far, offered by 39% of the survey respondents, was that it depends on the material or type of product. No other single response was offered by more than 6% of the respondents. Other responses referred to differences in materials or context: 6% stated that paper degrades faster; 6% stated that plastic does not degrade or takes a long time to degrade; 5% indicated that it depends on the climate or other conditions, or how the product is disposed; 3% indicated that vegetation decomposes more quickly; and 3% stated that it depends on size. In total, 68% of the survey respondents gave answers to question 4 that indicate recognition of differences in the rate of decomposition related to type of material and/or the context. (RX 856 (Stewart Expert Report at 25); Stewart, Tr. 2580).

550. Question 4a of the Stewart survey was a "yes" or "no" question which asked: "Do you think there are differences in the amount of time it takes for different types of products to biodegrade, decompose or decay?" Ninety-eight percent replied, "yes." Question 4b asked those who believed such differences exist: "What differences exist in the time for different types of products to biodegrade, decompose or decay?" Various differences were cited, including the type of product, the size of the product, the environment, and the climate conditions. (RX

856 (Stewart Expert Report at 26); RX 605 (Stewart Expert Report Appendix D at 22-23).

551. Answers to the question whether "if something is biodegradable, how long do you think it would take for it to decompose or decay," in Dr. Stewart's survey, must be put into the context of answers to other questions in the survey, such as questions 4a and 4b (F. 550), which indicate wide recognition of differences in the rate of biodegradation. (Stewart, Tr. 2581; RX 856 (Stewart Expert Report at 26)).

c. Summary and conclusions

552. Dr. Stewart's survey was designed in a fashion that is very consistent with accepted standards and best practices in the design of survey research. (Stewart, Tr. 2587; F. 326, 507-544).

553. Not one respondent to Dr. Stewart's survey understood biodegradation to mean the complete breakdown of the substance into elements in nature within one year after customary disposal. (Stewart, Tr. 2583).

554. Based on Dr. Stewart's survey, consumers interpret the term, "biodegradable," to mean the process by which a product breaks down or decays; and consumers understand that the time for this process varies depending on the materials involved and that the process of biodegradability is not always, or even often, a rapid process. (F. 546, 548-549; Stewart, Tr. 2579; RX 856 (Stewart Expert Report at 25-26)).

555. Based on Dr. Stewart's survey, no significant minority of Americans define "biodegradation" to mean that a product will completely biodegrade into elements in nature within one year after customary disposal. (Stewart, Tr. 2586).

556. Based on Dr. Stewart's survey, there is little evidence that consumers' understanding of biodegradability is restricted to decomposition processes that occur within one year or less. (RX 856 (Stewart Expert Report at 26)).

d. Manufacturers Pilot Survey

557. Dr. Stewart conducted a pilot survey of manufacturers of plastic ("Manufacturers Pilot Survey"). (Stewart, Tr. 2587).

558. ECM provided Dr. Stewart with a list of 200 ECM customers in order to conduct the Manufacturers Pilot Survey. (Stewart, Tr. 2637-2639).

559. For the Manufacturers Pilot Survey, ECM provided a customer list to Dr. Stewart that included names and telephone numbers of individuals that were identified as most knowledgeable about the manufacture of plastics and the components that would be acquired for that process. (Stewart, Tr. 2588).

560. ECM provided to Dr. Stewart a list of representatives from customer organizations who were involved in the purchase of materials for the manufacturer of plastics. (RX 856 (Stewart Expert Report at 27)).

561. The Manufacturers Pilot Survey was conducted in an attempt to ascertain whether more knowledgeable purchasers have a more common understanding of biodegradability. (Stewart, Tr. 2588; RX 56 (Stewart Expert Report at 27-28)).

562. The pilot survey had a limit of 20 hours of calling. (Stewart, Tr. 2588).

563. Representatives from ten of ECM's customers participated in the pilot survey of manufacturers of plastic, which was also implemented by CSRS. (RX 856 (Stewart Expert Report at 27-28)).

564. The pilot survey of manufacturers of plastics was not developed into a full-blown study because the respondents were people who were difficult to contact, and in 20 hours of interviewing time, CSRS was only able to conduct interviews of 10 respondents. (Stewart, Tr. 2806).

565. The sample size of the Manufacturers Pilot Survey is too small to support any conclusions. (CCX 865 (Frederick Rebuttal Expert Report ¶ 17)).

E. Substantiation

1. Landfill Conditions

566. Landfilling is the largest management option for municipal solid waste ("MSW") in the United States. About 54 percent of solid waste is managed in that capacity. (JX 3 at 2; Tolaymat, Tr. 126).

567. MSW is waste that is generated in the residential, commercial, and institutional sectors. (Barlaz, Tr. 2177).

568. MSW composition, roughly, is paper, 20 percent; food waste, 20 percent; plastics, 10 percent; and glass, 3 to 5 percent. (Barlaz, Tr. 2181).

569. MSW is highly heterogeneous. (Barlaz, Tr. 2175; RX 853 (Barlaz Expert Report at 4)).

570. Active landfills are dynamic and heterogeneous environments. (CCX 893 (Tolaymat Expert Report at 10)).

571. It is very, very difficult to describe a "typical" landfill. (Barlaz, Tr. 2193).

572. The range of moisture content, temperatures, and oxygen levels in landfills can be considerable. (Barlaz, Tr. 2205-2208).

573. With respect to microbial composition, it would be unreasonable to expect or identify a "one-size-fits-all" description of an MSW landfill because the diversity of potential environments presented in landfills is vast with too many variables, which, in turn, leads to a proliferation of many different types of microorganisms. (Burnette, Tr. 2387-2388).

a. Temperature

574. Landfill temperatures are not controlled, but are often a result of environmental conditions. A landfill in a hot climate such as Florida would have a higher temperature than a similar landfill in a cold climate such as Alaska. (CCX 893 (Tolaymat Expert Report at 12 n.7)).

575. Landfills often have major temperature variations, even within the same landfill. (Barlaz, Tr. 2208-2209; Sahu, Tr. 1842-1844).

576. Dr. Barlaz has seen landfills where steam has been emitted from one side of the landfill, while on the other side of the same landfill, the temperatures might be in the range of 100 degrees Fahrenheit. (Barlaz, Tr. 2208).

577. Temperatures in MSW landfills in the United States range between 20 and 40 degrees Celsius (between 68 and 104 degrees Fahrenheit) and average around 37 degrees Celsius (98.6 degrees Fahrenheit). (CCX 893 (Tolaymat Expert Report at 12); Barlaz, Tr. 2208-2209 (37 to 40 degrees Celsius is most typical)).

578. United States landfills generally operate at mesophilic[9] temperatures. (Tolaymat, Tr. 139-140). *See also* RRCCFF 420 ("ECM agrees that, in very general terms, the range of temperatures wherein landfills usually operate are in the mesophilic range.").

b. Oxygen

579. Most landfills in the United States are required by federal regulations to operate with oxygen content below 5%. (Tolaymat, Tr. 138-139) (describing effects of EPA regulations on landfill oxygen levels). *See also* RRCCFF 419 ("ECM agrees that MSW landfill environments are predominantly anaerobic, but not exclusively so.").

[9] "Mesophilic" refers to a class of microorganisms that have optimal temperature around 98.6 degrees Fahrenheit. (Barlaz, Tr. 2228). *See* F. 733-739.

580. There is oxygen in landfills, to the extent that it comes from waste materials, water, and other chemicals. (Barlaz, Tr. 2189-2190).

581. Every reaction in which a microbe gains energy or has a source of energy is an oxidative reaction. (Barlaz, Tr. 2190).

582. Oxidative reactions need not involve oxygen, and they occur in anaerobic systems. (Barlaz, Tr. 2191-2192).

c. Moisture

583. Moisture content is important for biodegradation and a higher rate of biodegradation is expected in areas of landfills with high moisture content. (Tolaymat, Tr. 146).

584. The phrase "dry tomb" landfill is misused because the implication of the term is that if moisture is not being actively added to a landfill, then it is a dry tomb landfill, which is false. (Barlaz, Tr. 2197-2198).

585. There are many landfills that, by virtue of infiltration of rainwater alone, are not dry tomb landfills. (Barlaz, Tr. 2199).

586. The range of moisture content in landfills can be considerable. (Barlaz, Tr. 2206).

587. A landfill in Florida, where it rains a lot, will have a higher moisture content than a landfill in Arizona, where there is hardly any rain at all. (Tolaymat, Tr. 146; Barlaz, Tr. 2207 (landfills in regions that are arid tend to be dryer)).

588. Within a landfill, there can be pockets of dry and very moist areas. (Barlaz, Tr. 2205-2206; Tolaymat, Tr. 274) (explaining that, in one part of a landfill that he went to, Dr. Tolaymat was able to read a newspaper that was ten years old, whereas, on another side of the landfill cell,[10] it was "really gooey, black waste.").

[10] A landfill cell is the whole area where trash is compacted. Landfill cells are considered distinct entities and operate as distinct units, similar to buildings that are next to each other on the same block. (Tolaymat, Tr. 272).

589. Dr. Barlaz has seen moisture readings on approximately a thousand samples of MSW from various landfills, ranging from 15 to 18 percent at the low end, to above 40 percent at the high end. (Barlaz, Tr. 2206).

590. Complaint Counsel's expert, Dr. Tolaymat, testified that, without the active addition of moisture, the typical moisture content in United States landfills is between 15 and 30%, and that in areas where "ponding"[11] occurs, he has seen samples extracted from landfills at 50 to 55% moisture content. (Tolaymat, Tr. 145, 274).

591. Leachate is a liquid that percolates through waste material in a landfill. (JX 4 at 5).

592. Leachate recirculation increases overall moisture content, and also helps balance the moisture levels within the same landfill. (Barlaz, Tr. 2205).

593. Peer-reviewed studies, some co-authored by Dr. Tolyamat, conclude that the addition of leachate recirculation seems to promote biogas production and increase moisture content. (RX 851 (Tolaymat, Dep. at 82-86); RX 898; RX 899; RX 900).

594. Some landfill operators spray waste with leachate as the waste goes into the landfill, which also accelerates biodegradation. (Barlaz, Tr. 2200).

595. Dr. Tolaymat acknowledged that landfill operators practice spray application of liquid to waste, leachate recirculation, and other methods to increase moisture content. (Tolaymat, Tr. 273-278).

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[11] Landfill operators apply a daily cover, sometimes consisting of soil. When it rains or leachate migrates through the landfill cell and hits the daily cover, this results in ponding – leachate getting stuck on top of the daily cover. Once ponded water exists in a landfill, it is very difficult to rid the landfill of the ponded water. (Tolaymat, Tr. 273).

596. More and more landfills are now recirculating leachate or taking in commercial liquids from other sources and adding it to waste. Those landfills are operating to enhance waste decomposition. (Barlaz, Tr. 2200).

597. When Dr. Barlaz recently performed a landfill gas study on more than 15 landfills around the country, he found that more than two-thirds of those landfills were spray-applying leachate to the working face of the landfill, although those landfills were not calling themselves "bioreactors." (Barlaz, Tr. 2201).

598. A landfill might collect around 300 gallons per acre per day of landfill leachate. (Barlaz, Tr. 2205-2506).

d. Biodegradation in a landfill

599. Biodegradation processes are highly variable in the heterogeneous landfill environment, where you have different microenvironments throughout the landfill. This means the level of biodegradation and activity will be variable in the landfill environment. (Sahu, Tr. 1768-1770).

600. The differing pockets of activity and varying conditions in a landfill will have an effect on the rate of biodegradation. (Sahu, Tr. 1770-1771).

601. Researchers have identified many specific microorganisms that populate MSW landfills. (Burnette, Tr. 2390).

602. Landfill leachate carries microorganisms; contains carboxylic acids, humic matter, ammonia, and other chemicals; and has nutrients in the form of dissolved ammonia and phosphate, which are major nutrients or macronutrients, and contain trace metals, which are nutrient sources for microorganisms. (Barlaz, Tr. 2203-2205).

603. Landfills contain species within the phyla Proteobacteria, Firmicutes, and Thermotagae, which are large families that contain many forms of individual bacteria. (Burnette, Tr. 2390-2392).

604. There are also fungi present in landfills that have been identified in the peer-reviewed literature and are responsible for biodegradation. (Burnette, Tr. 2372, 2394, 2392).

605. MSW landfills contain bacteria, fungi, and other microorganisms that secrete enzymes capable of completing biodegrading processes. (Sahu, Tr. 1865-1866; Burnette, Tr. 2372-2373).

606. Scientists have published information concerning the types of bacteria and microorganisms that are found in nature (including MSW landfills), which have also been shown to biodegrade conventional plastics. (Sahu, Tr. 1868-1869; RX 855 (Sahu Expert Report at 34)).

607. In peer-reviewed literature, scientists have used DNA sequencing to identify many species existing in landfills that are capable of degrading plastics. (Burnette, Tr. 2390-2392; RX 854 (Burnette Expert Report at 10)).

e. Anaerobic biodegradation

608. Anaerobically biodegradable materials have the potential to generate methane. (Barlaz, Tr. 2183-2184).

609. Stoichiometry is the relationship between the chemical composition of reactants of an equation (those materials on the left side), and the end products (the materials on the right side). (Barlaz, Tr. 2185).

610. Principles of stoichiometry deal with conservation of mass, and are applicable to the conversion of substrates to methane during anaerobic biodegradation. (Barlaz, Tr. 2185-2187).

611. To microorganisms, MSW represents a source of food or energy, so if there is energy to be gained by consuming or attacking a substrate, they will do it. (Barlaz, Tr. 2186).

612. In general, the process of anaerobic biodegradation involves hydrolysis reactions that eventually produce products

such as butyric acid, acetic acid, hydrogen, and carbon dioxide. (Barlaz, Tr. 2186).

613. Butyric acid is then attacked by microorganisms referred to as acetogenic, which convert the butyric acid to acetic acid and carbon dioxide. (Barlaz, Tr. 2186-2187).

614. Methanogenic archaea use either the acetic acid or hydrogen plus carbon dioxide and convert either of those substances to methane. (Barlaz, Tr. 2187).

615. The concerted activity of at least four trophic groups of microorganisms enables the conversion of materials to methane and carbon dioxide. (Barlaz, Tr. 2187).

616. Microbes may secrete some waste products of metabolism to the environment as a product of biodegradation. (Barlaz, Tr. 2188).

617. Cell mass is also a product of biodegradation, meaning that carbon extracted from waste may consume the carbon for growth rather than convert carbon to methane or gas. (Barlaz, Tr. 2188).

618. In an anaerobic test system, the ratio of methane gas to carbon dioxide is usually in the range of 1:1, but may appear more like 60% methane and 40% carbon dioxide, because carbon dioxide can dissolve into the liquid phase. (Barlaz, Tr. 2188-2189).

619. Significant anaerobic biodegradation occurs in MSW landfills, and the prime evidence for that is the production of methane in those landfills. (Barlaz, Tr. 2174).

f. Methane

620. MSW contains chemical compounds that have methane potential. (Barlaz, Tr. 2183-2184).

621. All MSW landfills have the potential to produce gases, and those gases are a signature of biological activity. (Sahu, Tr. 1846).

622. The gases generated from MSW landfills show that there are biological reactions occurring, and so the gases are indicative of underlying biological activity in the landfill. (Sahu, Tr. 1847).

623. Landfills can produce substantial amounts of methane gas emissions. (Barlaz, Tr. 2174-2175; 2192-2193).

624. Methane is the end product of biodegradation in landfills. (Barlaz, Tr. 2174).

625. There are about 2,000 MSW landfills in the United States and commercial quantities of methane are recovered from at least 600 of them. (Barlaz, Tr. 2174, 2197).

626. Dr. Barlaz has seen landfills that make 250 to 500 cubic feet of landfill gas (at 50% methane) per minute. (Barlaz, Tr. 2192).

627. The gases generated from MSW landfills show that there are biological reactions occurring and are indicative of underlying biological activity in the landfill. (Sahu, Tr. 1847).

628. Methane production is clear evidence that MSW landfills are biologically active because methane is the direct result of anaerobic metabolism. (Burnette, Tr. 2384-2385).

g. Degradation times in landfills

629. Waste that is disposed in MSW landfills will undergo aerobic biodegradation to some degree, particularly in the early stages after waste disposal and before the waste is compacted and covered. (Barlaz, Tr. 2214; Sahu, Tr. 1839-1840).

630. Because landfill environments are highly variable with respect to moisture content and temperature, even within a single landfill, landfill conditions can support many different rates of biodegradation, including accelerated rates of biodegradation in areas of high moisture or temperature. (Sahu, Tr. 1768-1771).

631. Decay rates fluctuate in landfills. The rate at which a material biodegrades in a landfill is described by its first order decay rate, which can be converted to the material's half-life. The decay rate models of even the most degradable MSW components, food waste and grass, do not predict complete biodegradation within one year. (RX 853 (Barlaz Expert Report at 3, 14, Table 1); Barlaz, Tr. 2296-2297).

632. If a material is disposed in a landfill, then for the purpose of determining whether it biodegrades, it does not matter whether it degrades in two, ten, or twenty years. (Barlaz, Tr. 2283-2284).

2. Scientific Evidence on the Definitions of Biodegradability

a. Dr. McCarthy's definition of "biodegradability"

633. Complaint Counsel's degradable polymer expert, Dr. McCarthy, used in his expert report a definition for biodegradable provided to him by Complaint Counsel. Footnote one of Dr. McCarthy's report states:

> Complaint Counsel asked me to assume that the unqualified marketing claim 'biodegradable' means that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling). I use this definition and the scientific definition of biodegradable interchangeably in this Expert Report, because there is no substantive difference between the two that affects my analysis or my opinions.

(CX 891 (McCarthy Expert Report at 5 n.1); McCarthy, Tr. 482-483) ("footnote one definition"). This opinion is unsupported, unpersuasive, and rejected. (F. 634-675).

634. In the words of Dr. McCarthy, his expert report was the result of a "collaborative effort" between Dr. McCarthy and Complaint Counsel. (McCarthy, Tr. 482-483).

635. When Dr. McCarthy was asked, "[c]an you identify for me the content in footnote one that you yourself drafted?" he stated, "[p]robably the scientific definition part of it." (McCarthy, Tr. 487).

636. Dr. McCarthy's report does not contain a specifically designated "scientific definition" but does, later in his report, define biodegradation "as a chemical process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as an energy source (*i.e.*, as a food source)." (CCX 891 (McCarthy Expert Report at 8)).

637. This later definition of biodegradation (F. 636) does not have the "within one year" or completeness requirements contained in the footnote one definition in Dr. McCarthy's expert report. (RX 855 (Sahu Expert Report at 13 n.11)).

638. Although Dr. McCarthy initially testified that the definition in footnote one of his expert report – that "'biodegradable' means that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling)" is "equivalent" to the scientific definition and is "interchangeable" with the scientific definition of biodegradable, Dr. McCarthy subsequently testified he would like to change his testimony regarding the footnote one definition being "interchangeable" with the scientific definition because "'interchangeable' . . . is a bit strong." (McCarthy, Tr. 486-487, 496).

639. Dr. McCarthy's expert report does not contain any citations to any scientific literature to support the definition set forth in footnote one of his report – that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling). (CCX 891 (McCarthy Expert Report at 5 n.1); RX 855 (Sahu Expert Report at 11)).

640. No peer-reviewed literature defines "biodegradation" to be limited to a complete breakdown of plastic into elements found

in nature within one year after customary disposal. (Barlaz, Tr. 2281; Sahu, Tr. 1773).

641. No scientist has published a peer-reviewed article defining biodegradation to be limited to the complete breakdown of a plastic or material into elements found in nature within one year after customary disposal. (Burnette, Tr. 2376) (further explaining, "in microbiology and in biochemistry, it's rare that we think of things in terms of completion. We certainly don't put rates on things that we don't have a clear definition for.")).

642. Complaint Counsel's expert, Dr. Michel, has never defined biodegradation as having to result in a complete breakdown of material into elements found in nature within one year after customary disposal in any of his peer-reviewed articles. (Michel, Tr. 2908).

643. Dr. McCarthy admitted that he was unaware of any instance in which a peer-reviewed article concerning plastics biodegradation ever defined the term, "biodegradable" as entailing a complete break down and return to nature within one year after customary disposal. (McCarthy, Tr. 493-494).

644. While Dr. McCarthy opines in his expert report that ECM could have performed confirmatory testing to show biodegradation by conducting a gas evolution test showing at least 60% conversion to methane and carbon dioxide within 18 months (F. 848), such testing would not be able to show complete biodegradation within "one year." (RX 855 (Sahu Expert Report at 12)).

645. Dr. McCarthy is unaware of any instance in which a peer-reviewed article concerning plastics biodegradation defined the term "biodegradation" as entailing a complete breakdown and return to nature within one year after customary disposal. (McCarthy, Tr. 493-494).

646. Dr. McCarthy has defined the terms "biodegradable" or "biodegradation" in articles he has authored. He has never, in any of his published scientific literature, defined "biodegradable" to mean that the entire plastic will completely break down and return

to nature within one year after customary disposal. (McCarthy, Tr. 487-488).

647. Dr. McCarthy co-authored an article titled, "*Advances in Properties and Biodegradability of Co-Continuous, Immiscible, Biodegradable, Polymer Blends*." In that article, Dr. McCarthy concluded that certain test samples were biodegradable without proving that the samples completely biodegraded within one year after customary disposal. (McCarthy, Tr. 577-579, 582; RX 940).

648. Dr. McCarthy co-authored an article titled, "*Biodegradable Blends of Bacterial Polyesters with Polyethylene and Polystyrene*." No author of "*Biodegradable Blends of Bacterial Polyesters with Polyethylene and Polystyrene*" established that the polyethylene and polystyrene blends that were tested completely broke down and returned to nature within one year after customary disposal. (McCarthy, Tr. 586; RX 945).

649. Dr. McCarthy, in 2003, authored a chapter titled, "*Biodegradable Polymers*" in the text titled, "*Plastics and the Environment*." In this chapter, Dr. McCarthy stated that "[t]he definition of biodegradable polymer varies greatly among scientists, manufacturers, and consumers." (McCarthy, Tr. 488-490; RX 924 at 359).

650. Because manufacturers had different definitions of the term "biodegradable," ASTM International, formerly known as the American Society for Testing and Materials ("ASTM"), developed an agreed-upon definition (F. 679). (McCarthy, Tr. 492-93).

651. Dr. McCarthy has relied upon the ASTM definition of the term "biodegradable" in a publication that he wrote on biodegradable polymers in 2003. (McCarthy, Tr. 494-95).

652. The ASTM definition for biodegradation involving plastic at the time Dr. McCarthy wrote the chapter in 2003 (F. 649) was: "'plastic designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties'... in which the degradation results from the action of naturally-occurring micro-organisms

such as bacteria, fungi, and algae.'" (McCarthy, Tr. 495; RX 924 at 359).

653. The ASTM definition (F. 652) does not define "biodegradable" to mean that there is a complete break down and return to nature of the treated plastic within one year after customary disposal. (McCarthy, Tr. 494).

654. Dr. McCarthy is the editor of the *Journal of Polymers and the Environment*, formerly the *Journal of Polymer Degradation*. In this role, Dr. McCarthy evaluates the scientific merits of articles, and edits and determines which articles are published in the *Journal of Polymers and the Environment*. No article would appear in the *Journal of Polymers and the Environment* without Dr. McCarthy's approval. (McCarthy, Tr. 509-513, 527).

655. Dr. McCarthy reviewed an article titled, "*Biodegradable Polymers-A Review on Recent Trends and Emerging Perspectives*" that was published in the *Journal of Polymers and the Environment* in June 2011. (McCarthy, Tr. 511-512; RX 925).

656. In "*Biodegradable Polymers-A Review on Recent Trends and Emerging Perspectives*," the authors state that "[t]he various definitions of biodegradation depend on the field of application of the polymers (biomedical area or natural environment). Many different definitions have officially been adopted, depending on the background of the defining standard organizations and their particular interests." (McCarthy, Tr. 527-528; RX 925).

657. In "*Biodegradable Polymers-A Review on Recent Trends and Emerging Perspectives*," the authors list a series of sources for the definition of "biodegradable" and "biodegradation" that are within the universe of biomedical and the natural environment literature. With the exception of the ASTM D6400 protocol, the "Standard Specification for Labeling of Plastics Designed to be Aerobically Composted in Municipal or Industrial Facilities," (CCX 91), not one of the definitions recited in that paragraph includes a requirement that treated plastics break down and return to nature within one year of customary disposal. (McCarthy, Tr. 511-513, 527-529; RX 925).

658. Dr. McCarthy's writings, outside of this litigation, that define biodegradation do not include the qualifier that an item must completely break down within a period of one year. (Sahu, Tr. 1783-1785).

659. Dr. McCarthy invented some polymer blends that are the subject of a United States patent, patent number 5,883,199 ("'199 patent"). (McCarthy, Tr. 534-535; RX 756).

660. Dr. McCarthy reviewed each specification in the '199 patent and signed a declaration affirming the validity of each specification before submitting the '199 patent to the United States Patent and Trademark Office. (McCarthy, Tr. 548).

661. Dr. McCarthy extrapolated from the five blends tested in the '199 patent to classify additional blends not tested as biodegradable. (McCarthy, Tr. 549-550; RX 756).

662. The '199 patent allows a blend of a homopolymer to be biodegradable. (McCarthy, Tr. 598; RX 756).

663. In the '199 patent, Dr. McCarthy reported on testing that he had done with various blends of degradable and nondegradable polymers, indicating that Dr. McCarthy understands that a blend of degradable and nondegradable polymers can degrade. (Sahu, Tr. 1893).

664. Dr. McCarthy did not establish in the '199 patent that any of the polymer blends in the '199 patent would biodegrade completely within one year after customary disposal. (McCarthy, Tr. 545-546; RX 841 (McCarthy, Dep. at 76-77); RX 756).

665. In the '199 patent, McCarthy does not define biodegradation as something that should be complete within one year. Instead, his patent discusses ways of making blends of different polymers of different types and states that his patent allows a user to make a formulation of plastics that can provide a desired degree of biodegradation within a given period of time. Dr. McCarthy does not say the blend will completely biodegrade

or that the biodegradation must be complete within one year. (Sahu, Tr. 1784-1785).

666. Under an agreement with the University of Massachusetts (UMass), Dr. McCarthy assigned his '199's patent rights to UMass. UMass is patent number '199's assignee. In exchange, Dr. McCarthy receives a 10% profit share of the royalty stream. (RX 761; RX 757; McCarthy, Tr. 523-524; RX 841 (McCarthy, Dep. at 57-59)).

667. Metabolix Corporation ("Metabolix") is the exclusive licensee of a biodegradable polymer covered by the '199 patent. (McCarthy, Tr. 523; RX 209; RX 756).

668. Dr. McCarthy acknowledged that Metabolix's products compete directly with ECM's technology for market share. (McCarthy, Tr. 538-408; RX 841 (McCarthy, Dep. 64-66)).

669. As of the date of the hearing, Dr. McCarthy had received about $28,000 in royalties as a result of the patent he invented, under which Metabolix is the exclusive licensee. (McCarthy, Tr. 524, 612).

670. To the extent Metabolix's sales increase based on a reduction in the market for the ECM Additive, royalties from the patent will increase and Dr. McCarthy's income from those royalties will increase as well. (*See* RX 841 (McCarthy, Dep. at 51-52, 55-61)).

671. The definition of "biodegradable" used by Dr. McCarthy in footnote one of his report follows the language of the FTC's Green Guides, which state that "[i]t is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal." (*Compare* CCX 891 (McCarthy Expert Report at 5 n.1) *with* RX 347, at § 260.8(c)).

672. Under the definition of "biodegradable" used by Dr. McCarthy in footnote one of his expert report, if a plastic biodegrades to 95 percent on the 364th day after customary disposal, and biodegrades to 100 percent on the 366th day, the

item would not satisfy McCarthy's definition of "biodegradable." (McCarthy, Tr. 525-26; RX 841 (McCarthy, Dep. at 28-29)).

673. Not even tree trunks, orange peels, or banana peels -- all generally accepted to be biodegradable in the environment -- can reliably break down into elements found in nature within one year after customary disposal. (McCarthy, Tr. 503-509, RX 841 (McCarthy, Dep. at 187); *see also* Barlaz, Tr. 2218; Michel, Tr. 2955).

674. Even the most easily biodegradable substances, such as food waste, will not biodegrade in an MSW landfill within one year after customary disposal. (Tolaymat, Tr. 153-154; RX 853 (Barlaz Expert Report at 11); CCX 893 (Tolaymat Expert Report at 16)).

675. In his article, "*Biodegradation of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation*," Dr. Michel did not stop his biodegradation test at 365 days and reported that cellulose, a material known to be biodegradable, degraded roughly 74% in approximately 400 days. (CCX 164; Michel, Tr. 2903-2904, 2954-2955).

b. Scientific definitions of "biodegradability"

676. Scientists disagree as to a specific definition of "biodegradable." (McCarthy, Tr. 491).

677. ASTM develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services. Standards are developed within committees, and membership in the ASTM is open to anyone with an interest in its activities. (CCX 891 (McCarthy Expert Report at 19 n.10)).

678. The ASTM defines biodegradation, as related to plastic products, as the process by which natural biota decompose a plastic product into different chemical materials. (Sinclair, Tr. 782).

679. Based on the record evidence, the ASTM D883-12 definition of biodegradability is:

> A degradable plastic is defined as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.

(Sinclair, Tr. 785; CCX 14).[12]

680. There are different variants of the definition of biodegradation, but they all speak to the same idea of degrading the object of interest using biological means. (Sahu, Tr. 1774; Sahu, Tr. 1760 ("[B]iodegradation means different things to different researchers … or in different contexts.")).

681. In all contexts, biodegradation simply means the breakdown of whatever is the object of interest using biological means, using essentially biota such as bacteria or fungi or other type of naturally occurring or evolving biota in the environment. (Sahu, Tr. 1760).

682. The common scientific definition of biodegradation is degradation by using biological means. (Sahu, Tr. 1782).

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[12] After an extensive review of the record, it appears that neither party offered ASTM D883-12 into evidence. Respondent, in its proposed finding 1348, proposed this finding, with a citation to the testimony of Mr. Sinclair and to CCX 14, which is Respondent's Certificate of Biodegradability. *See* F. 269. Complaint Counsel did not dispute RPFF 1348 in its Reply to Respondent's Proposed Findings of Fact. Therefore, this language is accepted as the ASTM D883-12 definition.

683. The scientific literature defining biodegradation does not contain a time restraint or require complete degradation. (Sahu, Tr. 1783).

684. The commonly and scientifically accepted term for biodegradation, to the extent there is any consensus at all, is that the mechanism of degradation is via biotic or biological agents, such as bacteria, fungi, or other living organisms, as opposed to other abiotic degradation pathways. There is not a "scientific" definition that constrains this any further, especially with regard to completeness or an arbitrarily selected time frame. (RX 855 (Sahu Expert Report at 12-13)).

685. Complaint Counsel's expert, Dr. Michel, has recognized in his testimony concerning cellulose that a biodegradable material is "fully" biodegradable even if it biodegrades only to 44% in a test environment. (Michel, Tr. 2960-2961).

686. The biodegradability of a product describes a property of the material, much like its color or weight or density. A product is either biodegradable, or it is not. (Barlaz, Tr. 2217-2218).

687. A product that is biodegradable will biodegrade at various rates and to various extents based on the external environmental conditions, but will remain biodegradable regardless. (Barlaz, Tr. 2218-2219).

688. Changes in temperature and moisture do not influence intrinsic biodegradability of a material. For example, a piece of paper in a dry environment, at 70 degrees Fahrenheit, will biodegrade because that is an intrinsic property of paper. The moisture and temperature affect the rate of biodegradability, but not whether it will biodegrade. (Barlaz, Tr. 2218-2219).

689. Biodegradation involves microorganisms acting on substrates to break down same. (Burnette, Tr. 2376-2377).

690. Most biologists would agree biodegradation means the biological activity resulting in the breakdown of a substrate of a product. (Burnette, Tr. 2375-2376).

691. There are several definitions of biodegradation used to describe a biological process. In general, biodegradation refers to the chemical alteration, or "breakdown," of any material as a consequence of biological action. The fundamental requirement of biodegradation is the presence of live (micro) organisms facilitating the mechanism of degradation. (RX 854 (Burnette Expert Report at 4)).

692. From a microbiological standpoint, biodegradation is the conversion of one substance to another substance as the result of biological activity. (Burnette, Tr. 2375).

693. Biodegradation is the conversion of organic matter through the action of bacteria and fungi into more elementary components or elements. (Tolaymat, Tr. 130).

694. Biodegradation is the mineralization of materials as a result of the action of naturally-occurring microorganisms such as bacteria and fungi. (Michel, Tr. 2907-2908; CCX 880).

695. Biodegradation is a process by which microbial organisms sustain their life by eating and metabolizing a material. (Barber, Tr. 2069).

696. Biodegradation is not subject to a time span limitation because it is an ongoing process. (Barber, Tr. 2069).

3. ECM Plastics Will Not Fully Biodegrade in 9 Months to 5 Years in a Landfill

697. The expert testimony in this case establishes that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill. (F. 698-702).

698. Complaint Counsel's expert, Dr. McCarthy, opined that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill:

(a) ECM Plastics will not completely biodegrade in periods of time as short as five years. (CCX 891 (McCarthy Expert Report at 26)).

(b) Conventional nondegradable plastics treated with 1% ECM Additive will not completely break down into elements found in nature within five years. (McCarthy, Tr. 681-682).

699. Complaint Counsel's expert, Dr. Tolaymat, opined that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill:

(a) Even if ECM Plastics were located in a faster-degrading area of a landfill, they would not degrade in five years or less. Even food scraps will take, on average, seven years to biodegrade. (CCX 893 (Tolaymat Expert Report at 16)).

(b) Plastics made with the ECM Additive will not biodegrade completely in five years or less in MSW landfills. (Tolaymat, Tr. 121-122). Even the most biodegradable material would not completely biodegrade in a landfill within 5 years even under optimum conditions for biodegradability. (Tolaymat, Tr. 153-156 (discussing half-lives and decay rates of various types of waste)).

700. Complaint Counsel's expert, Dr. Michel, opined that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill:

(a) Rebutting Respondent's expert and opining: Dr. Sahu appears to agree with the central point in the case which is that it has not been demonstrated that ECM amended conventional plastics will biodegrade in a landfill in 1 to 5 years. (CCX 895 (Michel Rebuttal Expert Report at 12)).

701. Respondent's expert, Dr. Sahu, opined that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill:

(a) "[T]he expectation that all plastics with the ECM additive added in the usual amount (*i.e.*, at a level of 1 or at most a few percent) should

> completely . . . degrade in typical landfill conditions, in a time period of 1 year or even 5 years, is unrealistic." (RX 855 (Sahu Expert Report at 8)).
>
> (b) Dr. Sahu's report and testimony estimate ECM Plastic would take 30 years to completely biodegrade, possibly up to 100 years on the "very, very high side." (RX 855 (Sahu Expert Report at 44); Sahu Tr. 1953-1954).

702. Respondent's expert, Dr. Barlaz, opined that ECM Plastics will not fully biodegrade in 9 months to 5 years in a landfill:

> (a) "[T]he suggestion that all materials should biodegrade within one or even five years of disposal is not consistent with even the highest rates of biodegradation expected for mixed MSW. When considering the decay rate of even the most degradable MSW components, food waste and grass, models do not predict complete biodegradation within one year." (RX 853 (Barlaz Expert Report at 3)).
>
> (b) Plastics generally biodegrade slower than food waste. Food waste, leaves and grass take slightly under five years to biodegrade under accelerated biodegradation conditions. Most, if not all, of the most readily degradable MSW will not completely biodegrade in five years or less. (Barlaz, Tr. 2292-2297).

703. Mr. Sinclair conceded he was "open to the possibility" that the 9 months to 5 years claim might not be correct. (Sinclair, Tr. 986-988).

4. Competent and Reliable Scientific Methods to Prove Biodegradability

a. General standards

704. Competent and reliable scientific evidence is required to show whether plastics containing the ECM Additive are biodegradable under conditions of typical disposal, specifically, in MSW landfills in the United States. (CCX 891 (McCarthy Expert Report at 13); RX 855 (Sahu Expert Report at 11)).

705. Competent and reliable scientific evidence requires the results of appropriately analyzed, independent, well-designed, well-conducted, and well-controlled testing. (CCX 891 (McCarthy Expert Report at 13)).

b. Landfill environment

706. A landfill, by its nature, is different from a controlled laboratory reactor; in the latter, scientists attempt to control the environment to eliminate variables. (Sahu, Tr. 1769-1770).

707. A landfill cannot be standardized or homogenized. (Sahu, Tr. 1769-1770).

708. Without accelerated testing (F. 718), lab tests for biodegradation could take anywhere from 5 to 500 years. It is not practical to try to simulate the landfill ecosystem at that time scale in a laboratory. (Barlaz, Tr. 2212).

709. It would be scientifically unreasonable to design a perfect closed-system test that would be representative of all the potential microenvironments in an MSW landfill. (Burnette, Tr. 2387-2388).

710. In a laboratory closed-system reactor, the test article is not exposed to all of the conditions which it may be exposed to in an MSW landfill. (Burnette, Tr. 2389).

711. Any test fundamentally is trying to capture in a lab environment a very complex ecosystem. Because landfills are

heterogeneous, one has to be cautious in projecting rates that you get from a lab environment, which tends to be homogeneous. (Sahu, Tr. 1795-1796).

c. Extrapolation and the rate of biodegradation

712. No one test can support a rate of biodegradation of plastics in landfills. The rate of biodegradation is a matter of scientific judgment. (Tolaymat, Tr. 261-262). *See also* Tolaymat, Tr. 219-224 (when questioned concerning which tests, if any, can be used by a company to prove the rate of biodegradation in an MSW landfill, Dr. Tolaymat did not have one test to recommend).

713. Measurement of the rate of biodegradation at laboratory-scale requires sufficient methane production data over time to calculate a rate. While laboratory experiments are useful to assess whether a material is biodegradable and to assess the relative rate of biodegradability for multiple materials, there is not a uniformly utilized method to extrapolate rate data as measured at laboratory-scale to field-scale landfills. (RX 853 (Barlaz Expert Report at 10); (Barlaz, Tr. 2282) ("[I]t's very, very difficult to measure rates at either – at field scale either for individual components or for bulk waste, so all we have is the lab.").

714. In the publicly available peer-reviewed literature and in his experience, Dr. Sahu has not seen any kind of extrapolation to complete biodegradation. In other words, he has not seen a study that has taken a rate derived from a test and then extrapolated from that rate to attempt to state a time period for complete biodegradation. (Sahu, Tr. 1795-1796).

715. Dr. Sahu could not think of any instances where scientists had extrapolated data from gas evolution tests that were conducted for less than a year to conclude that plastics would continue to biodegrade in a natural environment. Rates change due to many factors, and there are good reasons not to extrapolate that far. (Sahu, Tr. 1795-1796).

716. In his '199 patent (F. 659), Dr. McCarthy extrapolated gas evolution test data showing a rate of biodegradation reaching 14% in 45 days to label a substrate as biodegradable. (Sahu, Tr. 1894; McCarthy, Tr. 558-560; RX 756).

d. Accelerated testing

717. Research concerning the microbiology of refuse decomposition in the laboratory is by definition "accelerated." (Barlaz, Tr. 2211-2212).

718. In "accelerated testing," scientists try to mimic a slow natural process in the lab in a manner faster than would have occurred in nature. Scientists try to speed up in a lab environment the real-world phenomena so that they can get results in a reasonable period of time. (Sahu, Tr. 1924).

719. Accelerated tests are commonly done in engineering, biology, drug testing and almost everywhere where the natural phenomena of interest happens to be of a long time scale. (Sahu, Tr. 1924).

720. Accelerated testing is appropriate for biodegradation studies because biological reactions are generally slower than chemical reactions. With accelerated testing, one can find out about these relatively slow processes in a lab environment within a reasonable period of time. (Sahu, Tr. 1924-1925).

721. Accelerated gas evolution tests on plastics try to mimic the landfill conditions in the lab environment. (Sahu, Tr. 1926).

722. In laboratory-scale closed-system reactor tests, like the ASTM D5511 (F. 759), materials are tested under conditions designed to enhance the rate of decomposition, including the incubation temperature and the use of leachate neutralization and recirculation. (RX 853 (Barlaz Expert Report at 8)).

723. Dr. Tolaymat, Complaint Counsel's expert, agreed that accelerated testing to demonstrate biodegradation is possible. (Tolaymat, Tr. 243-244).

724. Attempting to truly simulate a landfill environment might require testing that spans 100 years. (Barlaz, Tr. 2212) ("it's not practical to try to simulate that kind of ecosystem at the time scale in the laboratory").

725. To see if a slowly degrading material is fully biodegradable, you would have to run a test for ten, fifteen, or twenty years. (Barber, Tr. 2057).

726. Running a test for ten to twenty-five years would be prohibitively expensive. In some cases, testing requires daily monitoring or interaction with the sample. (Barber, Tr. 2058).

727. Running a test for tens of years would be exceedingly difficult because maintaining a viable culture requires monitoring of temperature, water, pH, and nutrients. (Barber, Tr. 2058).

728. Dr. Barber found it very difficult to maintain a real active biological system longer than 12 to 18 months, and the concept of maintaining this level of activity for tens of years in a laboratory is next to impossible. (Barber, Tr. 2058-2059).

729. Once a test that has run for a discrete, reasonable period of time ensures that the amount of material that has been biodegraded is much higher than the amount of additive, so that it is not just the additive that is biodegrading, that indicates that the microbes are attacking the base polymer and there is no reason that the microbes would not continue to attack those base polymers until it was completely biodegraded. (Barber, Tr. 2057).

730. Dr. Tolaymat was unable to give an example of a practical laboratory test that would simulate landfill conditions, but also be accelerated, so that testing would not be required to continue for decades. (Tolaymat, Tr. 247-250).

731. The ASTM D5511 test and other gas evolution tests, including the test used by Dr. McCarthy in his '199 patent, are "accelerated tests" designed to reveal intrinsic biodegradability. (*See* Sahu, Tr. 1923-1927; Barlaz, 2211-2212; McCarthy, Tr. 547-548).

e. Temperature

732. One way to "accelerate" a biodegradation test is to increase the temperature. (Sahu, Tr. 1926-1927).

733. "Mesophilic" refers to a class of microorganisms that have optimal temperature around 98.6 degrees Fahrenheit. (Barlaz, Tr. 2228).

734. At temperatures above 43 to 44 degrees Celsius, mesophiles are killed off or severely inhibited. (Barlaz, Tr. 2228; Burnette, Tr. 2432).

735. Many bacteria identified in the peer-reviewed literature as responsible for biodegrading plastics fall within the mesophilic range. (Burnette, Tr. 2432-2433).

736. "Thermophiles" have an optimal temperature closer to 60 degrees Celsius or about 130 to 140 degrees Fahrenheit. (Barlaz, Tr. 2228).

737. Mesophilic and thermophilic bacteria function at different temperatures and pace, but they use common and universal mechanisms of action to make energy. (Burnette, Tr. 2430-2431).

738. The difference between mesophilic and thermophilic conditions affects the rate of biodegradation. (Barlaz, Tr. 2228).

739. At a fundamental level, there is no difference in the way thermophilic bacteria metabolize waste versus the way mesophilic bacteria metabolize waste. The particular enzymes involved, however, are different, as is the rate of biodegradation. (Sahu, Tr. 1843-1844).

740. Because bacteria capable of degrading plastics are mesophilic, test conditions (like the ASTM D5511) that promote only thermophilic bacteria may not provide a truly "optimal" environment for assessing total biodegradability. (Burnette, Tr. 2432-2433).

f. Weight loss tests

741. The scientific community does not consider weight loss tests alone sufficient for determining biodegradation. (CCX 892 (McCarthy Rebuttal Expert Report at 10-11); McCarthy, Tr. 414; RX 855 (Sahu Expert Report at 41)).

742. Although weight loss is evidence of decomposition, it is not necessarily a good, accurate measure, because one can have weight loss without having decomposition. (Tolaymat, Tr. 172-173).

g. Gas evolution tests

743. The expert testimony in this case establishes that gas evolution data is a competent and reliable method to prove biodegradability, and it is the most practical and widely used measure of biodegradation in the scientific field. F. 745-749.

744. Tests that rely on gas evolution to detect biodegradation measure the carbon dioxide (CO2) and methane (CH4) that evolve as a result of biodegradation. (RX 855 (Sahu Expert Report at 34, 41)).

745. The most typical type of biodegradation test is a gas evolution test, which monitors the end-products of biodegradation. (CCX 891 (McCarthy Expert Report at 15)). Most of the testing used by scientists to assess biodegradability is gas evolution or respiromic testing. (McCarthy, Tr. 413-414).

746. Dr. McCarthy relied on gas evolution data when assessing whether plastic polymers that he designed were biodegradable under anaerobic conditions. (McCarthy, Tr. 547-548; RX 756 at column 11; *see also* Sahu, Tr. 1894-1895; CCRFF 1611).

747. Gas evolution tests are reliable evidence to show biodegradation in landfills. (Tolaymat, Tr. 171).

748. It is conventional wisdom now, with some justification, that the only true indicator of biodegradation is, in fact, gas evolution. (RX 855 (Sahu Expert Report at 41)). Gas evolution testing can provide reliable and competent scientific evidence and is generally relied upon by scientists to show the biodegradability of materials. (Sahu, Tr. 1792, 1896).

749. Data from gas evolution testing is broadly accepted by the scientific community of evidence of anaerobic biodegradation. (Barlaz, Tr. 2246).

h. BMP tests

750. A biochemical methane potential ("BMP") test is a gas evolution test that evaluates the decomposition of various materials by measuring the amount of carbon that is decomposed in an anaerobic environment. It provides measurements that give one the optimal amount of methane that would be generated from the anaerobic decomposition of a particular substrate. (Tolaymat, Tr. 171-172).

751. The BMP test is performed in a small 160 milliliter glass vial, whereas the ASTM D5511 test is a reactor-scale test, performed in a "high-solids environment." (Barlaz, Tr. 2220-2224).

752. The BMP test conditions differ dramatically from the typical United States landfill and have a much higher moisture content. (Tolaymat, Tr. 237-238).

753. There are no standards for conducting a BMP test. BMP testing can be modified from laboratory to laboratory. (Tolaymat, Tr. 239; Barlaz, Tr. 2220-2222).

754. In BMP tests, laboratories could choose to follow different protocols when adding types of vitamins and minerals. (Tolaymat, Tr. 237-238; Barlaz, Tr. 2221-2222). Other adaptations to BMP tests include changes to temperature or duration of the test and modifications to the preparation of the test sample or screening the material by passing it through a 1 millimeter screen. When a laboratory grinds material to be small enough to pass through a 1 millimeter screen, it becomes the consistency of whole wheat flour. (Barlaz, Tr. 2221-2222).

755. A BMP test can be considered as a screening test for anaerobic biodegradation, although the actual volume of methane generated in a landfill may well be less than that measured by a BMP test. (RX 853 (Barlaz Expert Report at 8); Barlaz, Tr. 2231, 2267-2268).

756. BMP tests are not appropriate for testing slower degrading materials, in that the amount of biodegradation

observed through the BMP testing is likely to be only a fraction of the total biodegradation possible. (Barlaz, Tr. 2231, 2267-2268).

757. Dr. Barlaz has never used a BMP test to establish rate data. (Barlaz, Tr. 2231, 2267).

i. The ASTM D5511 test

758. The ASTM sets forth protocols established by the scientific community to evaluate materials and has established standard test methods for determining biodegradability of plastics. (CCX 891 (McCarthy Expert Report at 19)).

759. ASTM D5511 is a "Standard Test Method for Determining the Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions." (CCX 84; CCX 891 (McCarthy Expert Report at 20)).

760. The ASTM D5511 test is a gas evolution test. (CCX 891 (McCarthy Expert Report at 21); RX 855 (Sahu Expert Report at 41)).

761. The ASTM D5511 test is a laboratory-scale reactor test. (Barlaz, Tr. 2222-2223).

762. As compared to the BMP test, a laboratory-scale reactor test is performed in a "high-solids environment," and it is "more representative of a high-solids matrix as we see in a landfill." (Barlaz, Tr. 2224).

763. The methodology involved in laboratory-scale reactor testing starts with a composition of "inoculum"[13] from well-decomposed refuse or MSW. Water is added to the system to achieve the requisite moisture levels and the laboratory monitors the pH, and other variables in the leachate or solution. (Barlaz, Tr. 2224-2225).

[13] Inoculum is source material used to introduce microorganisms to an environment. As used in anaerobic test methods, inoculum is an anaerobically digested organic waste that includes all groups of microorganisms required to convert a substrate to methane and carbon dioxide. (JX 4 at 4).

764. In laboratory-scale reactor testing, the system is designed to capture gas that is generated in the vessels, including the methane and carbon dioxide in the gas, which is used to calculate the methane generation rate. Controls are used with laboratory-scale reactors, including an inoculum blank that includes nothing but the decomposed MSW, so that the laboratory can measure the background methane attributable to the inoculum alone. (Barlaz, Tr. 2225-2226).

765. In laboratory-scale reactor testing, the laboratory corrects for background methane attributable solely to the inoculum by subtracting the amount of gas produced by the inoculum blank. Theoretical methane potential is calculated from the chemical formula and the chemical composition of the test materials using stoichiometry. (Barlaz, Tr. 2225-2226).

766. In an ASTM D5511 test, the specimen is exposed to an inoculum from an anaerobic digester operating on household waste as its sole substrate (*i.e.*, sole food source). (CCX 891 (McCarthy Expert Report at 21)).

767. In an ASTM D5511 test, gas collection tubes are connected to the test vessel and gas produced in the vessel is gathered and later measured. (*See* RX 356 at 2 (ASTM D5511 test method, summary and apparatus)).

768. The objective of an ASTM D5511 test is to calculate a percentage of biodegradation based on the gas emissions. (Tolaymat, Tr. 303).

769. Complaint Counsel's rebuttal expert, Dr. Michel, acknowledged that gas evolution testing, like the ASTM D5511 test, is generally recognized in the field as a competent and reliable method to show biodegradation. (Michel, Tr. 2907; CCX 880).

770. Dr. Michel has relied on ASTM D5511 gas evolution testing when assessing whether plastic materials were anaerobically biodegradable. (Michel, Tr. 2904-2905; CCX 880).

771. With proper controls (such as the positive, negative, and inoculum controls), as required and included in the [ASTM]

D5511 method . . . an [ASTM] D5511 test should be able to indicate, via gas evolution, if biodegradation of the test article, has, in fact, occurred – and to what extent. (RX 855 (Sahu Expert Report at 41)).

772. The ASTM D5511 tests utilize a negative control by testing an article with an additive and also testing a negative control article, without the additive. (Sahu, Tr. 1919-1921).

773. The ASTM D5511 test method is capable of assessing intrinsic biodegradability. (RX 853 (Barlaz Expert Report at 8); Barlaz, Tr. 2219).

774. The term "intrinsic biodegradability" describes a property of the material, much like its color or weight or density. Intrinsic biodegradability is not going to change no matter where you put that material. (Barlaz, Tr. 2217-2218).

775. From a microbiological perspective, ASTM D5511 or similar laboratory reactor testing is a competent and reliable scientific method to assess biodegradability of materials in landfills. (Burnette, Tr. 2373).

776. Gas evolution tests, like the ASTM D5511 test, are useful for predicting some baseline performance in landfill settings, albeit not optimal, and are a competent and reliable scientific method for assessing biodegradability of materials in landfills. (Burnette, Tr. 2373, 2437-2439).

777. Many laboratories deviate slightly from the ASTM D5511 protocol. (Sahu, Tr. 1922-1923).

i. Landfill environment

778. The ASTM D5511 test is not representative of all possible MSW landfill conditions. However, the ASTM D5511 test does prescribe a methodology that creates an environment that is found in MSW landfills. The ASTM D5511 test is, thus, an appropriate microcosm characteristic of an MSW landfill subset. (RX 854 (Burnette Expert Report at 23)). *See also* Burnette, Tr. 2373, 2439-2440 (The ASTM D5511 test, while not representative of every possible environment in a landfill, is likely

to be representative of a subset of environmental conditions in a landfill.).

779. The ASTM D5511 test is an approximation of a landfill environment. It is the closest, most practical, and standardized test currently available for mimicking landfill conditions. (RX 855 (Sahu Expert Report at 42-43)).

780. Complaint Counsel's expert witness, Dr. Michel, chose to utilize the ASTM D5511 test in his testing, in part because it resembles the environment in a biologically active landfill. (Michel, Tr. 2905-2906; CCX 164).

ii. Temperature

781. The ASTM D5511 test method states: "Incubate the Erlenmeyer flasks in the dark or in diffused light at 52°C (±2°C) for thermophilic conditions, or 37°C (±2°C) for mesophilic conditions for a period of normally 15-30 days." (RX 356 at 3 (Section 11.2)).

782. Temperatures in landfills are highly variable, and can often meet or substantially exceed the 52°C that is tested in the ASTM D5511 test. (Barlaz, Tr. 2207-2209; Sahu, Tr. 1842-1844).

783. Although one cannot determine the exact conditions in a particular location within a particular landfill, that is neither the goal nor the appropriate bench-mark for rejecting a test. (RX 855 (Sahu Expert Report at 44)).

iii. Duration

784. The ASTM D5511 test method states: "The digester shall be operating for a period of at least four months on the organic fraction, with a retention time of a maximum of 30 days under thermophilic conditions (52 ± 2°C). Gas-production yields shall be at least 15 mL at standard temperature and pressure of biogas per gram of dry solids in the digester and per day on the average for at least 30 days." (RX 356 at 3 (Section 9.1)).

785. The ASTM D5511 test method does not specify a cutoff time or duration for the test and contemplates tests of varying durations: For the test to be considered valid, the positive control must achieve 70% biodegradation within 30 days. The incubation time shall be run *until* no net gas production is noted for at least five days from both the positive control and test substance reactors. (RX 356 at 3 (Section 11.2)) (emphasis added).

786. The ASTM D5511 test method states: "If sufficient biodegradation (a minimum of 70% for cellulose after 30 days, and the deviation among the cellulose replicates is less than 20% of the mean) is not observed within the duration of the test method, then the test method must be regarded as invalid and shall be repeated with fresh inoculum." (RX 356 at 4 (Section 13.2)).

787. Extending the duration of a D5511 test does not render the data unreliable. As long as the conditions of ASTM D5511 tests are maintained, then there is no reason to simply reject a test based on it having been run longer. (Sahu, Tr. 1928).

788. If an ASTM D5511 test is conducted over an extended period of time, in a lab environment where you can quickly lose biological activity, you have to be aware of the biological activity. Unlike in a landfill where biological systems are being replenished and renewed and have a greater propensity to thrive, a lab environment can quickly lose activity if the biota die. (Sahu, Tr. 1928-1929).

789. Dr. Tolaymat testified that an ASTM D5511 test could be conducted for several years while remaining viable. (Tolaymat, Tr. 251).

790. Complaint Counsel's rebuttal expert, Dr. Michel, performed biodegradation gas evolution studies in his laboratory that exceeded 500 days. (Michel, Tr. 2899).

j. Limitations of closed-system testing

791. No life is designed to live in a closed-system for a sustained period of time. In the closed-system laboratory

environment, there is no way to release or expel the waste products created by the bacterial metabolism. (Burnette, Tr. 2401-2402).

792. It is difficult to maintain adequate biological life in a closed-system laboratory environment for sustained periods of time. Thus, the test environments have a finite life span that may not be adequate to assess the full spectrum of possible biodegradation. (Burnette, Tr. 2374-2375).

793. Limitations of the closed-system test environment are significant because, in the natural environment where those limitations are removed, the biodegradation of test substrates could be even greater. (Burnette, Tr. 2389-2390).

794. In a closed-system reactor test, biodegradation is tested in one possible environment experimentally replicated. Greater biodegradation would be observed if the test material were analyzed in a sampling of different possible MSW landfill environments, such as manipulating oxygen or pH levels. These changes in variables may provide for the rise of different microbial populations that can further the biodegradation process. (RX 854 (Burnette Expert Report at 25)).

795. If in a closed-system laboratory reactor the test material is slowly degrading, then you would not expect to see prolonged biodegradation over time because the microorganisms that would act upon the substrate die. (Burnette, Tr. 2403).

796. Closed-system laboratories may restrict the types of conditions that allow certain bacteria to thrive and, thus, the test environment may unintentionally limit the biodegradation that can be observed. (Burnette, Tr. 2411-2412).

797. In the open landfill environment, while biodegradation may be at varying rates, the total biodegradation should be expected to increase or, at least, continue onward, absent the limitations of a closed-system test. (Burnette, Tr. 2437-2440).

798. Evidence that a plateau has formed in the laboratory tests can signal that the test environment is no longer conducive to biodegradation testing. That is particularly evident where the

plateau forms in the positive control, an article known to be biodegradable. (Burnette, Tr. 2401-2402; Sahu, Tr. 1929-1932).

799. The presence of a plateau in the closed-system laboratory tests does not necessarily mean that biodegradation of the test substrate is no longer possible, or that the test substrate is finished biodegrading. (Sahu, Tr. 1931).

k. Inconclusive test results

800. Tests that have inconclusive results, that do not clearly show the signal of biodegradation, do not necessarily prove that the tested plastics are not biodegradable. There are many reasons that might point to the cause of an inconclusive test. (Sahu, Tr. 1938-1939).

801. To properly understand an inconclusive test, the scientist must understand, *inter alia*, the biological activity in the test vessels; know whether the additive was in fact properly mixed and present in the plastic; know whether the plastic was manufactured with the additive properly, such that the additive was not rendered ineffective; and know whether the presence of other additives or impurities may have hindered biodegradation. (Sahu, Tr. 1939-1940).

802. "Negative" tests are not the same thing as "inconclusive" tests, and a test is not truly "negative" until all of the variables have been explored and you still have replicability of results. (Burnette, Tr. 2442).

803. The likelihood of cell death in a closed-system laboratory test is probable without refreshing the system with new nutrients or expelling the waste. (Burnette, Tr. 2442-2443).

804. The untimely death of the microorganisms in the closed-system laboratory test can lead to an inconclusive test with respect to biodegradation testing. (Burnette, Tr. 2443).

805. Inconclusive tests can be the result of an inoculum that is not viable. (Barlaz, Tr. 2272-2273).

806. For slowly degrading substances, there is risk that the inoculum may not remain viable over time in a closed-system laboratory reactor test. (Barlaz, Tr. 2273-2274).

807. The inconclusive test results relevant to this case do not alter Dr. Barlaz's opinion concerning the evidence that shows plastics amended with the ECM Additive were shown to biodegrade anaerobically. (Barlaz, Tr. 2274).

l. Testing proposed by Dr. Tolaymat

808. Complaint Counsel's expert, Dr. Tolaymat, testified that to establish a rate of biodegradation in a landfill, one could conduct lysimeter testing or "*in situ*" testing. (Tolaymat, Tr. 221). This opinion is unsupported, unpersuasive, and rejected. (F. 809-825).

i. Lysimeter testing

809. A lysimeter is a large column of various types of material, which could be stainless steel, designed to hold approximately a ton of solid waste. Lysimeter testing usually involves placing material in a cylinder, making sure it is airtight, and changing temperature or leachate to vary the testing conditions. (Tolaymat, Tr. 226-229).

810. There is no set definition for a lysimeter as used in biodegradation testing. (Barlaz, Tr. 2239).

811. Lysimeter testing may vary considerably from laboratory to laboratory. (Tolaymat, Tr. 228).

812. Dr. Barlaz disagreed with Dr. Tolaymat's position that lysimeter testing should be conducted to test for biodegradation, and Dr. Barlaz "was surprised" that Dr. Tolaymat had used data on settlement and leachate quality to obtain data on the biodegradability of a specific material, which is not scientifically supported. (Barlaz, Tr. 2240-2241).

813. Dr. Barlaz found Dr. Tolaymat's suggested use of lysimeter testing to be unscientific because it would be extremely

difficult to gather useable, representative biodegradability data from a large lysimeter design. (Barlaz, Tr. 2241-2242).

814. Assuming it was even possible to get data showing anaerobic biodegradability from a lysimeter test, Dr. Barlaz explained that you would then need to test for multiple years to gather suitable data on a slowly degrading substrate. (Barlaz, Tr. 2242-2243).

815. In testing for anaerobic biodegradation of ECM Plastics in his peer-reviewed study, marked CCX 164, Dr. Michel did not use lysimeter testing. (Michel, Tr. 2906-2907; CCX 164).

ii. *In situ* testing

816. *In situ* testing refers to testing or evaluations conducted in the natural environment where the scientific phenomena generally occur. In the context of landfill biodegradation studies, *in situ* testing refers to tests conducted on or within MSW landfills. (JX 4 at 4).

817. In *in situ* studies, a researcher puts material into a landfill, then at some point, digs it up and evaluates if it is either there, or not there, and if it is there, how much weight did it lose. (Barlaz, Tr. 2236-2237).

818. There are many problems with *in situ* landfill testing, including loss of product samples, which frequently occurs. (Barlaz, Tr. 2237).

819. Also, during *in situ* testing, the researcher cannot determine if weight loss was specifically attributed to biodegradation. (Barlaz, Tr. 2237-2238).

820. When a researcher buries a product in a landfill, one cannot measure methane and CO2 emissions. (Barlaz, Tr. 2237).

821. Landfill *in situ* studies allow only for qualitative information about a test sample. (Barlaz, Tr. 2238).

822. Practical difficulties also limit the availability of landfill *in situ* testing. Those difficulties include finding cooperative landfills that will work with researchers to maintain access to landfill sites and samples and agree not to deposit additional waste on top of the test area. (Barlaz, Tr. 2238).

823. One cannot get quantitative information on anaerobic biodegradability from an *in situ* landfill test even if it was done perfectly, and the possibility of doing it perfectly is slight at best. (Barlaz, Tr. 2236).

824. According to Dr. Barlaz, "to suggest that [*in situ* landfill studies are] what we have to do to make -- to prove a material is biodegradable to me is, number one, technically it's not sound because you can't measure methane and CO2. And even if … technically it were sound, you're imposing this hurdle on people that's completely unrealistic." (Barlaz, Tr. 2238-2239).

825. In testing for anaerobic biodegradation of ECM Plastics in his peer-reviewed study, marked CCX 164, Dr. Michel used did not use *in situ* testing. (Michel, Tr. 2906-2907; CCX 164).

m. Testing proposed by Dr. McCarthy

826. Complaint Counsel's expert, Dr. McCarthy, opined that: "at least one confirmatory test must be conducted to establish that the plastic component of the ECM Plastics will biodegrade" and that "ECM could have performed confirmatory testing by radiolabeling or by conducting a gas evolution test showing at least 60% conversion to methane and carbon dioxide within 18 months." (CCX 891 (McCarthy Expert Report at 27)). This opinion is unsupported, unpersuasive, and rejected. (F. 827-860).

i. Radiolabeling testing

827. The opinions of Complaint Counsel's expert, Dr. McCarthy, that to scientifically prove a claim that the plastic – not merely the additive and inoculum – is biodegrading, the claimant must support its claim with at least one test with positive results from C14 labeling of the conventional plastic, (CCX 891 (McCarthy Expert Report at 24), and of Dr. Michel, that "[t]o

obtain accurate evidence of biodegradation, experiments are best performed using ^{14}C-labeled substrates and measuring evolved $^{14}CO_2$ over time") (CCX 895 (Michel Rebuttal Expert Report at 12), are unsupported, unpersuasive, and rejected. (F. 828-847).

828. C-14 testing is radiolabeling testing involving tagging radioisotopes of carbon 14 ("C-14" or "^{14}C") of a high-molecular weight plastic, such as polyethylene ("PE"), before conducting a gas evolution test. During the gas evolution test, biogases are monitored for the radiolabeled C14. If the radiolabeled carbon is detected in the biogases, then the conventional plastic polymer is undergoing a material transformation through biodegradation. If the radiolabeled carbon is not detected in the biogases, then the observed biogases are likely due to other factors, such as biodegradation of the additive or the inoculum. (CCX 891 (McCarthy Expert Report at 23-24)).

829. Dr. McCarthy does not explain how C14 testing could be done as a practical matter. He does not explain how one can formulate materials with the ECM Additive in small batch quantities, just for C14 testing purposes, nor does he explain the practical impediments associated with such a task – including handling the radiological materials and their proper disposal; contamination and decontamination issues in the manufacturing plant and the laboratory when such tests would be done; or the time and cost involved. (RX 855 (Sahu Expert Report at 47)).

830. Although radiolabeling testing is a powerful and sensitive technique, it is expensive to obtain the starting materials in radiolabeled form. In addition, the location of the radiolabel will influence the results of the test and the label must be placed on the most difficult to degrade carbon atoms. (RX 853 (Barlaz Expert Report at 9)).

831. C14 testing is only a marker test that is helpful where the percentage of biodegradation is so minimal that one cannot discern where it came from. (Barlaz, Tr. 2243-2246).

832. C14 testing not the industry standard or reasonably required by any expert in the field as necessary evidence to show biodegradation of materials. (Sahu, Tr. 1905; Barlaz, Tr. 2244-

2246) (Dr. Barlaz would be "surprised" if any expert had performed C14 testing on plastics because it is very difficult to find a company that could properly make the test article, and the impracticalities outweigh any benefit).

833. Dr. Sahu found no evidence that radiolabeled testing is generally accepted as a requirement for biodegradability testing of polymers. (Sahu, Tr. 1794-1795).

834. In the pre-complaint phase of this case, Dr. Sahu searched for a commercial laboratory that could perform radiolabeled testing for ECM and could not find any company able to radiolabel the polymer or create the radiolabeled polymer that would then be subject to further laboratory testing. (Sahu, Tr. 1897-1898).

835. There are difficulties associated with handling radioactive carbon. Aside from the regulatory issues, the laboratory must be prepared to handle the radioactive material and ensuing decontamination and be capable of doing so. (Sahu, Tr. 1902-1903).

836. A testing laboratory would require a considerable amount of C14 to test plastics for biodegradation because the manufacturer must create a commercial-scale product for testing. (Sahu, Tr. 1903).

837. It would be hard to find a lab that could make the properly radiolabeled plastic for C14 testing of plastic polymers. (Barlaz, Tr. 2245-2246).

838. Dr. Michel provided no documentation other than a one-page estimate, which he drafted, regarding the possibility of, and costs associated with, conducting C14 radiolabeling testing on plastic polymers. (Michel, Tr. 2968-2969; CCX 895 (Michel Rebuttal Expert Report Appendix A at 23)).

839. When questioned about the type of evidence required to support biodegradability, Dr. Tolaymat did not mention radiolabeled testing. (Tolaymat, Tr. 112-347).

840. At his deposition, Dr. Tolaymat explained that radiolabeled testing "could be as expensive . . . as doing the study in a landfill environment" and that "[i]t's not used as frequently." (RX 851 (Tolaymat, Dep. at 256)).

841. The C14 radiolabeled test method was not used to test biodegradation in Dr. McCarthy's '199 patent. (McCarthy, Tr. 540-542; RX 756 at 8-12).

842. Dr. McCarthy has not used C14 radiological testing in any biodegradation experiments that he has performed at UMass Lowell. (McCarthy, Tr. 563).

843. In his article titled, "*Advances in Properties and Biodegradability of Co-Continuous, Immiscible, Biodegradable, Polymer Blends*," Dr. McCarthy did not use C14 radiological testing. (McCarthy, Tr. 577-579; RX 940).

844. In his article titled, "*Biodegradable Polymer Blends of Poly(lactic acid) and Poly(ethylene glycol)*," Dr. McCarthy measured enzymatic degradation through a weight loss study and did not use an ASTM standard testing method or a C14 radiological test. (McCarthy, Tr. 583-584; RX 941).

845. In his article titled, "*Degradation Ranking of Plastics in a Landfill Environment*," Dr. McCarthy used weight loss as his measure of degradability and did not use C14 radiological testing. (McCarthy, Tr. 585; RX 942).

846. In testing for anaerobic biodegradation of ECM Plastics in his peer-reviewed study, marked CCX 164, Dr. Michel did not use C14 radiolabeling testing. (Michel, Tr. 2906; CCX 164).

847. Dr. Michel has never performed a radiolabeled test to measure biodegradation of plastic polymers or products. (Michel, Tr. 2906).

ii. Sixty percent conversion to methane and carbon dioxide within 18 months

848. The opinion of Complaint Counsel's expert, Dr. McCarthy, that biodegradation tests must show at least 60% biodegradation to support a claim of complete biodegradation (CCX 891 (McCarthy Expert Report at 15-16), is unsupported, unpersuasive, and rejected. (F. 849-860).

849. Dr. McCarthy provided no literature or documentary evidence showing that scientists in the field require 60% or greater biodegradation before a product can be deemed biodegradable. (*See* McCarthy, Tr. 359-680; CCX 891 (McCarthy Expert Report); CCRFF 1544).

850. Dr. McCarthy did not perform tests showing at least 60% biodegradation to support biodegradable claims in his '199 patent. (Sahu, Tr. 1894; McCarthy, Tr. 558-560; RX 756).

851. In his expert report, Dr. McCarthy wrote that a study to determine whether something is biodegradable must have a negative control. (McCarthy, Tr. 559; CCX 891 (McCarthy, Expert Report at 16)).

852. In his '199 patent, Dr. McCarthy labeled a substrate biodegradable even though the rate of biodegradation was lower than 60%, reaching only 14% in 45 days, and where he did not use a negative control. (Sahu, Tr. 1894; McCarthy, Tr. 558-560; RX 756).

853. In the '199 patent, Dr. McCarthy concluded that a substance that biodegraded by 25% in 45 days was biodegradable. (McCarthy, Tr. 630-634; RX 756).

854. Dr. McCarthy's opinion in this case is that a biodegradation study must last long enough for the sample to reach at least 60% biodegradation. (McCarthy, Tr. 637; CCX 891 (McCarthy Expert Report at 15-16)).

855. Dr. McCarthy agrees that, ordinarily, 60% biodegradation of a sample is not something that can occur in just a few minutes. (McCarthy, Tr. 637-638).

856. In an article Dr. McCarthy co-authored, titled, "*The Influence of Injection Molding Conditions on Biodegradable Polymers*," Dr. McCarthy analyzed certain polymers for their rates of biodegradation by conducting a test that lasted five minutes. (McCarthy, Tr. 634-636; RX 969).

857. Dr. McCarthy relied on the tests he reported in "*The Influence of Injection Molding Conditions on Biodegradable Polymers*" to draw conclusions about the biodegradability of polymers. (McCarthy, Tr. 638-639; RX 969).

858. The testing reported in "*The Influence of Injection Molding Conditions on Biodegradable Polymers*" fails to demonstrate 60% biodegradation. (McCarthy, Tr. 639; RX 969).

859. Complaint Counsel's rebuttal expert, Dr. Michel, testified that a "material that only biodegrades 44% to elements found in nature is biodegradable." (Michel, Tr. 2961).

860. There is no consensus in the peer-reviewed literature that a gas evolution should produce 60% biodegradation before a test article can be deemed biodegradable. (Sahu, Tr. 1793).

n. The priming effect

861. In biodegradation tests, where one measures methane generation from the inoculum and methane generation from the inoculum plus substrate to evaluate whether the differential methane is attributable to the substrate, the priming effect theory posits that the difference is not necessarily attributable to the substrate. Instead, the priming effect would say that there is also some methane produced that is over and above that which is produced by the inoculum only, and over and above that which could be attributable to the additive. The basis for the priming effect theory is that, assuming that the additive is biodegraded, not only do you generate methane from the additive, but you have stimulated the microbial community, which gives you additional

methane so that the background methane is higher than what you would measure in your inoculum controls. (Barlaz, Tr. 2277-2278).

862. There is no consensus in the peer-reviewed literature as to what the priming effect is, and the degree to which it could be in action during biodegradation testing of plastics. (Sahu, Tr. 1888-1889).

863. The scant information in the peer-reviewed literature concerning the priming effect of a substrate in the test environment has generally been limited to rapidly accessible or degrading substrates like glucose. (Sahu, Tr. 1888-1889).

864. The priming effect theory was first described in the peer-reviewed literature in reference to aerobic systems and with readily degradable substrates. (Barlaz, Tr. 2278).

865. Comparing a potential priming effect from a readily degradable substrate in an aerobic environment to a slowly degradable substrate in an anaerobic environment is not an appropriate comparison scientifically. (Barlaz, Tr. 2280-2281).

866. In the absence of supporting data and any peer-reviewed literature, the priming effect theory, as described by Complaint Counsel's witnesses, is "quite speculative as a way to shoot down a test" or dismiss data. (Barlaz, Tr. 2278-2280).

867. Dr. McCarthy assumed that the ECM Additive was 60% polycaprolactone ("PCL"). In Dr. Barlaz's own research, the amount of degradation solely from PCL was not that significant to stimulate background methane. (Barlaz, Tr. 2279-2280).

868. The amount of biodegradation observed in the ECM tests is much higher than any reasonable interpretation of a priming effect theory. (Barlaz, Tr. 2280-2281).

869. When Dr. McCarthy relied on gas evolution testing to demonstrate that his polymer blends in the '199 patent were biodegradable, Dr. McCarthy did not account for, or even

mention, any biodegradation that might result from the priming effect. (Sahu, Tr. 1893-1894; RX 756 at 8-12; CCRFF 2036-2037).

5. How the ECM Additive Works

870. The ECM Additive is introduced to the plastic as a pellet, which is melted together with the plastic resin to form a film or packaging material. (Sahu, Tr. 1813).

871. The ECM Additive goes into the blend uniformly no matter whether it has a high or low weight distribution. It will be present along with varying chain lengths of original polymers that were there in the plastic and as they have cooled down and formed crystalline and amorphous regions. (Sahu, Tr. 1814).

872. The process of adding the ECM Additive into a finished plastic product involves melting the additive pellets and the plastics together, through which they are literally mixed together and compounded. The melted compound is usually extruded or blown and then cooled. As the melt is cooling, it is further processed to make the article, such as a plastic bag. (Sahu, Tr. 1813-1816).

873. ECM Plastics are also manufactured using injection molding. (Sahu, Tr. 1816-1817).

874. When the ECM Additive is melt-compounded into the final plastic, the goal is to disperse the additive evenly throughout the plastic, like a colorant (color additive). (Sahu, Tr. 1814-1815).

875. High temperatures or scorching during the manufacturing process render the ECM Additive ineffective. (Sahu, Tr. 1815).

876. If the ECM Additive has been overheated or scorched, it may not be apparent or obvious to the plastic manufacturer. (Sahu, Tr. 1815).

877. Companies may leave the ECM Additive “on the screw” while manufacturing, which cooks the additive. (Sinclair, Tr. 762).

878. The temperatures used in manufacturing ECM Plastics depend on the materials' glass transition and melting temperatures. (Sahu, Tr. 1817).

879. The temperature will depend on how the manufacturer would like the viscosity properties of the plastic to be during manufacturing, and how they intend to handle the melt after heating. (Sahu, Tr. 1817).

880. The ECM Additive is introduced into the main plastic resin, like any other additive, such as a colorant. (Sahu, Tr. 1818).

881. Color additives are sometimes not properly mixed with the plastic, and the appearance of the final product clearly shows the inconsistent colors. (Sahu, Tr. 1818).

882. The "dwell time" during manufacturing refers to the residence time, or how long the additive is exposed to high temperatures during manufacturing. (Sahu, Tr. 1836-1837).

883. Because ECM Plastics are melt-compounded, longer dwell times can cause the plastic or additive to denature during manufacturing, which must be carefully avoided to ensure additive efficacy. (Sahu, Tr. 1837-1838).

884. The load rate of the ECM Additive is the mass or percent of the additive that manufacturers add to a melt. (Sahu, Tr. 1819).

885. The customary load ratings for color additives are anywhere from 0.5 percent to 2 or 3 percent. (Sahu, Tr. 1819-1820).

886. Molecular weight is a basic concept in chemistry, and molecular weights are generally consistent. For instance, the molecular weight of carbon dioxide is 44, no matter where it exists, because it contains one carbon and two oxygen atoms. (Sahu, Tr. 1804).

887. Polymers are not specifically defined molecules and a polyethylene product does not have the same number of repeating monomer units in each strain. (Sahu, Tr. 1805).

888. Because polymer chains have varying lengths within a product, the strains have different molecular weights, and that creates a molecular weight distribution. (Sahu, Tr. 1805).

889. There is no way to manufacture a polymer and ensure that all the lengths of the individual chains in the same polyethylene product melt have the same molecular weight. (Sahu, Tr. 1807-1808).

890. Molecular weight distribution will affect product characteristics such as tensile strength. (Sahu, Tr. 1808-1809).

891. The ECM Additive affects molecular weight as a system-wide MasterBatch additive that enters the structure of the plastic. (Sahu, Tr. 1809-1810, 1813).

892. When the ECM Additive is blended into plastic, it alters the plastic matrix, the polymer chains, and adds an attractant that permits microorganisms to take root at the surface and within the plastic. (Sahu, Tr. 1810).

893. To examine the threshold question of whether plastics or polymers are capable of biodegrading, Dr. Sahu performed an extensive literature search and memorialized his research in his expert report. (Sahu, Tr. 1848-1849; RX 855 (Sahu Expert Report at 24-40)).

894. Dr. Sahu based his opinion on a thorough review of peer-reviewed literature published since the 1950s, as well as between 30 to 40 different tests collected during this case. Dr. Sahu's report includes many of the citations to, and discussions of, the literature that he relied on. (Sahu, Tr. 1754-1756, 1791; RX 855 (Sahu Expert Report)).

895. Dr. Burnette's research revealed that peer-reviewed publications demonstrate that there are organisms that make an enzyme that can degrade plastics. (Burnette, Tr. 2426-2429; RX 854 (Burnette Expert Report at 16-22)).

896. Conventional plastics are those made from petroleum feedstocks or natural gas, as opposed to those manufactured from biological materials like starches. (Sahu, Tr. 1758).

897. Conventional plastics have only existed in modern manufacturing for about ninety to one hundred years. (Sahu, Tr. 1879-1880).

898. It is commonly accepted that conventional plastics last very long in the environment, perhaps 10,000 years. (Sahu, Tr. 1758-1759; CCX 891(McCarthy Expert Report at 7)).

899. Although conventional plastics biodegrade very slowly, they still biodegrade. (RX 855 (Sahu Expert Report at 40, 44)).

900. Dr. McCarthy does not provide support for the proposition in his expert report that there is "overwhelming scientific consensus that conventional plastics are not biodegradable after customary disposal," and has acknowledged that there are peer-reviewed scientific publications that conclude that conventional plastics are biodegradable. (CCX 891 (McCarthy, Report at 13); McCarthy, Tr. 570-576; RX 841 (McCarthy, Dep. at 112-115)).

901. Conventional plastics like polyethylene have been proven to be biodegradable in peer-reviewed literature. (Sahu, Tr. 1848-1853).

902. Polyethylene can be considered a conventional plastic in the sense that it is ordinarily derived from feedstocks like petroleum or natural gas. (Sahu, Tr. 1784-1785).

903. There are many different grades of plastics in the commercial stream. Polyethylene has at least ten different commercial grades. (Sahu, Tr. 1785-1786).

904. In general, because the end-application of ECM Plastics is not demanding (*e.g.*, plastics made for carrying groceries vs. medical devices), the grade of polymer used in manufacturing ECM Plastics is not high. (Sahu, Tr. 1877-1878).

905. Plastics that are intended for garbage bags or packaging materials can be made of a lesser grade than plastics intended for more specific uses. (Sahu, Tr. 1878).

906. Lesser grade plastics are more likely to contain impurities and inconsistencies that promote biodegradation. (Sahu, Tr. 1878-1879).

907. Polyethylene is comprised of the monomer ethylene, which is a repeating unit in the polyethylene polymer. (Sahu, Tr. 1788).

908. Dr. Sahu evaluated different polymers, including polyethylene, polypropylene, and polystyrene. (Sahu, Tr. 1801).

909. Dr. Sahu focused on certain polymers because the vast majority of ECM Plastics manufactured by ECM's Customers (about three quarters) are polyethylene-based products. (Sahu, Tr. 1801; RX 471).

910. The ECM Additive helps to set in motion the attraction/migration of microbes and biological agents to the plastic, and to the areas of the plastic where weaknesses or hydrophilic defects exist. (RX 855 (Sahu Expert Report at 27); Sahu, Tr. 1865-1867).

911. The formation of biofilms near the additive sites promotes the development and growth of bacteria, which spreads to other areas of the plastic. (RX 855 (Sahu Expert Report at 27)).

912. Depending on the linear chains and branches within a polymer, biological activity typically begins at the weak points and endings of a polymer chain, and works into the remaining portions of the polymer. (Sahu, Tr. 1866-1867).

913. Microbes secrete enzymes and chemicals that degrade plastic where the biofilms are present, beginning with the weak links in plastic. (RX 855 (Sahu Expert Report at 27)).

914. Dr. Sahu relied on peer-reviewed literature to demonstrate that plastic polymers biodegrade, including

crystalline regions therein. (RX 855 (Sahu Expert Report at 24-40)).

915. Dr. Sahu reviewed hundreds of papers in preparation of his expert report, including the 11 that he quoted and relied upon in the text of his report. Those include: (1) Tokiwa, Y., et al., *Biodegradability of Plastics*, Int. J. Mol. Sci. 2009, 10, 3722-3742; (2) Tilstra, L., et al., *The biodegradation of blends of polycaprolactone and polyethylene exposed to a defined consortium of fungi*, *Journal of Environmental Polymer Degradation*, Vol. 1, No. 4, 1993; (3) Zheng, Y., et al., *A Review of Plastic Waste Biodegradation, Critical Reviews in Biotechnology*, 25:243-250, 2005; (4) Bhardwaj H, Gupta R, Tiwari A (2012) *Microbial Population Associated With Plastic Degradation*. 1: 272. doi:10.4172/scientificreports; (5) Arutchelvi, J., et. al., *Biodegradation of polyethylene and polypropylene, Indian Journal of Biotechnology*, Vol. 7, January 2008, p. 9-22; (6) Mueller, R-J., *Biological degradation of synthetic polyesters – Enzymes as potential catalysts for polyester recycling,* Process Biochemistry, Volume 41, Issue 10, October 2006, p. 2124-2128; (7) Van der Zee, M., *Analytical Methods for Monitoring Biodegradation Processes of Environmentally Degradable Polymers*, Section 11.4.2; (8) Shah, A.A., et. al., *Biological degradation of plastics: A comprehensive review*, Biotechnology Advances Vol. 26, 2008, p. 246-265; (9) Pramila, R., et. al., *Biodegradation of Low Density Polyethylene (LDPE) by Fungi Isolated from Municipal Landfill Area*, J. Microbiol. Biotech. Res., 2011, 1 (4):131-136; (10) Albertsson, A-C., *Biodegradation of synthetic polymers. II. A limited microbial conversion of ^{14}C in polyethylene to $^{14}CO_2$ by some soil fungi*, *Journal of Applied Polymer Science*, Volume 22, Issue 12, p. 3419-3433, December 1978; and (11) Albertsson, A-C., et. al., *Biodegradation of synthetic polymers. III. The liberation of $^{14}CO_2$ by molds like fusarium redolens from ^{14}C labeled pulverized high-density polyethylene*, *Journal of Applied Polymer Science*, Volume 22, Issue 12, p. 3435-3447, December 1978. (RX 855 (Sahu Expert Report at 24-40)).

916. Based on his experience and research, Dr. Sahu determined that peer-reviewed literature demonstrated that beyond aerobic biodegradation, anaerobic processes are capable of biodegrading conventional plastics. (Sahu, Tr. 1858-1859).

917. Inclusion of the ECM Additive, a biodegradable substance and attractant for microbiological growth, contributes to an acceleration of biodegradation. (Sahu, Tr. 1853-1855).

918. The ECM Additive likely promotes biodegradation in two ways: first, by serving as an attractant for microbial growth on and within plastics; and second, by weakening or perturbing the carbon-carbon bonds through weaknesses in the chain or the addition of more weak points in the form of the additive. (Burnette, Tr. 2435-2436).

919. When the ECM Additive is added to the plastics mixture, it perturbs the plastics mixture. Enzymes look for points of weakness. If there is a way to take a bond that is already favorable for an enzyme and make it even more favorable, it would be to further reduce that bond strength. The ECM Additive could be perturbing those preferred carbon-carbon bonds, making the plastic more available as a food source. (Burnette, Tr. 2436).

920. The biodegradation of plastic polymers involves, *inter alia*, hydrolytic cleavage of polymer bonds. (Sahu, Tr. 1859-1860).

921. The hydroxyl radical is capable of facilitating hydrolytic reactions. (Sahu, Tr. 1860).

922. Oxidative reactions involve electron transfer. (Sahu, Tr. 1860-1861; Burnette, Tr. 2421).

923. Oxidative reactions need not occur in the presence of oxygen and occur in anaerobic systems. (Sahu, Tr. 1861-1862; Burnette, Tr. 2421-2422).

924. Oxidative reactions can play a role in anaerobic biodegradation of polymers. (Burnette, Tr. 2422).

925. Pro-oxidants can facilitate biodegradation, but they are not the only mechanisms that work to degrade polymers. (Sahu, Tr. 1871-1873).

926. Many forms of polymer biodegradation have been documented in the peer-reviewed literature. (Sahu, Tr. 1875).

927. Blending biodegradable and non-biodegradable polymers is one of the means documented in the peer-reviewed literature by which polymers can be rendered biodegradable. (Sahu, Tr. 1876; RX 925 at 647).

928. In "*Biodegradable Polymers - A Review on Recent Trends and Emerging Perspectives*," published in the *Journal of Polymers and the Environment* that Dr. McCarthy edits, the authors discussed the methods to create "biodegradable polymer blends," and one of the methods they cited was "blending a thermoplastic resin with a biodegradable one." The authors state: the insertion of weak links into polymers can cause biodegradation; compounding polymers with photosensitizers can cause biodegradation; and "[t]he most frequently adopted approach to degradability design of [Low Density Polyethylene] LDPE has been to introduce pro-degradant additives such as starch and cellulose into synthetic polymers." (McCarthy, Tr. 673-674; RX 925).

929. Dr. McCarthy did not inform the authors of "*A Review on Recent Trends and Emerging Perspectives*" that they had no basis for the claim that one can blend a biodegradable additive into an otherwise nonbiodegradable polymer and cause the nonbiodegradable polymer to become biodegradable. (McCarthy, Tr. 674).

930. In an article Dr. McCarthy authored titled, "*Biodegradable Blends of Bacterial Polyesters with Polyethylene and Polystyrene*," Dr. McCarthy wrote that "binary blends of bacterial polyesters with polyethylene (PE) and polystyrene (PS)" can result in a biodegradable 'blend.'" (McCarthy, Tr. 586; RX 945).

931. Dr. McCarthy based his opinion that microbes and enzymes cannot penetrate into PE crystalline phase inside plastics based on his experience with polycaprolactone generally. He did not perform specific experiments on plastics containing the ECM Additive. (McCarthy, Tr. 677-678).

932. The scientific literature shows that polymer chains with molecular weights as high as 10,000 can be biodegraded. (Sahu, Tr. 1872-1873).

933. As molecular weights decrease through microbial biodegradation, the susceptibility of polymers to further biodegradation increases. (Sahu, Tr. 1873).

934. Because the ECM Additive is uniformly dispersed throughout an ECM Plastic, the additive provides a continued food source for microbial growth through plastic degradation and the additive's effect is not limited to a surface effect. (Sahu, Tr. 1863-1864).

935. The presence of the ECM Additive throughout the plastic provides for continued and complete biodegradation of the conventional plastic. (Sahu, Tr. 1865).

936. MSW landfills contain bacteria, fungi, and other microorganisms that secrete enzymes capable of completing the biodegrading processes that Dr. Sahu identified in his expert report. (Sahu, Tr. 1865-1866).

937. Those microorganisms have evolved over time, and can evolve quickly, to adapt for plastics biodegradation. (Sahu, Tr. 1880-1881).

938. Scientists in the field have published information concerning the types of bacteria and microorganisms that are found in nature (including MSW landfills), which have also been shown to biodegrade conventional plastics. (Sahu, Tr. 1868-1869; RX 855 (Sahu Expert Report at 34)).

939. Those microorganisms described in F. 938 are found in landfills, sewage treatment plants, digesters, and compost piles. (Sahu, Tr. 1869).

940. Plastic polymers can have amorphous and crystalline regions. Crystalline portions of the polymer can be biodegraded just as the amorphous regions can, but perhaps at a different rate. (Sahu, Tr. 1883-1885).

941. Crystalline portions of polymers are still fundamentally composed of the same chains. Those polymer regions are actually semi-crystalline. (Sahu, Tr. 1884).

942. Scientists have examined the biodegradability of crystalline portions of polymers and found that they do in fact biodegrade. (Sahu, Tr. 1885).

943. Peer-reviewed literature has discussed the loss of crystallinity or decreases in crystallinity, or loss of the lamellae that are the crystalline subcomponents as indicators that degradation has occurred in the crystalline portions of plastics. (Sahu, Tr. 1885).

944. In the article titled, *Biodegradation of polyethylene and polypropylene*, Arutchelvi, J., et. al*., Indian Journal of Biotechnology*, Vol. 7, January 2008, p. 9-22, the authors focused on polyethylene and polypropylene and discussed other literature wherein scientists have observed loss of crystallinity in conventional plastics. (Sahu, Tr. 1885-1886; RX 586; RX 855 (Sahu Expert Report at 35)).

945. While scientists have posited that biodegradation begins in amorphous regions of the polymers, the peer-reviewed literature also supports that crystalline regions will biodegrade. (RX 855 (Sahu Expert Report at 28, 41 n. 62); RX 586 at 13).

946. The amorphous regions of a polymer are more susceptible to degradation, but while the crystalline sections of a polymer are "more resistant than the amorphous region," they will also degrade in kind. (RX 855 (Sahu Expert Report at 28 (quoting Tokiwa, Y., et al., *Biodegradability of Plastics*, Int. J. Mol. Sci. 2009, 10, 3722-3742; RX 582)).

947. Tokiwa, Y., et al. (RX 582) have explained that certain enzymes have been shown to biodegrade "both the amorphous and crystalline" portions of plastics. (RX 582 at 3732 (discussing the lipase enzymatic degradation of PCL)).

948. The degree of crystallinity is one of many factors that can influence the biodegradability of plastics. (RX 582 at 3722).

949. Plastics with high degrees of crystallinity can be more biodegradable than others with lesser degrees of crystallinity if other factors promote biodegradability, such as surface area, molecular weight distribution, and the melting point. (Sahu, Tr. 1886; RX 582 at 3722).

950. It is a scientific error to use the crystallinity of a polymer as the only factor or variable that governs whether a plastic will biodegrade. (Sahu, Tr. 1887).

951. Peer-reviewed literature support's Dr. Sahu's opinion that the ECM Additive contributes to an acceleration of biodegradation. Tokiwa, Y., et al. explained in the *International Journal of Molecular Sciences* (2009) that "the adherence of microorganisms on the surface of plastics followed by the colonization of the exposed surface is the major mechanisms involved in the microbial degradation of plastics." Tokiwa, et al., further explained that many factors, including the polymer morphology, chemical and physical properties of the plastics, the surface conditions (*e.g.*, surface area, hydrophilic and hydrophobic properties), the molecular weight and molecular weight distribution, glass transition temperature, melting temperature, and crystallinity are just some of the many factors that can affect the rate of biodegradability of plastics. (RX 855 (Sahu Expert Report at 28); RX 582).

952. The rate of biodegradation of plastic polymers depends on many variables, including the various properties of the base plastic, the presence and types of amounts of biological organisms in the vicinity of the plastic material, and the properties of the local physical environment. (RX 855 (Sahu Expert Report at 27)).

953. Many factors affect the ability of a plastic to biodegrade. (Sahu, Tr. 1828).

954. The inclusion of impurities and other additives in a plastic polymer can influence the ultimate biodegradability of the plastic. (Sahu, Tr. 1828).

955. Impurities are included in the final plastic product unintentionally. (Sahu, Tr. 1829-1830).

6. Types of Microbes that Biodegrade Plastics

956. Bacteria are the most proliferative, abundant form of life known. (Burnette, Tr. 2377).

957. Bacteria are very small, single-celled organisms that primarily live in colonies. (Burnette, Tr. 2378).

958. There are bacteria that are specifically anaerobic, called obligate anaerobes, which can only proliferate in an anaerobic environment. (Burnette, Tr. 2378-2379).

959. There is a broad class of bacteria, called facultative anaerobes, which possess the tools to live, proliferate, reproduce, and feed in both oxygen and non-oxygen containing environments. (Burnette, Tr. 2379).

960. The types of microorganisms relevant to biodegradation can be facultative anaerobes, obligate anaerobes, and methanogens, archaea bacteria. (Burnette, Tr. 2379-2380).

961. Archaea bacteria are within a subclass of bacteria that contain many types of anaerobic organisms. (Burnette, Tr. 2380).

962. Enzymes are proteins by definition. (Burnette, Tr. 2380).

963. Enzymes catalyze reactions or expedite reactions that may move slowly or may not move at all. (Burnette, Tr. 2380).

964. Enzymes have active sites which structurally favor the substrate in a manner such that the reaction can be facilitated. (Burnette, Tr. 2381).

965. Enzymes in landfills come primarily from microorganisms, bacteria and fungi. (Burnette, Tr. 2382).

966. Enzymes in nature are not made without the presence of an organism to make them. (Burnette, Tr. 2382).

967. In an MSW landfill, with respect to the degradation of food sources, the goal of enzymatic production is to obtain carbon for microbial metabolism. (Burnette, Tr. 2383-2384).

968. There are bacteria that secrete certain chemicals, *e.g.*, polysaccharide in nature, acidic or basic, that would result in chemical degradation of food sources. (Burnette, Tr. 2384).

969. Microbial succession is the lifecycle of microorganisms. (Burnette, Tr. 2385).

970. In the natural environment, it would be rare to find a singular species of bacteria; multiple species of bacteria coexist and each has a discrete function in the overall cycle of life. (Burnette, Tr. 2385).

971. Microbial succession involves the lifecycle of a population of bacteria from initiation through proliferation until death. (Burnette, Tr. 2385).

972. The process of biodegradation and bacterial metabolism can take several paths to access carbon in substrates, including, *e.g.*, hydrolysis reactions, oxidative reactions, and fermentation. (Burnette, Tr. 2396-2399).

973. Feedback inhibition is a common mechanism by which the product of a biochemical reaction itself will loop back and negatively impact further production of the product, like an accumulation event that prevents the reaction from going forward. (Burnette, Tr. 2403-2404; RX 854 (Burnette Expert Report at 14, Figure 5)).

974. During testing in a closed-system environment, the buildup of inhibitory byproducts begins to occupy binding sites of certain other enzymes and when that happens, the byproducts of the microbiological metabolic functions will compete adversely with the substrate for enzymatic binding sites. (Burnette, Tr. 2404-2405).

975. Virtually all microorganisms are susceptible to feedback inhibition effects. (Burnette, Tr. 2405).

976. A biofilm is the formation of microbial colonies in a somewhat concerted manner that develop into films. (Burnette, Tr. 2406).

977. Bacteria can adhere to plastics, in part, by secreting polysaccharides, which promote bonding to the food source. (Burnette, Tr. 2407-2408).

978. The process of adhering to potential food substrates has been described as "docking and locking." (Burnette, Tr. 2408).

979. The surface area of a plastic has a substantial influence on the ability of a biofilm to form and adhere. (Burnette, Tr. 2409).

980. Biofilms can contain hundreds to thousands of bacterial species. (Burnette, Tr. 2410).

981. Enzymes can weaken or break carbon-carbon bonds in plastic polymers (and other long-chain polymers) by lowering the amount of energy required to break the bonds. (Burnette, Tr. 2414).

982. The increase in free chlorine ions in solution during the test marked RX 254 performed by Environ on polyvinyl chloride ("PVC") substrate ("BioPVC test") indicates that the carbon-carbon bonds were either broken or the bond breakage was imminent. (Sahu, Tr. 1912-13; RX 254; Burnette, Tr. 2414-2416).

983. When chlorine atoms are present in the solution of the BioPVC test (F. 982), it indicates that the HCl group was cleaved from the polymer through a nucleophilic attack on the PVC molecule. (Burnette, Tr. 2415-2417).

984. The resulting PVC molecule in the BioPVC test is substantially weakened in that area, and the carbon-carbon bonds will thus break because the remaining carbon-carbon bond is subject to a hydrolysis reaction that will, in fact, cause bond breakage. (Burnette, Tr. 2417; CCX 1081).

985. The fact that PVC molecule in the BioPVC test becomes unstable and degraded after losing the HCl group is a textbook analysis of a nucleophilic attack; it is documented in the peer-reviewed literature, and it is "a fundamental of biochemistry." (Burnette, Tr. 2417-2418).

986. Nucleophilic attack means that the enzyme is looking for a positively charged substance to attack. (Burnette, Tr. 2418).

987. Depolymerases are a class of enzymes that reduce large polymers into smaller units. (Burnette, Tr. 2418-2419).

988. Depolymerases are also responsible for biodegradation of plastic polymers, and they are ubiquitous in the environment. (Burnette, Tr. 2418-2421).

989. Depolymerases use hydrolysis and nucleophilic attacks to break bonds, and they are involved in the reduction and oxidation reactions. (Burnette, Tr. 2419).

990. Dr. Burnette's expert report (RX 854) documented several microorganisms that have been identified for their ability to biodegrade plastic polymers. (Burnette, Tr. 2420-2421).

991. Anaerobic and aerobic metabolisms in microorganisms are different concepts, but they share many key similarities, including certain mechanisms of action used to achieve the breakdown of substrates. For example, the use of pyruvate dehydrogenase is a key ingredient and factor in both aerobic and anaerobic metabolism. (Burnette, Tr. 2424-2425).

992. One documented pathway to polyethylene biodegradation includes a common mechanism applicable to both aerobic and anaerobic systems, including the co-factor NAD (nicotinamide adenine dinucleotide, a coenzyme found in living cell) and the oxidative reactions that occur in both environments. (Burnette, Tr. 2426).

993. Dr. Burnette identified and testified to other mechanisms of enzymatic degradation of plastic polymers, including the degradation of polyethylene terephthalate, using the cutinase

enzyme, a more difficult to digest polymer. (Burnette, Tr. 2427-2428).

994. Hydrolysis reactions are not limited to environments with high moisture contents. (Burnette, Tr. 2429).

995. Digestion of certain polymer chains may require just a few molecules of water. (Burnette, Tr. 2429).

996. Impurities may include byproducts from manufacturing. (Sahu, Tr. 1830).

997. Impurities affect the biodegradability of plastics by providing attack points in the polymer chains. (Sahu, Tr. 1830).

998. Impurities become spots where the plastic is weaker than it would be without the impurities, and those weaknesses facilitate microbial attack. (Sahu, Tr. 1830-1831).

999. Virtually all plastic articles have additives. (Sahu, Tr. 1836).

1000. Some plastic additives (*e.g.*, colorants) may include components that have an antimicrobial effect. (Sahu, Tr. 1827-1828).

1001. Additives to plastics create heterogeneity in the polymer, and create opportunities for biological attack. (Sahu, Tr. 1830-1831).

1002. Plastic additives may include articles like plasticizers, lubricants, impact modifiers, fillers, pigments, flame retardants, stabilizers, and antimicrobial agents. (Sahu, Tr. 1831-1833).

1003. There are plastic additives that can have antimicrobial properties but are not specifically introduced to the plastic for antimicrobial purposes. (Sahu, Tr. 1835).

1004. There are some catalysts, including copper-based, zinc-based or silver-based components that have antimicrobial properties but are not included intentionally as antimicrobials. (Sahu, Tr. 1835).

1005.An antimicrobial additive or impurity would likely reduce or negate biodegradation. (Sahu, Tr. 1836).

7. Dr. Barlaz's Analysis of Gas Evolution Data from ECM Tests

1006.In a gas evolution laboratory-scale reactor test, it is broadly accepted by the scientific community that biodegradation can be proven with data showing that the volume of methane produced in the test vessel is greater than the volume of gas produced in the inoculum. (Barlaz, Tr. 2246).

1007.Methane is only produced in a system that is strictly anaerobic. (Barlaz, Tr. 2188).

1008.Dr. Barlaz reviewed many of the gas evolution studies involving ECM Plastics. (Barlaz, Tr. 2247).

1009.Dr. McCarthy did not run any statistics for the gas evolution studies on ECM Plastics. (McCarthy, Tr. 654).

1010.Dr. Barlaz was surprised that Dr. McCarthy was dismissive of gas evolution testing involving ECM Plastics without having examined the data. (Barlaz, Tr. 2247).

1011.Dr. Barlaz examined the raw data produced from the gas evolution studies on ECM Plastics by certain laboratories, particularly the data concerning methane generation from the test substrate and methane generation from the inoculum that would be the background methane. (Barlaz, Tr. 2247-2248).

1012.For those gas evolution studies on ECM Plastics where Dr. Barlaz had raw data or triplicate data, he performed statistical analysis, including t-tests, to determine whether there were statistically significant differences between the methane generation in the reactor with the test substrate and the methane attributable to the inoculum alone. (Barlaz, Tr. 2248).

1013.The t-statistic is the most common statistical test after a calculation of the average. The t-test is a statistical procedure that

allows one to determine the significant difference between two sets of data. (Barlaz, Tr. 2259-2260).

1014.Dr. Barlaz also calculated standard deviations for gas evolution studies on ECM Plastics where he had triplicate data; however, the t-test is superior in that it also takes into consideration the elements of standard deviation. (Barlaz, Tr. 2264).

1015.In many instances of the gas evolution studies on ECM Plastics, Dr. Barlaz determined from the data itself that the results were statistically significant, and that the data suggested that there was anaerobic biodegradability of the test plastic. Dr. Barlaz concluded for those studies, that ratios varied, but the ratios were generally significant even at the lower end. (Barlaz, Tr. 2248-2249).

1016.For other gas evolution studies on ECM Plastics where triplicate data was not available, Dr. Barlaz examined the ratios of methane generation in the test material plus inoculum to methane generation from the inoculum only. (Barlaz, Tr. 2248).

1017.From the ratios described in F. 1016, Dr. Barlaz determined that the methane generation in the test vessels could be attributable to the test substrate, which suggests that the substrate was undergoing anaerobic biodegradation and conversion to methane. (Barlaz, Tr. 2249, 2260-2262).

1018.Dr. Barlaz prepared a spreadsheet of his statistical calculations from the gas evolution studies on ECM Plastics. (Barlaz, Tr. 2250; RX 472).

1019.Dr. Barlaz also updated his spreadsheet to include additional calculations based on the data from the gas evolution studies on ECM Plastics. (Barlaz, Tr. 2251; RX 968).

1020.To address the question of whether only the ECM Additive had biodegraded, Dr. Barlaz estimated the amount of methane that could theoretically be produced by the ECM Additive alone. (Barlaz, Tr. 2251).

1021.Dr. Barlaz made certain conservative assumptions about the ECM Additive when he calculated the amount of potential methane. (Barlaz, Tr. 2252-2253).

1022.Dr. Barlaz's conservative calculation was that one gram of the ECM Additive would produce 933 mL of methane gas. (Barlaz, Tr. 2253).

1023.Based on his calculation that one gram of the ECM Additive would produce 933 mL of methane gas, Dr. Barlaz looked at the methane yields in the test vessels during biodegradation testing, and determined if the amount of biodegradation exceeded the amount that could potentially be sourced from the additive. (Barlaz, Tr. 2253-2254).

1024.Dr. Barlaz made an assumption for his calculations that the ECM Additive was 50% carbon because most items are about 50% carbon. (Barlaz, Tr. 2254).

1025.Polyethylene, by contrast, is almost 90% carbon. (Barlaz, Tr. 2254).

1026.Dr. Barlaz also calculated the methane yield of the ECM Additive based on the formula for the ECM Additive that Dr. McCarthy used in his expert report at page 24, footnote 17. (Barlaz, Tr. 2254-2255; CCX 891 (McCarthy Expert Report at 24 n.17)).

1027.Based on Dr. McCarthy's description of the ECM Additive that was based on reverse engineering of the ECM Additive, Dr. Barlaz calculated a methane yield for the ECM Additive of 838 mL per gram. (Barlaz, Tr. 2255; RX 968).

1028.Using Dr. McCarthy's assumptions, the data produced in the gas evolution tests suggests that even more of the substrate plastic (not the ECM Additive) biodegraded, because the ECM Additive would have had a lower potential methane yield. (Barlaz, Tr. 2255-2256).

1029.Using, as an example, the ASTM D5511 test on ECM Plastics performed by NE Labs on behalf of Minigrips ("NE Labs Minigrips test") (F. 1286-1312), Dr. Barlaz explained the

arithmetic summarized in his spreadsheet. (Barlaz, Tr. 2256-2257; RX 968).

1030.Dr. Barlaz calculated the weight of the ECM Additive (in grams) by multiplying the percentage of the ECM Additive load rating (in the Minigrips test, 1.5%) by the starting weight of the entire test plastic. (Barlaz, Tr. 2256-2257).

1031.By calculating the amount of total methane potential from one gram of ECM Additive, Dr. Barlaz could determine the total amount of methane possible in the ECM Additive in each specific test by multiplying the actual weight of the ECM Additive by the conservative 933 mL calculation (F. 1022) (or 838 mL if using Dr. McCarthy's assumptions) (F. 1027). (Barlaz, Tr. 2256-2258; RX 968).

1032.Dr. Barlaz also calculated the net methane for each test vessel, which he did by subtracting the mean triplicate methane data from the inoculum blanks from the test vessels. (Barlaz, Tr. 2257-2258; RX 968 (summary sheet)).

1033.Dr. Barlaz looked for a 95% certainty in the statistics that he ran, which would mean that the researchers are 95% "certain that you got the right answer." (Barlaz, Tr. 2260).

1034.Dr. Barlaz's t-statistics were generally well below the .05 that indicates statistical significance at the 95% level. (Barlaz, Tr. 2257).

1035.Dr. Barlaz's mathematical process is explained in his testimony. (Barlaz, Tr. 2257-2259).

1036.Dr. Barlaz explained that where the methane is associated and produced from the test vessel is not attributable to the inoculum, and not attributable to the ECM Additive, then the biodegradation must come from the plastic substrate itself. (Barlaz, Tr. 2258).

1037.Dr. Barlaz also analyzed the ratios of methane to carbon dioxide in the lab tests. (Barlaz, Tr. 2261-2262).

1038.A ratio of methane to carbon dioxide that is greater than 1:1 is a good indication that the anaerobic environment was behaving properly. (Barlaz, Tr. 2262-2263).

1039.Gas evolution testing does not account for carbon that may have been cleaved from the substrate, but converted to cell mass instead of gas. (Barlaz, Tr. 2263-2264).

1040.The biodegradation numbers calculated by the laboratories in this case based on gas data alone are a lower limit of the carbon conversion that was actually realized. (Barlaz, Tr. 2263-2264).

1041.Based on his statistical analyses and the test data he reviewed concerning ECM Plastics, Dr. Barlaz testified that competent and reliable scientific evidence exists to show that plastics manufactured with the ECM Additive are anaerobically biodegradable. (Barlaz, Tr. 2264-2265).

1042.Dr. Barlaz testified that "there are certainly many tests where there's good scientific evidence that the material -- that the material underwent anaerobic [biodegradation]." (Barlaz, Tr. 2265).

8. Testing Performed on the ECM Additive

1043.Dr. Barlaz reviewed the test materials in evidence in this case. Based on checking of the lab reports, Dr. Barlaz concluded that in numerous tests, plastics manufactured with the ECM Additive were shown to anaerobically biodegrade to methane. (Barlaz, Tr. 2175).

1044.There were some tests that did not conclusively show anaerobic biodegradation, but there were many more tests that did. In totality, there is evidence that plastics made with the ECM Additive is anaerobically biodegrading. (Barlaz, Tr. 2274).

1045.For purposes of determining biodegradability under landfill conditions, only anaerobic biodegradability is of relevance. (RX 853 (Barlaz Expert Report at 7); Barlaz, Tr. 2300).

a. Anaerobic testing by Eden Research Laboratories

1046.Eden Research Laboratories ("ERL") is a laboratory in New Mexico, owned and operated by Mr. Thomas Poth. (Poth, Tr. 1440-1441).

1047.Mr. Poth completed the course requirements for an undergraduate degree from New Mexico Institute of Mining and Technology in chemistry and environmental engineering and has taken numerous courses on hazardous waste management and radioactive waste management at the graduate level, but did not receive a degree. (Poth, Tr. 1435-1436).

1048.ERL employs two full-time employees, and two part-time employees. In addition to Mr. Poth, ERL's other full-time employee is Dr. Brian Esau. ERL's tests are performed by Mr. Poth and Dr. Esau. (Poth, Tr. 1440-1441).

1049.Dr. Esau has a master's degree and a Ph.D. in biochemistry from the University of Illinois at Champaign-Urbana. Dr. Esau participates in the daily operation of the laboratory, including project design, and performs testing of products. (Poth, Tr. 1441).

1050.ERL has performed biodegradability testing of plastic products such as plastic bags and drink bottles since 2010. Approximately 50% of ERL's current business is biodegradability testing. (Poth, Tr. 1444-1445).

1051.ERL performs ASTM D5511 biodegradation testing for clients. (Poth, Tr. 1447-1448).

1052.ERL follows the D5511 protocol, but has made adjustments to that protocol to more closely simulate a landfill. (Poth, Tr. 1449-1450).

1053.ERL has increased the solids content in its D5511 test. (Poth, Tr. 1450).

1054.Other than the adjustment to solids content (or moisture content), ERL does not alter the D5511 test protocol in any substantial way. (Poth, Tr. 1450).

1055.ERL increased the solids content of its test so that its D5511 test would look more like a landfill as opposed to a digester. (Poth, Tr. 1450).

1056.ERL explained to its customers that ERL's testing is not performed at optimal moisture content and, as a consequence, the performance of test samples in biodegradation testing are not going to be optimal. (Poth, Tr. 1451-1452).

1057.ERL explained that the higher solid content involved in ERL D5511 testing would be more appropriate because the testing was more indicative of performance in a landfill. (Poth, Tr. 1452).

1058.ERL prepares its test inoculum with compost obtained from a local facility. (Poth, Tr. 1457-1458).

1059.ERL conditions its inoculum in an incubator to climatize it to temperature and promote selection of anaerobic microbes. (Poth, Tr. 1459-1460).

1060.ERL combines its compost with sewage sludge to form the final inoculum. (Poth, Tr. 1461).

1061.Sewage sludge, as used by ERL, consists of the solids that come from the digester in ERL's laboratory. (Poth, Tr. 1461).

1062.ERL determines the moisture content of its inoculum, and adjusts the liquid added to the inoculum before placing it in the incubator, which helps control the specific moisture content in the final, test-ready inoculum. (Poth, Tr. 1463).

1063.ERL reviews and controls for the carbon to nitrogen levels, the ammonia levels, and the pH. (Poth, Tr. 1463-1464).

1064.ERL runs all D5511 tests in triplicate, using three separate test vessels for each of the three controls in the D5511 standard, the two additional controls that ERL relies on, and the test vessels. (Poth, Tr. 1466).

1065.ERL uses a gas chromatograph to analyze the gas emissions produced during the D5511 test. (Poth, Tr. 1468-1469).

1066.ERL calibrates its gas chromatograph monthly and as appropriate. (Poth, Tr. 1469).

1067.ERL uses a graduated cylinder to record total gas volume and collect gas during the D5511 test. (Poth, Tr. 1468).

1068.ERL does not use Mylar or Kevlar bags for gas collection because ERL previously determined that those bags leaked methane, and because the bags made gas transfer difficult. (Poth, Tr. 1468).

1069.ERL calculates the percentage of biodegradation observed in a D5511 test by performing the necessary calculations of theoretical gas yields, and comparing those to the gas yield of the sample (excluding the gas produced by the inoculum blanks). (Poth, Tr. 1469-1471).

1070.ERL's method of calculating the percentage of biodegradation follows the ASTM D5511 standard. (*Compare* F. 1069 *with* RX 356 at 4).

1071.ERL has had difficulties in testing certain plastic polymers in laboratory reactor tests. (Poth, Tr. 1472-1473).

1072.With plastic foams, ERL found it was difficult to have decent surface area contact with the inoculum because foam products frequently consumed too much space in the test vessel. (Poth, Tr. 1473).

1073.ERL's testing protocols, which follow the D5511 test, are not suitable for plastics that have components inhibitory to microorganisms. (Poth, Tr. 1471).

1074.ERL does not refresh inoculum during D5511 tests that are run over a long duration. (Poth, Tr. 1474).

1075.ERL has seen plateaus in the biodegradation in long term tests, which last for a period of up to two months before

biodegradation in the test system sometimes resumes. (Poth, Tr. 1474).

1076.ERL uses a standard format for reporting data in a D5511 test. (Poth, Tr. 1480-1481).

1077.Dr. Barlaz visited ERL in about December 2012. His visit predated and was unrelated to his participation as an expert witness in this case. (Barlaz, Tr. 2274-2275).

1078.Dr. Barlaz observed ERL's test reactors and reviewed ERL's testing process with ERL's owner, Thomas Poth. (Barlaz, Tr. 2275).

1079.Having reviewed ERL's biodegradation testing, Dr. Barlaz was comfortable that ERL's testing was strictly under anaerobic conditions and that ERL had the appropriate capability to monitor gas volume and composition. (RX 853 (Barlaz Expert Report at 14); Barlaz, Tr. 2275).

i. RX 248, ERL No. 092511B

1080.In September 2011, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL No. 092511B, marked RX 248. (RX 248).

1081.ERL performed the test on behalf of FP International, using test samples that were provided by FP International. (RX 248 at 1).

1082.The test marked RX 248 followed the ASTM D5511 protocol. The solid content of the test was 48.4%. (RX 248 at 1).

1083.In the test marked RX 248, the study authors recorded gas evolution data on a weekly basis and calculated pH volumes, volatile fatty acids, and ammonium nitrogen levels. (RX 248 at 1-4).

1084.The test marked RX 248 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic,

and two test samples, all of which were run in triplicate. (RX 248; Poth, Tr. 1466-1467).

1085.The test marked RX 248 included two "test" plastic samples, both amended with the ECM Additive at 1% by weight. (RX 248 at 1-2).

1086.The two test samples, marked "ERL #223" and "ERL #224" in RX 248, were polyethylene airbags. (RX 871 (Blood, Dep. at 166-169)).

1087.The test marked RX 248 involved a negative control that was an airbag control, a plastic that was not amended with the ECM Additive. (RX 248).

1088.The test marked RX 248 revealed biodegradation of the two ECM amended plastics in the amount of 11.5% for sample ERL #223 and 15.2% for sample ERL #224 after 120 days of anaerobic testing. (RX 248 at 5).

1089.In the test marked RX 248, the amount of methane recorded in sample ERL #223 was 3,884.2 mL. The amount of methane recorded from sample ERL #224 was 4,761.8 mL. (RX 248 at 5).

1090.In the test marked RX 248, the total mass of the sample ERL #223 was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.2 grams. (RX 248).

1091.Based on Dr. Barlaz's calculation from the data from the sample ERL #223 in the test marked RX 248, the total theoretical yield of methane from 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968).

1092.At 3,884.2 mL, the amount of methane recorded from test sample ERL #223 in RX 248 was nearly twenty times the biodegradation that could have been sourced from the ECM Additive alone. (RX 248 at 5; RX 968; Barlaz, Tr. 2252-2258).

1093.In the test marked RX 248, the total mass of the sample marked ERL #224 was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.2 grams. (RX 248).

1094.Based on Dr. Barlaz's calculation from the data from the sample ERL #224 in the test marked RX 248, the total theoretical yield of methane from the 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968).

1095.At 4,761.8 mL, the amount of methane recorded from the test sample ERL #224 in RX 248 is more than twenty five times the amount of biodegradation that could have been sourced from the ECM Additive alone. (RX 248 at 5; RX 968; Barlaz, Tr. 2252-2258).

1096.The cumulative amount of methane collected from the test marked RX 248 represented about fifty percent of the total gas emissions. (RX 248 at 5).

1097.The study author of the test marked RX 248 reported that it was "obvious that biodegradation has occurred on the treated sample." (RX 248 at 6).

1098.Based on the data collected in the test marked RX 248, the study author reported that, as of the date of the report, "the treated sample is continuing to biodegrade." (RX 248).

ii. RX 839, ERL No. 070312C

1099.In July 2012, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL No. 070312C, marked RX 839. (RX 839).

1100.ERL performed the test marked RX 839 on behalf of Shields Bag & Printing. (RX 839 at 113977).

1101.The test marked RX 839 followed the ASTM D5511 protocol. The solid content of the test was 48.4%. (RX 839 at 113977).

1102.In the test marked RX 839, the study authors recorded gas evolution data on a weekly basis and calculated pH volumes, volatile fatty acids, and ammonium nitrogen levels. (RX 839 at 113977-113980).

1103.The test marked RX 839 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic, and one test sample, all of which were run in triplicate. (RX 839 at 113982; Poth, Tr. 1466-1467).

1104.The test marked RX 839 included a test plastic sample amended with the ECM Additive at 1% by weight. The test sample, "ERL #476A," was a clear film. (RX 839 at 113978, 113982).

1105.The test marked RX 839 involved a negative control that was a control film, a plastic that was not amended with the ECM Additive. (RX 839 at 113982).

1106.The test marked RX 839 revealed biodegradation of the ECM amended plastic in the amount of 7.9% after 22 weeks of anaerobic testing. (RX 839 at 113982).

1107.In the test marked RX 839, the amount of methane recorded in sample ERL #476A was 2,053.2 mL. (RX 839 at 113982).

1108.In the test marked RX 839, the total mass of the sample ERL #476A was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.2 grams. (RX 839 at 113982; Barlaz, Tr. 2252-2258).

1109.Based on Dr. Barlaz's calculation from the data from the test marked RX 839, the total theoretical yield of methane from 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1110.At 2,053.2 mL, the amount of methane recorded from test sample ERL #476A in RX 839 was eleven times the amount

of biodegradation that could have been sourced from the ECM Additive alone. (RX 839 at 113982; RX 968; Barlaz, Tr. 2252-2258).

1111.The amount of methane recorded in the test marked RX 839 in the inoculum blanks was just 792.7 mL. (RX 839 at 113982).

1112.The study author of the test marked RX 839 reported that it was "obvious that biodegradation has occurred on the treated sample." (RX 839 at 113982).

1113.Based on the data collected in the test marked RX 839, the study author reported that, as of the date of the report, "the treated sample is continuing to biodegrade." (RX 839 at 113982).

iii. RX 403, ERL Fellows

1114.In October 2012 through February 2013, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL Fellows Test, marked RX 403. (RX 403).

1115.ERL performed the test marked RX 403 on behalf of Fellows. (RX 403 at 001048).

1116.The test marked RX 403 followed the ASTM D5511 protocol. (RX 403 at 001048).

1117.The test marked RX 403 is an ERL "update." (RX 403).

1118.ERL produces update reports to keep customers abreast of the status of testing. Update reports do not include all of the information relevant to the test, or all of the information included in a final report. (Poth, Tr. 1475-1477).

1119.The test marked RX 403 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), two negative controls consisting of untreated plastics, and two test samples, all of which were run in triplicate. (RX 403 at 001048; Poth, Tr. 1466-1467).

1120.The test marked RX 403 included two test plastic samples amended with the ECM Additive at 1% by weight. (RX 403 at 001048).

1121.In the test marked RX 403, one test sample, designated "568-P1004," included a "1% ECM BioFilm Resin" and the other test sample, designated "570-TPU," included a "1% ECM BioFilm Resin Pink." (RX 403 at 001048).

1122.The test marked RX 403 involved negative controls that were control resins, plastics that were not amended with the ECM Additive and contained "0% ECM." (RX 403 at 001052).

1123.ERL recorded data for the test marked RX 403 through 197 days. (RX 403 at 001052).

1124.In the test marked RX 403, ERL recorded biodegradation of the ECM amended sample 568-P1004 in the amount of 71.8% after 197 days of anaerobic testing. (RX 403 at 001052).

1125.In the test marked RX 403, for the sample marked 568-P1004, Dr. Barlaz calculated a net methane yield of 7,548.9 mL, meaning that the test produced 7,548.9 mL more than the inoculum blanks. (RX 403; RX 968; Barlaz, Tr. 2252-2258).

1126.In the test marked RX 403, the total mass of the sample 568-P1004 was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.2 grams. (RX 403 at 001052; Barlaz, Tr. 2252-2258).

1127.Based on Dr. Barlaz's calculation from the data from the test marked RX 403, the total theoretical yield of methane from 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1128.At a net methane production of 7,548.9 mL, the amount of methane recorded from test sample 568-P1004 in the test marked RX 403 was more than forty times the amount that could

have theoretically been sourced from the ECM Additive. (RX 403 at 113982; RX 968; Barlaz, Tr. 2252-2258).

1129.In the test marked RX 403, ERL recorded biodegradation of the ECM amended sample 570-TPU in the amount of 16.1% after 197 days of anaerobic testing. (RX 403 at 001052).

1130.In the test marked RX 403, for the sample marked 570-TPU, Dr. Barlaz calculated a net methane yield of 2,337.5 mL, meaning that the test produced 2,337.5 mL more than the inoculum blanks. (RX 403; RX 968; Barlaz, Tr. 2252-2258).

1131.In the test marked RX 403, the total mass of the sample 570-TPU was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.2 grams. (RX 403 at 001052; Barlaz, Tr. 2252-2258).

1132.Based on Dr. Barlaz's calculation from the data from the test marked RX 403, the total theoretical yield of methane from 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1133.At 2,337.5 mL, the amount of methane recorded from test sample 570-TPU in the test marked RX 403 was more than twelve times the amount of biodegradation that could have been sourced from the ECM Additive alone. (RX 403 at 113982; RX 968; Barlaz, Tr. 2252-2258).

1134.The ratio of mean substrate methane to mean inoculum methane in the test marked RX 403 was more than 5:1, indicating that the biodegradation observed in the test environment was confidently ascribed to the test article. (RX 968; Barlaz, Tr. 2247-2250).

iv. RX 402, ERL FP International

1135.In October 2013 through February 2014, ERL reported test data from an anaerobic biodegradation test in laboratory

reactors, ERL FP International Testing, marked RX 402. (RX 402).

1136.ERL performed the test marked RX 402 on behalf of FP International, an ECM customer. (RX 402 at 001046; F. 53, 58).

1137.The test marked RX 402 followed a modernized and more recent ASTM protocol. (RX 402 at 001046).

1138.The test report is an ERL "update." (RX 402). *See* F. 1118.

1139.The test marked RX 402 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic, and two test samples, all of which were run in triplicate. (RX 402 at 001046; Poth, Tr. 1466-1467).

1140.The test marked RX 402 included two test plastic samples amended with the ECM Additive at 1% and 1.75% by weight. (RX 402 at 001046).

1141.One test sample in the test marked RX 402 designated "726" included a "Film with 1% ECM." (RX 402 at 001046).

1142.One test sample in the test marked RX 402 designated "727" included a "Film with 1.75% ECM." (RX 402 at 001046).

1143.The test marked RX 402 involved a negative control that was a control film containing "0% ECM." (RX 402 at 001046).

1144.ERL recorded data for the test marked RX 402 through 290 days. (RX 402 at 001042).

1145.In the test marked RX 402, ERL recorded biodegradation of the ECM amended sample 726 in the amount of 11.5% after 290 days of anaerobic testing. (RX 402 at 1042).

1146.For the sample marked 727 in the test marked RX 402, Dr. Barlaz calculated a net methane yield of 1,352.2 mL, meaning that the test produced 1,352.2 mL more than the inoculum blanks. (RX 402; RX 968; Barlaz, Tr. 2252-2258).

1147.In the test marked RX 402, the total mass of the sample 727 was 20 grams. The ECM Additive, at 1% by weight, had a mass of 0.35 grams. (RX 402 at 001042; RX 968; Barlaz, Tr. 2252-2258).

1148.Based on Dr. Barlaz's calculation from the data from the test marked RX 402, the total theoretical yield of methane from 0.35 grams of the ECM Additive is 326.55 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1149.At a net methane production of 1,352.2 mL, the amount of methane recorded from test sample 727 in RX 402 was more than four times the amount of biodegradation that could have theoretically been sourced from the ECM Additive alone. (RX 402 at 001042; RX 968; Barlaz, Tr. 2252-2258).

v. CCX 548, ERL FP International

1150.In October 2013 through February 2014, ERL reported test data from an anaerobic biodegradation test in laboratory reactors, ERL FP International Testing, marked CCX 548. (CCX 548).

1151.ERL performed the test marked CCX 548 on behalf of FP International. (CCX 548 at 1).

1152.The test marked CCX 548 followed a modernized and more recent ASTM protocol. (CCX 548 at 1).

1153.The test report is an ERL "update." (CCX 548). *See* F. 1118.

1154.The test marked CCX 548 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic, and a test sample, all of which were run in triplicate. (CCX 548 at 1; Poth, Tr. 1466-67).

1155.The test marked CCX 548 included a test plastic amended with the ECM Additive and labeled "723 – Biodegradable EPS FloPak" ("723"). (CCX 548 at 1).

1156.ERL recorded data for the test marked CCX 548 through 291 days. (CCX 548 at 1).

1157.In the test marked CCX 548, ERL recorded biodegradation of the ECM amended sample 723 in the amount of 30.4% after 291 days of anaerobic testing. (CCX 548 at 1).

1158.In the test marked CCX 548, for the sample marked 723, ERL reported 2,705.9 mL of total methane, compared to just 383.4 mL of methane in the inoculum blank. The net methane is 2322.5 mL in the 723 sample vessels. (CCX 548 at 1).

1159.In the test marked CCX 548, the sample mass of the 723 test sample was 7.5 grams. The amount of the ECM Additive is not provided in the report marked CCX 548. (CCX 548 at 1).

1160.Even assuming that the ECM Additive was introduced at 5% by weight, the weight of the ECM Additive in the 7.5 gram 723 sample tested in CCX 548 would have been 0.375 grams. (CCX 548; RX 968; Barlaz, Tr. 2252-2258).

1161.Based on Dr. Barlaz's calculations from the data from the test marked CCX 548, the total theoretical yield of methane from 0.375 grams of the ECM Additive is 349.875 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1162.At a net methane production of 2322.5 mL, the amount of methane recorded from test sample 723 in the test marked CCX 548 was more than 6.5 times the amount of biodegradation that could have theoretically been sourced from the ECM Additive alone. (CCX 548 at 1; RX 968; Barlaz, Tr. 2252-2258).

vi. CCX 546, ERL FP International

1163.In November 2013, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL FP International Testing, marked CCX 546. (CCX 546).

1164.ERL performed the test marked CCX 546 on behalf of FP International. (CCX 546 at 1).

1165.The test marked CCX 546 is an ERL "update." (CCX 546). *See* F. 1118.

1166.The test marked CCX 546 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic, and two test samples, all of which were run in triplicate. (CCX 546 at 1; Poth, Tr. 1466-1467).

1167.The test marked CCX 546 included two test plastics containing the ECM Additive, labeled "223A-TKN Green" ("223A") and "224A-HOP Green" ("224A"). (CCX 546 at 1).

1168.Mr. James Blood, of FP International, explained that the primary difference between the test samples marked "TKN" and "HOP" in test CCX 546 was the location or factory where the samples were manufactured. (RX 871 (Blood, Dep. at 164-165)).

1169.The ERL test marked CCX 546 does not report the amount of ECM Additive included in the test samples. (CCX 546 at 1).

1170.Mr. Blood testified that the test marked CCX 564 would have involved a 1% ECM additive product. (RX 871 (Blood, Dep. at 164-165)).

1171.ERL recorded data for the test marked CCX 546 through 977 days. (CCX 546 at 1).

1172.In the test marked CCX 546, ERL recorded biodegradation of the ECM amended sample 223A in the amount of 36.7% after 977 days of anaerobic testing. (CCX 546 at 1).

1173.In the test marked CCX 546, ERL recorded biodegradation of the ECM amended sample 224A in the amount of 39.8% after 977 days of anaerobic testing. (CCX 546 at 1).

1174.For the sample marked 223A in the test marked CCX 546, ERL reported 9,268.8 mL of total methane, compared to just 1,805.9 mL of methane in the inoculum blank. (CCX 546 at 1).

1175.The net methane is 7,462.9 mL in the 223A sample vessels in the test marked CCX 546. (CCX 546 at 1; RX 968; Barlaz, Tr. 2252-2258).

1176.For the sample marked 224A in test CCX 546, ERL reported 9,970.8 mL of total methane, compared to just 1,805.9 mL of methane in the inoculum blank. (CCX 546 at 1; RX 968; Barlaz, Tr. 2252-2258).

1177.The net methane is 8,164.9 mL in the 224A sample vessels in the test marked CCX 546. (CCX 546 at 1; RX 968; Barlaz, Tr. 2252-2258).

1178.In the test marked CCX 546, the sample mass of the 223A test sample was 20 grams and the sample mass of the 224A sample was 20 grams. (CCX 546 at 1).

1179.At 1% by weight, the sample mass of the ECM Additive in the 223A and 224A samples in the test marked CCX 546 was 0.20 grams. (RX 968; Barlaz, Tr. 2252-2258).

1180.Based on Dr. Barlaz's calculations from the data from the test marked CCX 546, the total theoretical yield of methane from 0.2 grams of the ECM Additive is 186.6 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1181.At a net methane production of 7,462.9 mL, the amount of methane recorded from test sample 223A in the test marked CCX 546 was about forty times the amount that could have possibly been sourced from the ECM Additive. (CCX 546 at 1; RX 968; Barlaz, Tr. 2252-2258).

1182.At a net methane production of 8,164.9 mL, the amount of methane recorded from test sample 224A in the test marked CCX 546 was about forty-four times the amount of biodegradation that could have possibly been sourced from the ECM Additive. (CCX 546 at 1; RX 968; Barlaz, Tr. 2252-2258).

vii. CCX 534, ERL MicroTek

1183.In May 2012 through March 2013, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL MicroTek Testing, marked CCX 534. (CCX 534).

1184.The test marked CCX 534 was performed by ERL on a polyethylene film on behalf of MicroTek. (CCX 534 at 009017).

1185.The test marked CCX 534 is an ERL "update." (CCX 534). *See* F. 1118.

1186.The test marked CCX 534 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), a negative control consisting of an untreated plastic, and a test sample, all of which were run in triplicate. (CCX 534 at 009017; Poth, Tr. 1466-1467).

1187.The test marked CCX 534 included a test plastic amended with the ECM Additive, labeled "BIO10115 ECM FILM" ("BIO10115"). (CCX 534 at 009017).

1188.The ERL test marked CCX 534 does not report the amount of ECM Additive included in the test samples. (CCX 534 at 009017).

1189.ERL recorded data for the test marked CCX 534 through 485 days. (CCX 534 at 009017).

1190.In the test marked CCX 534, ERL recorded biodegradation of the ECM amended sample BIO10115 in the amount of 45.2% after 485 days of anaerobic testing. (CCX 534 at 009017).

1191.For the sample marked BIO10115 in the test marked CCX 534, ERL reported 7,588.2 mL of total methane, compared

to just 1,781.7 mL of methane in the inoculum blank. (CCX 534 at 009017).

1192.The net methane for the sample marked BIO10115 in the test marked CCX 534 is 5,806.5 between the test vessels and the inoculum vessels. (CCX 534 at 009017; RX 968; Barlaz, Tr. 2252-2258).

1193.The sample mass of the BIO10115 test sample in the test marked CCX 534 was 13 grams. (CCX 534 at 009017).

1194.Even assuming that the ECM Additive was included at 5% by weight, the sample mass of the ECM Additive in the BIO10115 sample in the test marked CCX 534 would have been 0.65 grams. (CCX 534 at 009017; RX 968; Barlaz, Tr. 2252-2258).

1195.Based on Dr. Barlaz's calculations from the data from the test marked CCX 534, the total theoretical yield of methane from 0.65 grams of the ECM Additive is 606.45 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1196.At a net methane production of 5,806.5 mL, the amount of methane recorded from test sample BIO10115 in the test marked CCX 534 was about nine and one half times the amount of biodegradation could have possibly been sourced from the ECM Additive. (CCX 534 at 009017; RX 968; Barlaz, Tr. 2252-2258).

viii. CCX 547, ERL EcoLab

1197.In March 2013 through September 2013, ERL reported test data from an anaerobic D5511 biodegradation test in laboratory reactors, ERL EcoLab Testing, marked CCX 547. (CCX 547).

1198.ERL performed the test marked CCX 547 on behalf of EcoLab. (CCX 547 at 009008).

1199.The test marked CCX 547 is an ERL "update." (CCX 547). *See* F. 1118.

1200.The test marked CCX 547 included the use of an inoculum blank, a negative control (polyethylene), a positive control (cellulose), and a test sample, all of which were run in triplicate. (CCX 547 at 009017; Poth, Tr. 1466-1467).

1201.The test marked CCX 547 included two "test" plastics containing the ECM Additive, on sample labeled "538A BIO10115 ECM Film," ("538A") and another sample labeled "539A BIO10115 ECM Film" ("539A") (CCX 547 at 009008).

1202.ERL recorded data for the test marked CCX 547 through 452 days. (CCX 547 at 009004-009008).

1203.In the test marked CCX 547, ERL recorded biodegradation of the ECM amended sample 538A in the amount of 19.6% after 452 days of anaerobic testing. (CCX 547 at 009008).

1204.In the test marked CCX 547, ERL recorded biodegradation of the ECM amended sample 539A in the amount of 46.5% after 452 days of anaerobic testing. (CCX 547 at 009008).

1205.The ERL test marked CCX 547 does not report the amount of ECM Additive included in the test samples. (CCX 547 at 009008).

1206.For the sample marked 538A in the test marked CCX 547, ERL reported 5,356.4 mL of total methane, compared to just 1093.3 mL of methane in the inoculum blank. (CCX 547 at 009008).

1207.The net methane for sample 538A in the test marked CCX 547 is 4,263.1 mL between the test vessels and the inoculum vessels. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

1208.For the sample marked 539A, ERL reported 9,778.7 mL of total methane, compared to 1093.3 mL of methane in the inoculum blank. (CCX 547 at 009008).

1209.The net methane for sample 539A in the test marked CCX 547 is 8,685.4 mL between the test vessels and the inoculum vessels. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

1210.The sample masses of the 538A and 539A test samples were 20 grams each. (CCX 547 at 009008).

1211.Even assuming that the ECM Additive was included at 5% by weight in the 538A sample in the test marked CCX 547, the sample mass of the ECM Additive in the 538A sample would have been 1 gram. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

1212.Even assuming that the ECM Additive was included in the 539A sample in the test marked CCX 547 at 15%, the sample mass of the ECM Additive in the 539A sample would have been 3 grams. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

1213.Based on Dr. Barlaz's calculations from the data from the test marked CCX 547, the total theoretical yield of methane from 1 gram of the ECM Additive is 933 mL of methane, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1214.The total theoretical yield of methane from 3 grams of the ECM Additive is 2,799 mL, calculated by multiplying the grams of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive in the sample. (RX 968; Barlaz, Tr. 2252-2258).

1215.At a net methane production of 4,263.1 mL, the amount of methane recorded from test sample 538A in CCX 547 was more than four and one half times the amount of biodegradation (933 mL) that could have possibly been sourced from the ECM Additive assuming even a 5% load rate. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

1216.At a net methane production of 8,685.4 mL, the amount of methane recorded from test sample 539A in CCX 547 was more than three times the amount of biodegradation (2,799 mL)

that could have possibly been sourced from the ECM Additive assuming even a 15% load rate. (CCX 547 at 009008; RX 968; Barlaz, Tr. 2252-2258).

b. Anaerobic testing by Northeast Laboratories

1217.Mr. Alan Johnson serves as the current laboratory director at Northeast Laboratories ("NE Labs"). (Johnson, Tr. 1554).

1218.Mr. Johnson has a bachelor's degree with a major in biology and a minor in chemistry from the University of Connecticut and took graduate level coursework for a master's degree in microbiology, but did not complete the program. (Johnson, Tr. 1554-1555).

1219.NE Labs has 14 employees, working in different disciplines, including biodegradation, wastewater, microbiology, and chemistry. (Johnson, Tr. 1556-1557).

1220.NE Labs is certified by the Environmental Protection Agency, Food and Drug Administration, United States Department of Agriculture, Centers for Disease Control, and the state of Connecticut. These certifications authorize the lab to do pharmaceutical, wastewater, food and environmental microbiology testing. (Johnson, Tr. 1558-1559).

1221.NE Labs' biodegradation testing is a branch of NE Labs' testing services; however, NE Labs relies on its other laboratory divisions, including its chemistry lab, which has passed audits, for portions of the biodegradation testing work. (Johnson, Tr. 1560-1561).

1222.NE Labs began performing biodegradation testing around 2005. (Johnson, Tr. 1560).

1223.NE Labs' biodegradation testing business was initiated and operated by Dr. William Ullmann, who founded NE Labs in 1977. (Johnson, Tr. 1560-1562).

1224.Dr. Ullmann was the former director of the state of Connecticut's Public Health Laboratory and had a Ph.D. in microbiology. (Johnson, Tr. 1562-1563).

1225.Dr. Ullmann was responsible for developing NE Labs' biodegradation testing protocols, and he performed those studies until his death in 2011. (Johnson, Tr. 1563).

1226.NE Labs would begin biodegradation testing by obtaining test samples directly from customers, and then calculating the carbon content of those samples. (Johnson, Tr. 1564).

1227.NE Labs generally follows the ASTM D5511 protocol, but NE Labs uses metal canisters as reactor vessels instead of glass vessels. (Johnson, Tr. 1565).

1228.NE Labs' metal canisters are specially manufactured for biodegradation testing. (Johnson, Tr. 1565).

1229.NE Labs drills into the metal canisters and threads a fitting into the can so that the test tubing is airtight and feeds directly from the reactor into the graduated cylinder, where gas volume is measured. (Johnson, Tr. 1565-1566).

1230.The ASTM D5511 method calls for the use of an inverted graduated cylinder to measure total gas volume. (RX 356, at 2 § 6.1).

1231.NE Labs uses lined paint cans to prevent corrosion. (Johnson, Tr. 1566).

1232.The issue of corrosion was never an issue in NE Labs' shorter-duration studies. (Johnson, Tr. 1565-1566).

1233.In longer duration studies during the early years when NE Labs used unlined canisters, corrosion may have been an issue to the extent that NE Labs observed rust forming on the can. (Johnson, Tr. 1566).

1234.NE Labs seals its canisters with silicone caulking and then seals each container with a resin. (Johnson, Tr. 1567).

1235.NE Labs pressure treats its containers by applying compressed air. (Johnson, Tr. 1567-1568).

1236.NE Labs never had any indications that its test systems leaked or were not gas tight. (Johnson, Tr. 1566-1567).

1237.A leaking canister would be quite obvious. (Johnson, Tr. 1567-1568).

1238.NE Labs could determine whether its test vessels leaked or were airtight because if the canisters had leaked, then the water level in the graduated cylinder (used for gas collection) would be lowered. (Johnson, Tr. 1566-1567).

1239.NE Labs could determine that the test environment was not aerobic (or gaining oxygen) because the test vessels were producing methane, and the D5511 tests used methane as a marker for biodegradation. (Johnson, Tr. 1566-1567).

1240.The presence of methane means that the test environment is anaerobic. (Johnson, Tr. 1566-1567, 1570).

1241.NE Labs extracted gas from the cylinder through an extraction valve in the test tubing. (Johnson, Tr. 1568-1569).

1242.NE Labs uses a Quantek analyzer to analyze carbon dioxide. (Johnson, Tr. 1569).

1243.NE Labs uses an infrared ("IR") spectrometer to measure methane content. (Johnson, Tr. 1569).

1244.The precision of the IR spectrometer varies depending on the amount of methane detected in the system. (Johnson, Tr. 1586-1587).

1245.The error rate for the IR spectrometer may be as low as 1% or less for higher amounts of methane, but may be as high as 20% for very low amounts of methane recorded. (Johnson, Tr. 1586-1587).

1246.Because NE Labs' test vessels have headspace at the top of the canisters, the canisters contain ambient gases that are not produced from the biological processes in the tests. (Johnson, Tr. 1591-1592).

1247.The ambient gases in the headspace at the top of the canisters are collected in a graduated cylinder so that the gas composition would include a percentage of ambient gas unassociated with the inoculum or biota. (Johnson, Tr. 1591-1592).

1248.The biodegradation process produces carbon dioxide and methane, the presence of the latter in relatively equal proportions to the carbon dioxide is an indication that the test environment is anaerobic (as opposed to aerobic). (Johnson, Tr. 1566-1567; Barlaz, Tr. 2188-2189).

1249.NE Labs uses a standard format for its biodegradation test reports. (Johnson, Tr. 1571). The reports in evidence from NE Labs are in the format of NE Labs' standard reports. (Johnson, Tr. 1571-1572).

1250.NE Labs has performed extension biodegradation testing, in other words, testing over the initial period of time, for certain customers. (Johnson, Tr. 1573).

1251.For longer-term extension testing over 45 days past the planned termination date, NE Labs would assess whether the activity in the triplicate vessels had leveled off. (Johnson, Tr. 1573-1574).

1252.If the activity in the test vessels had leveled off, and the positive control had already been digested, NE Labs would remove the test materials and negative controls from the stale testing environment, and place those materials into a new reactor canister with fresh inoculum. (Johnson, Tr. 1573-1574).

1253.To maintain anaerobic conditions during a long-term extension test, NE Labs would sparge (or flush) the new canisters with nitrogen to remove excess atmospheric gases. (Johnson, Tr. 1573-1574).

1254.When using fresh canisters with fresh inoculum to extend tests, NE Labs would always use fresh inoculum blanks, and often use fresh negative control vessels. (Johnson, Tr. 1574-1575).

1255.Nothing in the record indicates that NE Labs changed canisters during biodegradation testing of ECM Plastics. (Johnson, Tr. 1560-1596).

1256.Nothing in the record indicates that corrosion of canisters occurred in biodegradation testing of ECM Plastics. (Johnson, Tr. 1557-1596).

1257.Nothing in the record indicates that there was leakage in the metal canisters that NE Labs used in biodegradation testing of ECM Plastics. (Johnson, Tr. 1560-1596).

1258.Dr. Barlaz reviewed NE Labs' testing protocol. (Barlaz, Tr. 2276).

1259.NE Labs' use of metal canisters in D5511 testing would not affect the validity of NE Labs' test results. (Barlaz, Tr. 2276).

1260.With respect to NE Labs' use of metal canisters, Dr. Barlaz explained that "you either have a leak in your system or you don't have a leak in your system, and if you don't have a leak in your system, then a metal can should be fine." (Barlaz, Tr. 2276).

1261.The fact that NE Labs was getting methane generation from their positive controls indicates that NE Labs has the ability to make a gas-tight system out of a metal can. (Barlaz, Tr. 2276).

1262.The presence of methane in NE Labs testing proves that the test environment was anaerobic "because oxygen kills methanogens" responsible for producing methane. (Barlaz, Tr. 2277).

1263.NE Labs used weekly gas measurements and would report the data for individual days based on an average from the weekly readings. (RX 873 (Ullmann, Dep. at 61)).

1264.Dr. Sahu had no concerns with NE Labs' methodology or inoculum type or amount. (Sahu, Tr. 1932-1933; RX 855 (Sahu Expert Report at 45-47)).

1265.Dr. Sahu was not concerned with the process of reinoculating the test vessels in long-term D5511 studies. (Sahu, Tr. 1933-1934).

1266.Dr. Sahu was satisfied that the amount of biogas produced in the ECM tests that was in excess of that which could come from the inoculum was sufficient to show that the plastic itself had been rendered biodegradable. (Sahu, Tr. 1934-1935).

i. RX 836, NE Labs N1048340 (PPC Industries, Inc.)

1267.From September 2010 through November 2013, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs N1048340 (PPC Industries, Inc.), marked RX 836. (RX 836).

1268.NE Labs performed the test marked RX 836 on behalf of PPC Industries, Inc. (RX 836 at 1).

1269.The test marked RX 836 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 836; Johnson, Tr. 1571).

1270.The test marked RX 836 included the use of an inoculum blank, a negative control (untreated plastic), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 836 at 2; Johnson, Tr. 1575).

1271.The test marked RX 836 included a plastic amended with 1% ECM Additive. (RX 155; RX 156; RX 157).

1272.The plastic sample in the test marked RX 836 was labeled "EP Flex Renew Green Poly Bags Treated," and the test involved an untreated "Clear Poly Bag" sample as a negative control. (RX 836 at 2).

1273.NE Labs recorded data for the test marked RX 836 through 900 days. (RX 836 at 126 (10/21/2013 Report)).

1274.In the test marked RX 836, NE Labs recorded biodegradation of the ECM amended sample "EP Flex Renew Green Poly Bags Treated" in the amount of 49.28% after 900 days of anaerobic testing. (RX 836 at 126 (10/21/2013 Report)).

1275.The negative control in the test marked RX 836 revealed just 0.1152% total biodegradation after 900 days of anaerobic biodegradation testing. (RX 836 at 126 (10/21/2013 Report)).

1276.Dr. Barlaz reviewed the raw data provided by NE Labs, including data pertaining to RX 836. (RX 836; RX 968; Barlaz, Tr. 2252-2258).

1277.For the sample "EP Flex Renew Green Poly Bags Treated," NE Labs reported 4,716 mL of total methane, compared to just 1,854 mL of methane in the inoculum blank. (RX 836; RX 472; RX 968).

1278.The net methane yield between the inoculum and the test vessel in the test marked RX 836 was 2,862.4 mL. (RX 836; RX 472; RX 968).

1279.Dr. Barlaz calculated the mean substrate to inoculum ratio at 2.5 for the test marked RX 836, affirming that the methane content observed in the test vessels was from the test substrate (the plastic). (RX 836; RX 968; Barlaz, Tr. 2247-2249, 2260-2263).

1280.Dr. Barlaz calculated methane and carbon dioxide t-statistics, and determined that the results of the test marked RX 836 were statistically significant. (RX 968; Barlaz, Tr. 2259-2260).

1281.The mass of the test sample in the test marked RX 836 was 20 grams. At 1% by weight, the mass of the ECM Additive in the sample test was approximately 0.2 grams. (RX 836 at 1; RX 968; Barlaz, Tr. 2251-2254).

1282.Based on Dr. Barlaz's calculations from the data from the test marked RX 836, the total theoretical yield of methane from the 1% ECM Additive tested in the test marked RX 836 is 186.6 mL of methane, calculated by multiplying the weight of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1283.At a net methane yield of 2,862.4 mL, the biodegradation of the test substrate in the test marked RX 836 was more than fifteen times the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 836; RX 968; Barlaz, Tr. 2252-2258).

1284.Dr. Barlaz also calculated standard deviations for the test marked RX 836, which were within reasonable limits as expressed by the t-statistics. (RX 968; RX 472; Barlaz, Tr. 2264).

1285.Based in part on the test marked RX 836, Dr. Barlaz testified that the scientific evidence showed that plastic containing the ECM Additive anaerobically biodegraded. (RX 968; Barlaz, Tr. 2274).

ii. RX 838, NE Labs 1149980 (MINIGRIPS)

1286.From May 2011 through August 2012, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1149980 (MINIGRIPS) Testing, marked RX 838 ("NE Labs Minigrips test") (RX 838).

1287.NE Labs performed the test marked RX 838 on behalf of Minigrips in Kennesaw, GA. (RX 838 at 1).

1288.The test marked RX 838 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 838; Johnson, Tr. 1571).

1289.The test marked RX 838 included the use of an inoculum blank, a negative control (untreated plastic), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 838 at 2; Johnson, Tr. 1575).

1290.The test marked RX 838 included a plastic amended with 1.5% ECM Additive. (RX 838).

1291.The plastic sample in the test marked RX 838 was labeled "#1149980-01 Zip Bags, Green Line LDPE/LLDPE[14] Treated, 1.5% ECM (25 Grams)," and the test involved an untreated control labeled "#1149980-02 Zip Bags, Red Line LDPE/LLDPE Untreated (25 Grams). (RX 838 at 1).

1292.NE Labs recorded data for the test marked RX 838 through 365 days. (RX 838 at 72 (6/4/2012 Report)).

1293.In the test marked RX 838, NE Labs recorded biodegradation of the ECM amended sample "#1149980-01" in the amount of 17.069% after 365 days of anaerobic testing. (RX 838 at 72 (6/4/2012 Report)).

1294.The negative control in the test marked RX 838 revealed just 0.1009% total biodegradation after 365 days of anaerobic biodegradation testing. (RX 838 at 72 (6/4/2012 Report)).

1295.Dr. Barlaz reviewed the raw data provided by NE Labs, including data pertaining to the test marked RX 838. (RX 838; RX 968; Barlaz, Tr. 2252-2258).

1296.For the sample #1149980-01, NE Labs reported 5,197 mL of total methane, compared to just 1,360 mL of methane in the inoculum blank. (RX 838; RX 472; RX 968).

1297.The net methane yield between the inoculum and the test vessel in the test marked RX 838 was 3,837.3 mL. (RX 838; RX 472; RX 968).

1298.Dr. Barlaz calculated the mean substrate to inoculum ratio at 3.8 for the test marked RX 838, affirming that the methane content observed in the test vessels was from the test substrate (the plastic). (RX 838; RX 968; Barlaz, Tr. 2247-2249, 2260-2263).

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[14] LDPE stands for low density polyethylene. LLDPE stands for linear low density polyethylene. (Sahu, Tr. 1808).

1299.Dr. Barlaz calculated methane and carbon dioxide t-statistics, and determined that the results of the test marked RX 838 were statistically significant. (RX 472; RX 968; Barlaz, Tr. 2259-2260).

1300.The mass of the test sample in the test marked RX 838 was 25 grams. At 1.5% by weight, the mass of the ECM Additive in the sample test was approximately 0.375 grams. (RX 838 at 1; RX 968; Barlaz, Tr. 2251-2254).

1301.Based on Dr. Barlaz's calculations from the data from the test marked RX 838, the total theoretical yield of methane from the 1.5% ECM Additive tested in the test marked RX 838 is 349.875 mL of methane, calculated by multiplying the weight of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1302.At a net methane yield of 3,837.3 mL, the biodegradation of the test plastic in the test marked RX 838 was about eleven times the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 838; RX 968; Barlaz, Tr. 2252-2258).

1303.Dr. Barlaz also calculated standard deviations for the test marked RX 838, which were within reasonable limits as expressed by the t-statistics. (RX 968; RX 472; Barlaz, Tr. 2264).

1304.Based in part on the test marked RX 838, Dr. Barlaz testified that the scientific evidence showed that plastic containing the ECM Additive anaerobically biodegraded. (RX 968; Barlaz, Tr. 2274).

1305.Along with its RX 838 test, NE Labs also performed an Analytical Report under ASTM D6579 to determine the molecular weight averages and molecular weight distribution of the test sample after completion of the biodegradation test. (RX 838 at 73 (8/1/2012 Report)).

1306.In its August 1, 2012 Analytical Report (RX 838), NE Labs demonstrated that the plastic zip bags treated with the 1.5%

ECM Additive had lost molecular weight after biodegradation testing. (RX 838 at 73 (8/1/2012 Report)).

1307.In the test marked RX 838, both the number average and the weight average molecular weights of the 1.5% ECM treated plastic had declined by about 16%, as measured using a different ASTM standard, ASTM D6579, which is a standard for calculating molecular weight averages and molecular weight distribution in the test sample vs. the negative control. (RX 838 at 73 (8/1/2012 Report)).

1308.For comparison, the biodegradation percentage recorded by NE Labs at the end of the RX 838 testing, measured by methane conversion, was listed at about 17%. (RX 838 at 72 (6/4/2012 Report)).

1309.In comments written on NE Labs' certificate of analysis, of the test marked RX 838, NE Labs explained that "change in molecular weight is a measure of bulk deterioration. As an analytical method it indicates that polymer chains are breaking down or cleaving during biodegradation." (RX 838 at 73 (8/1/2012 Report)).

1310.The NE Labs Minigrips test (RX 838) demonstrated about 6% biodegradation based on methane conversion after 30 days of testing, before ultimately continuing to biodegrade to more than 17% after 365 days of testing. (RX 838 at 6 (6/13/2011 Report)).

1311.The 17% biodegradation of the test substrate in the test marked RX 838 was confirmed through molecular weight testing, and far exceeded the amount of biodegradation that could have been sourced from the ECM Additive alone. (RX 838; RX 968; Barlaz, Tr. 2252-2258).

1312.Having reviewed the Minigrips data, Mr. Johnson testified that by the end of the test marked RX 838, there was virtually no activity of any kind occurring in any of the test vessels. (Johnson, Tr. 1589-1590).

iii. RX 398, NE Labs N0946510-01 (Masternet I)

1313.In December 2009, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs N0946510-01 (Masternet I), marked RX 398. (RX 398).

1314.NE Labs performed the test marked RX 398 on behalf of Masternet Ltd. in Mississauga, Ontario, Canada. (RX 398 at 1).

1315.The test marked RX 398 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 398; Johnson, Tr. 1571).

1316.The test marked RX 398 included the use of an inoculum blank, a negative control (untreated plastic, polyethylene), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 398 at 2; Johnson, Tr. 1575).

1317.The test marked RX 398 included a polyethylene plastic amended with 1% ECM Additive. (RX 398 at 1).

1318.The plastic test sample in the test marked RX 398 had an initial weight of 25 grams. (RX 398 at 2).

1319.NE Labs recorded data for the test marked RX 398 through 15 days. (RX 398 at 4).

1320.In the test marked RX 398, NE Labs recorded biodegradation of the ECM amended polyethylene in the amount of 4.91% after 15 days of anaerobic testing. (RX 398 at 4).

1321.The 4.91% biodegradation within 15 days of anaerobic testing, calculated based on methane conversion, in the test marked RX 398, is more than the 3.65% biodegradation observed in the first 15 days of testing in the NE Labs Minigrips test, marked RX 838. (RX 398 at 4; RX 838 at 6 (6/13/2011 Report)).

1322.Dr. Barlaz reviewed the raw data provided by NE Labs, including data pertaining to the test marked RX 398. (RX 398; RX 472; RX 968; Barlaz, Tr. 2252-2258).

1323.In the test marked RX 398, for the ECM amended plastic, NE Labs reported 2,628 mL of total methane, compared to 1,554 mL of methane in the inoculum blank. (RX 398; RX 472; RX 968).

1324.The net methane yield between the inoculum and the test vessel in the test marked RX 398 was 1,074.3 mL. (RX 398; RX 472; RX 968).

1325.Dr. Barlaz calculated methane and carbon dioxide t-statistics, and determined that the results of the test marked RX 398 were statistically significant. (RX 472; RX 968; Barlaz, Tr. 2259-2260).

1326.The mass of the 1% ECM amended polyethylene sample in the test marked RX 398 was 25 grams. At 1% by weight, the mass of the ECM Additive in the sample test was approximately 0.25 grams. (RX 398 at 1; RX 968; Barlaz, Tr. 2251-2254).

1327.Based on Dr. Barlaz's calculations from the data from the test marked RX 398, the total theoretical yield of methane from the 1% ECM Additive tested in the test marked RX 398 is 233.25 mL of methane, calculated by multiplying the weight of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1328.At a net methane yield of 1,074.3 mL, the biodegradation of the test plastic in the test marked RX 398 was more than four and one half times the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 398; RX 968; Barlaz, Tr. 2252-2258).

iv. RX 405, NE Labs 1048742-01 (Eco SmartPlastics I)

1329.In November 2010, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1048742-01 (Eco SmartPlastics I), marked RX 405. (RX 405).

1330.NE Labs performed the test marked RX 405 on behalf of Eco SmartPlastics in Bohemia, New York. (RX 405 at 1).

1331.The test marked RX 405 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 405; Johnson, Tr. 1571).

1332.The test marked RX 405 included the use of an inoculum blank, a negative control (untreated plastic, polypropylene), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 405 at 2; Johnson, Tr. 1575).

1333.The test marked RX 405 included a low-density polyethylene plastic ("LDPE") amended with 1.5% ECM Additive. (RX 405 at 1).

1334.The plastic test sample in the test marked RX 405 had an initial weight of 25 grams. (RX 405 at 1).

1335.NE Labs recorded data for the test marked RX 405 through 45 days. (RX 405 at 3).

1336.In the test marked RX 405, NE Labs recorded biodegradation of the ECM amended low-density polyethylene in the amount of 7.37% after 45 days of anaerobic testing. (RX 405 at 3).

1337.The 7.37% biodegradation within 45 days of anaerobic testing, calculated based on methane conversion, in the test marked RX 405, is roughly equal to the 7.53% biodegradation observed in the first 45 days of testing in the NE Labs Minigrips test, marked RX 838. (RX 405 at 3; RX 838 at 9 (7/5/2011 Report)).

v. RX 396, NE Labs 1048819 (Eco SmartPlastics II)

1338.In December 2010, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1048819 (Eco SmartPlastics II), marked RX 396. (RX 396).

1339.NE Labs performed the test marked RX 396 on behalf of Eco SmartPlastics in Bohemia, New York. (RX 396 at 1).

1340.The test marked RX 396 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 396; Johnson, Tr. 1571).

1341.The test marked RX 396 included the use of an inoculum blank, a negative control (untreated plastic, polypropylene), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 396 at 1-2; Johnson, Tr. 1575).

1342.The test marked RX 396 included a polyethylene terephthalate ("PET") plastic amended with the ECM Additive. (RX 396 at 1; CCX 413).

1343.In the test marked RX 396, the plastic test sample had an initial weight of 25 grams. (RX 396 at 1).

1344.The test report does not specify the amount of ECM Additive included in the test plastic in the test marked RX 396. (RX 396).

1345.Eco SmartPlastics used a 1.5% load rate for the ECM Additive in other plastic applications. (RX 405 at 1).

1346.NE Labs recorded data for the test marked RX 396 through 43 days. (RX 396 at 3).

1347.In the test marked RX 396, NE Labs recorded biodegradation of the ECM amended polyethylene in the amount of 7.01% after 45 days of anaerobic testing. (RX 396 at 4).

1348.The 7.01% biodegradation within 45 days of anaerobic testing, calculated based on methane conversion, in the test marked RX 396, is roughly equal to the 7.53% biodegradation observed in the first 45 days of testing in the NE Labs Minigrips test, marked RX 838. (RX 396 at 4; RX 838 at 9 (7/5/2011 Report)).

1349.For the ECM amended plastic in the test marked RX 396, NE Labs reported 3,496 mL of total methane, compared to 1,821 mL of methane in the inoculum blank. (RX 396 at 4).

1350.The net methane yield between the inoculum and the test vessel in the test marked RX 396 was 1,675 mL. (RX 396 at 4).

1351.In the test marked RX 396, even assuming Eco Smartplastics included the ECM Additive in the test PET plastic at an amount as high as 2%, a load rate higher than Eco SmartPlastics previously used, the mass of the sample would have been 0.5 grams. (Barlaz, Tr. 2251-2254).

1352.Based on Dr. Barlaz's calculations from the data from the test marked RX 396, the total theoretical yield of methane from a 2% ECM Additive (0.5 grams) tested in the test marked RX 396 is 466.5 mL of methane, calculated by multiplying the weight of the ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1353.At a net methane yield of 1,675 mL, the biodegradation of the test plastic in the test marked RX 396 was more than three and one half times the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 396; RX 968; Barlaz, Tr. 2252-2258).

vi. RX 395, NE Labs 1150851 (Sweet Tape Enterprise)

1354.In September 2011, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1150851 (Sweet Tape Enterprise, marked RX 395. (RX 395).

1355.NE Labs performed the test marked RX 395, on behalf of Sweet Tape Enterprise (M) Sdn. Bhd., in Malaysia. (RX 395 at 1).

1356.The test marked RX 395 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 395; Johnson, Tr. 1571).

1357.The test marked RX 395 included the use of an inoculum blank, a negative control (untreated plastic, polyethylene), a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 395 at 1-2; Johnson, Tr. 1575).

1358.The test marked RX 395 included a polypropylene ("PP") clear tape plastic amended with the ECM Additive. (RX 395 at 1; CCX 413).

1359.In the test marked RX 395, the plastic test sample had an initial weight of 25 grams. (RX 395 at 1).

1360.The test report for the test marked RX 395 does not specify the amount of ECM Additive included in the test plastic. (RX 395).

1361.NE Labs recorded data for the test marked RX 395 through 45 days. (RX 395 at 3).

1362.In the test marked RX 395, NE Labs recorded biodegradation of the ECM amended PP sample in the amount of 4.54% after 45 days of anaerobic testing. (RX 395 at 3).

vii. RX 394, NE Labs 1150851 (Tycoplas Sdn. Bhd.)

1363.In October 2011, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1150851 (Tycoplas Sdn. Bhd.), marked RX 394. (RX 394).

1364.NE Labs performed the test marked RX 394 on behalf of Tycoplas Sdn. Bhd. (RX 394 at 1).

1365.The test marked RX 394 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 394; Johnson, Tr. 1571).

1366.The test marked RX 394 included the use of an inoculum blank, a negative control (untreated polyethylene), a positive

control (cellulose), and a test sample, all of which were run in triplicate. (RX 394 at 1; Johnson, Tr. 1575).

1367.The test marked RX 394 included a plastic amended with the ECM Additive. (RX 394).

1368.In the test marked RX 394, the plastic sample was labeled PS Foam Lunch Boxes with ECM Additive. (RX 394 at 1).

1369.NE Labs recorded data for the test marked RX 394 through 15 days. (RX 394 at 3).

1370.In the test marked RX 394, NE Labs recorded biodegradation of the ECM amended polystyrene sample in the amount of 5.89% after 15 days of anaerobic testing. (RX 394 at 3).

1371.Dr. Barlaz reviewed the raw data provided by NE Labs, including data pertaining to the test marked RX 394. (RX 394; RX 968; Barlaz, Tr. 2252-2258).

1372.For the test PS sample in the test marked RX 394, NE Labs reported 1,962 mL of total methane, compared to just 621 mL of methane in the inoculum blank. (RX 394 at 3; RX 472; RX 968).

1373.The net methane yield between the inoculum and the test vessel in the test marked RX 394 was 1,340.6 mL. (RX 394; RX 472; RX 968).

1374.Dr. Barlaz calculated the mean substrate to inoculum ratio at 3.2 for the test marked RX 394, affirming that the methane content observed in the test vessels was from the test substrate (the plastic). (RX 394; RX 968; Barlaz, Tr. 2247-2249, 2260-2263).

1375.Dr. Barlaz calculated methane and carbon dioxide t-statistics, and determined that the results in the test marked RX 394 were statistically significant. (RX 472; RX 968; Barlaz, Tr. 2259-2260).

1376.The mass of the test sample in the test marked RX 394 was 25 grams. The test report (RX 394) does not specify the load rate of the ECM Additive in the test polystyrene product. (RX 394 at 1, 3).

1377.In the test marked RX 394, even assuming the ECM Additive was included at a 2% load rating, an amount higher than the 1.0-1.5% customers ordinarily use, the mass of the ECM Additive would be 0.5 grams. (RX 394 at 3; RX 968; Barlaz, Tr. 2251-2254).

1378.Based on Dr. Barlaz's calculations from the data from the test marked RX 394, the total theoretical yield of methane from 0.5 grams of the ECM Additive is 466.5 mL of methane, calculated by multiplying the weight of ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1379.At a net methane yield of 1,340.6 mL, the biodegradation of the test plastic in the test marked RX 394 was about three times the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 394; RX 968; Barlaz, Tr. 2252-2258).

1380.Dr. Barlaz also calculated standard deviations for the test marked RX 394, which were within reasonable limits as expressed by the t-statistics. (RX 968; RX 472; Barlaz, Tr. 2264).

1381.Based in part on the test marked RX 394, Dr. Barlaz testified that the scientific evidence showed that plastic containing the ECM Additive anaerobically biodegraded. (RX 968; Barlaz, Tr. 2274).

1382.Whereas the NE Labs Minigrips test, marked RX 838, demonstrated about 6% biodegradation based on methane conversion after 30 days of testing, before ultimately continuing to biodegrade to more than 17% after 365 days of testing, the NE Labs Tycoplas test, marked RX 394, exhibited nearly 6% biodegradation in roughly half the time. (RX 394). (RX 394; RX 838 at 6 (6/13/2011 Report)).

viii. RX 393, NE Labs 1253020 (National Tree Co.)

1383.In April 2012, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1253020 (National Tree Co.), marked RX 393. (RX 393).

1384.NE Labs performed the test marked RX 393 on behalf of National Tree Co. in Cranford, New Jersey. (RX 393 at 1).

1385.The test marked RX 393 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 393; Johnson, Tr. 1571).

1386.The test marked RX 393 included the use of inoculum blanks, negative controls (untreated plastic, PVC and PE), a positive control (cellulose), and two test samples, all of which were run in triplicate. (RX 393 at 1-2; Johnson, Tr. 1575).

1387.The test marked RX 393 included two test samples amended with the ECM Additive. (RX 393 at 1-2).

1388.In the test marked RX 393, one test sample was "PVC, Treated," the other test sample was "PE, Treated." (RX 393 at 2).

1389.Both test samples were 25 grams at the start of testing in the test marked RX 393. (RX 393 at 2).

1390.In the test marked RX 393, the negative controls involved untreated plastics, "PVC, Untreated" and "PE, Untreated." (RX 393 at 2).

1391.NE Labs recorded data for the test marked RX 393 through 15 days of anaerobic testing. (RX 393 at 4).

1392.In the test marked RX 393, NE Labs recorded biodegradation of the ECM amended PVC sample in the amount of 9.89% after 15 days of anaerobic testing. (RX 393 at 4).

1393.In the test marked RX 393, NE Labs recorded biodegradation of the ECM amended PE sample in the amount of 5.75% after 15 days of anaerobic testing. (RX 393 at 4).

1394.For the ECM amended PVC sample in the test marked RX 393, NE Labs reported 1119 mL of total methane, compared to 254 mL of methane in the inoculum blank. (RX 393 at 4).

1395.The net methane yield between the inoculum and the treated PVC sample in the test marked RX 393 was 865 mL. (RX 393 at 4).

1396.For the amended PE sample in the test marked RX 393, NE Labs reported 1451 mL of total methane, compared to 254 mL of methane in the inoculum blank. (RX 393 at 4).

1397.The net methane production in the PE treated sample in the test marked RX 393 was 1,197 mL of methane gas. (RX 393 at 4).

1398.In the test marked RX 393, the negative controls for PVC and PE reported 238 mL and 219 mL of methane respectively, which is consistent with the 254 mL of methane produced in the inoculum blank. (RX 393 at 4).

1399.The test report (RX 393) does not specify the amount of ECM Additive included in the test plastic in the test marked RX 393. (RX 393).

1400.In the test marked RX 393, even assuming National Tree Co. included the ECM Additive in the test plastics at an amount as high as 2%, a load rate higher than ECM recommended and higher than other customers ordinarily used, the mass of the ECM Additive in the samples would have been 0.5 grams. (Barlaz, Tr. 2251-2254).

1401.Based on Dr. Barlaz's calculations from the data from the test marked RX 393, the total theoretical yield of methane from 0.5 grams of the ECM Additive is 466.5 mL of methane, calculated by multiplying the weight of the ECM Additive by Dr. Barlaz's calculation of the mL of methane per gram of ECM Additive (933 mL). (RX 968; Barlaz, Tr. 2252-2258).

1402.At a net methane yield of 865 mL, the biodegradation of the treated PVC plastic in the test marked RX 393 was almost

twice the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 393; RX 968; Barlaz, Tr. 2252-2258).

1403.Similarly, at a net methane yield of 1,197 mL, the biodegradation of the treated PE plastic sample in the test marked RX 393 was more than two and one half the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. (RX 393; RX 968; Barlaz, Tr. 2252-2258).

ix. RX 392, NE Labs 1048036 (Transilwrap Co.)

1404.In April 2011, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs 1048036 (Transilwrap Co.), marked RX 392. (RX 392).

1405.NE Labs performed the test marked RX 392 on behalf of Transilwrap Co. in Richmond, Indiana. (RX 392 at 1).

1406.In the test marked RX 392 is an NE Labs analytical report of the type normally supplied by NE Labs. (RX 392; Johnson, Tr. 1571).

1407.The test marked RX 392 included the use of inoculum blanks, negative controls (polyethylene), a positive control (cellulose), and two test samples, all of which were run in triplicate. (RX 392 at 1-2; Johnson, Tr. 1575).

1408.The test marked RX 392 included two test samples amended with the ECM Additive. (RX 392 at 1-2).

1409.One test sample in the test marked RX 392 was a Thin HIPS ("High Impact Polystyrene") Based Sheet; the other test sample was a "Two Layer Laminating Film." Both test samples were 25 grams at the start of testing. (RX 392 at 1; CCX 273).

1410.Transilwrap described the samples in the test marked RX 392 as a "HIPS sheet allow with the ECM Additive, and a thin film PETG coated with EVA (also both having [the ECM] additive)." (CCX 273 at 3).

1411.NE Labs recorded data for the test marked RX 392 through 233 days of anaerobic testing. (RX 392 at 4).

1412.In the test marked RX 392, NE Labs recorded biodegradation of the ECM amended HIPS polystyrene sample in the amount of 7.85% after 233 days of anaerobic testing. (RX 392 at 4).

1413.In the test marked RX 392, NE Labs recorded biodegradation of the ECM amended Two Layer Laminating Film sample in the amount of 8.53% after 233 days of anaerobic testing. (RX 392 at 4).

1414.The test report (RX 392) does not specify the amount of ECM Additive included in the test plastic in the test marked RX 392. (RX 392).

x. RX 399, NE Labs N0843980 (Bio-Tec Environmental, LLC)

1415.In December 2008, NE Labs reported biodegradation test data from an anaerobic D5511 biodegradation test in laboratory reactors, NE Labs N0843980 (Bio-Tec Environmental), marked RX 399. (RX 399).

1416.NE Labs performed the test marked RX 399 on behalf of Bio-Tec Environmental, LLC in Albuquerque, New Mexico. (RX 399 at 1).

1417.The test marked RX 399 is an NE Labs analytical report similar to the type ordinarily supplied by NE Labs. (RX 399; Johnson, Tr. 1571).

1418.The test marked RX 399 included the use of an inoculum blank, a negative control, a positive control (cellulose), and a test sample, all of which were run in triplicate. (RX 399 at 1-2; Johnson, Tr. 1575).

1419.The test marked RX 399 included a polypropylene plastic sheet amended with the ECM Additive. (RX 399 at 1; CCX 413).

1420.In the test marked RX 399, the plastic test sample had an initial weight of 100 grams. (RX 399 at 1).

1421.The test report (RX 399) does not specify the amount of ECM Additive included in the test plastic in the test marked RX 399. (RX 399).

1422.In the test marked RX 399, NE Labs recorded data through 14 days. (RX 399 at 2).

1423.In the test marked RX 399, one of the earlier NE Labs biodegradation tests, NE Labs used two endpoints to assess biodegradation, methane gas conversion and gravimetric weight loss. (RX 399 at 2).

1424.Although gas data was not available, NE Labs concluded in the test marked RX 399 that, based on the average weight loss of the triplicate test samples and the methane gas conversion, the "results indicate[d] that the treated PP Sheets was biodegradable." (RX 399 at 2).

c. Anaerobic testing by North Carolina State University

1425.In his research program at North Carolina State University, Dr. Barlaz has conducted numerous tests on the biodegradation of various components of MSW. (Barlaz, Tr. 2071).

1426.Dr. Barlaz performs commercial BMP testing (F. 750) in his lab for interested companies. (Barlaz, Tr. 2265).

1427.Dr. Barlaz's experience with BMP testing is primarily with cellulosic material, which means that the majority of his testing has involved MSW testing, and cellulose is a major biodegradable component of same. (Barlaz, Tr. 2266).

1428.Dr. Barlaz's BMP tests are performed in a completely liquid environment. (Barlaz, Tr. 2222-2223).

1429.Dr. Barlaz's BMP tests are performed at 37 degrees Celsius. (RX 853 (Barlaz Expert Report at 8)).

1430.Dr. Barlaz's BMP studies have been conducted mostly up to 60 days in duration. (Barlaz, Tr. 2267).

1431.With respect to slowly degrading materials, the BMP test that Dr. Barlaz runs is likely not representative of the total biodegradation expected from the material, and thus it is quite possible that the material would have continued to biodegrade after Dr. Barlaz terminated his test. (Barlaz, Tr. 2267-2268).

1432.If the experimental goal of the test is to capture the maximum methane yield of a test substrate, then a 60-day test is too short to accomplish that objective. (Barlaz, Tr. 2267-2268).

1433.Dr. Barlaz conducted four biodegradation tests of ECM Plastics using the BMP test in his laboratory at North Carolina State University. (CCX 946; CCX 951; CCX 952; CCX 954; Barlaz, Tr. 2306-2320).

1434.The results of Dr. Barlaz's BMP test of ECM Plastics, marked CCX 951, showed no methane production. (CCX 951).

1435.The results of Dr. Barlaz's BMP tests of ECM Plastics, marked CCX 946 and CCX 954, showed negligible amounts of methane production. (CCX 946; CCX 954).

1436.The results of Dr. Barlaz's BMP test of ECM Plastics, marked CCX 952, showed significant and continuing biodegradation. (Barlaz, Tr. 2269-2274). These results are discussed further in F. 1437-1447.

i. CCX 952, NC State 2010 StarchTech BMP

1437.In March 2010, Dr. Barlaz reported results from a BMP test that he performed on behalf of StarchTech involving recycled polystyrene loosefill peanuts with the ECM Additive, NC State 2010 StarchTech BMP Testing, marked CCX 952. (CCX 952).

1438.In the test marked CCX 952, Dr. Barlaz performed his BMP test as he did other BMP tests performed at his North Carolina State University laboratory. (Barlaz, Tr. 2220-2222, 2269-2272).

1439.In the test marked CCX 952, Dr. Barlaz tested two materials, a recycled polystyrene loosefill plastic with the ECM Additive, and a starch-based biodegradable loosefill product. (Barlaz, Tr. 2270).

1440.Dr. Barlaz's results in the text marked CCX 952 showed significant methane generation that was attributed to the test substrate, *i.e.*, the plastic. (Barlaz, Tr. 2270; CCX 952).

1441.In the test marked CCX 952, Dr. Barlaz calculated the percent that each material was converted to methane, subtracting the methane produced from the inoculum blanks. (Barlaz, Tr. 2270-2271; CCX 952).

1442.In the test marked CCX 952, Dr. Barlaz calculated the percentage of biodegradation by examining the percent loss of volatile solids, which was 7.4% of the ECM-amended polystyrene loosefill product in 60 days. (CCX 952; Barlaz, Tr. 2271).

1443.In the test marked CCX 952, although Dr. Barlaz terminated his BMP test on day 60, he observed that the short term, laboratory-scale biodegradation test was not an accurate representation of the biodegradation potential of the sample. (Barlaz, Tr. 2271-2274).

1444.Dr. Barlaz's test report of the test marked CCX 952 included methane production data at day 30 and day 60. Dr. Barlaz explained that "the methane generation on day 60 is double that of the methane generation on day 30, so there – the implication is that the measured methane is a lower limit and more methane would have been produced had we run the test for longer than 60 days." (CCX 952 at 2; Barlaz, Tr. 2271).

1445.In the test marked CCX 952, the fact that methane generated during days 31-60 was equal to or more than methane generated on days 1-30 was scientifically significant because it demonstrates that the test sample was likely to evidence more biodegradation than the 60-day BMP test would suggest. (Barlaz, Tr. 2271-2272).

1446.In the test marked CCX 952, according to Dr. Barlaz, there was "no evidence that methane generation is slowing down,

whereas, if you look at the second material [starch-based product,] there's considerable evidence that methane generation is slowing down." (Barlaz, Tr. 2271-2272).

1447.Regarding the test marked CCX 952, Dr. Barlaz has concluded that this observed phenomena "speaks to the BMP as I've been using it with cutting it off at 60 days is perhaps imperfect or not appropriate if I have a slowly degradable substrate." (Barlaz, Tr. 2272).

d. Other anaerobic gas evolution testing

i. RX 265, OWS Microtech Research Inc. (Feb. 1999)

1448.In February 1999, Organic Waste Systems Inc. ("OWS") reported the results of anaerobic testing on the ECM additive pellets, OWS Microtech Research Inc. Anaerobic Testing, marked RX 265. (RX 265 at 6).

1449.In the test marked RX 265, OWS performed the test titled, "High Solids Anaerobic Digestion (HSAD) Test of ECM pellets," on behalf of Patrick F. Riley of Microtech Research. (RX 265).

1450.The OWS test marked RX 265 was performed under the ASTM D5511-94 method. (RX 265).

1451.In the OWS test marked RX 265, the substance tested was the ECM pellets by themselves. (RX 265).

1452.At the time of the test marked RX 265, in 1999, the ECM pellets were comprised of approximately 50% active biodegradable components, and 50% of a traditionally non-biodegradable carrier resin. (CCX 818 (Sinclair, Dep. at 116)).

1453.ECM later changed its load rating to a 70% load of the actively biodegradable components. (CCX 818 (Sinclair, Dep. at 118-120)).

1454.In the test marked RX 265, OWS measured total gas volume using a graduated cylinder. (RX 265 at 8).

1455.The OWS test marked RX 265 was conducted at a 34.1% solids content (63.9% moisture). (RX 265 at 12).

1456.In the test marked RX 265, after 15 days, the ECM pellets anaerobically biodegraded 24%. (RX 265 at 17).

1457.The test marked RX 265 was terminated after 15 days. (RX 265).

ii. RX 268, OWS Covidien (May 2010)

1458.In May 2010, OWS reported the results of anaerobic testing on polypropylene ("PP") product labeled "polypropylene plaques" in the OWS Covidien Anaerobic Testing, marked RX 268.[15] (RX 268 at 6).

1459.In the OWS test, marked RX 268, OWS performed the test titled, "High Solids Anaerobic Digestion (HSAD) Test," on behalf of Covidien in Mansfield, MA. (RX 268 at 1).

1460.The OWS test, marked RX 268, was performed under the ASTM D5511-02 method. (RX 268 at 3).

1461.In the OWS test, marked RX 268, the positive control, cellulose, reached a plateau at 69.5%. (RX 268 at 4).

1462.In the OWS test, marked RX 268, the failure to achieve 70% biodegradation in the positive control is an indication that the test environment was not suitable for biodegradation testing. (*See* RX 356 at 3 § 11.2.1.1).

1463.The OWS test, marked RX 268, revealed 3.9% biodegradation of the test sample in 15 days of anaerobic degradation. (RX 268 at 7).

1464.The test marked RX 268 indicated that the sample vessels plateaued around the same time as the cellulose vessels plateaued at 69.5%. (RX 268 at 5-7).

[15] The OWS Covidien Anaerobic Testing (May 2010) was entered into evidence as both CCX 157 and RX 268.

1465.In another OWS test performed for Microtech Research Inc. in 1999, the test marked RX 265, OWS wrote that cellulose should biodegrade at least to 85% through gas evolution, while at most 15% of the cellulose can be assimilated by microorganisms or left as other byproduct. (RX 265 at 16-17).

iii. CCX 164, Dr. Michel's study

1466.Dr. Michel co-authored a study titled, "*Biodegradation of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation*," *Journal of Polymer Degradation & Stability 98* (2013) 2583-2591 ("Dr. Michel's study"). (Michel, Tr. 2903-2904; CCX 164).

1467.Myers Industries ("Myers") funded, in part, Dr. Michel's study, marked CCX 164. (Michel, Tr. 2941).

1468.In Dr. Michel's study, marked CCX 164, Dr. Michel assessed the anaerobic biodegradability of a wide range of commercially available materials used to manufacture plastic products. (Michel, Tr. 2904; CCX 164).

1469.In order to measure the anaerobic biodegradation of plastics infused with the ECM Additive, Dr. Michel's study, marked CCX 164, ran a soil test lasting over two years and a protocol similar to that described in ASTM D5511-02. (Michel, Tr. 2904-2905; CCX 164).

1470.In testing for anaerobic biodegradation of ECM Plastics in his peer-reviewed study, marked CCX 164, Dr. Michel did not use C-14 radiolabeling testing, *in situ* testing, or lysimeter testing. (Michel, Tr. 2906-2907; CCX 164).

1471.For Dr. Michel's study identified as CCX 164, Myers prepared the two sample materials said to contain the ECM Additive. (Michel, Tr. 2925; CCX 164).

1472.Dr. Michel does not have a certificate of ingredients regarding the samples provided to him by Myers for the study marked CCX 164. (Michel, Tr. 2933).

1473.Other than stating that the samples containing the ECM Additive were produced by injection molding, Dr. Michel's study, marked CCX 164, does not indicate the conditions for the injection molding and does not identify the particular processing conditions that were used in the injection molding of the blends containing the ECM Additive. (Michel, Tr. 2926-2927; CCX 164).

1474.Dr. Michel did not contact ECM directly and did no testing of the plastics to ensure that Myers had properly manufactured the plastics purportedly containing the ECM Additive for the study marked CCX 164. (Michel, Tr. 2935-2936).

1475.Dr. Michel performed no tests on the samples in the study marked CCX 164 to determine whether any ingredient in the plastic had an adverse effect on microbial life forms in the test environment. (Michel, Tr. 2938).

1476.Dr. Michel conducted no investigation of the inoculum used in the study marked CCX 164 to determine if the inoculum remained viable halfway through the test. (Michel, Tr. 2961-2962).

1477.Both Dr. Michel's study, marked CCX 164, and his expert rebuttal report fail to inform the reader as to the molecular weight or the level of crystallinity of the polypropylene or of the polystyrene employed in the study. (Michel, Tr. 2962-2963; CCX 164; CCX 895 (Michel Rebuttal Expert Report)).

1478.Dr. Michel's study, marked CCX 164, reveals no investigation to determine which kinds of bacteria were alive within the test environment at the conclusion of the study. (Michel, Tr. 2963).

1479.Myers first paid Dr. Michel to conduct a study in 2008 or 2009 and has paid Dr. Michel approximately $40,000 to $50,000 for his work. (Michel, Tr. 2928-2929).

1480.Dr. Michel is aware, and has been aware since he first started doing work for Myers, that Myers sells nursery pots made

out of natural fibers, and that Myers probably markets those pots as compostable or biodegradable. (Michel, Tr. 2931-2932).

1481.The composting industry generally, and compostable plastics specifically, directly compete with ECM and other companies within the biodegradable plastics industry. (Sullivan, Tr. 696-697; Sinclair, Tr. 775-777).

1482.Dr. Michel is aware of the ethical standards that apply to peer-reviewed journal publications in his field. (Michel, Tr. 2939).

1483.Dr. Michel submitted his article, marked CCX 164, to Elsevier, Inc. ("Elsevier") for peer-review publication. When he did so, Dr. Michel submitted only the article itself, and no other documentation such as the underlying data upon which the study was based. Dr. Michel's article does not report the methane levels, the percentages of total gas composition, or triplicate data. (Michel, Tr. 2940; CCX 164).

1484.Elsevier based its decision to publish Dr. Michel's study solely on the text of the article and no underlying data. The data underlying this study, marked CCX 164, was not the subject of peer review. (Michel, Tr. 2940).

1485.Dr. Michel did not disclose to Elsevier that Myers funded his study, marked CCX 164. (Michel, Tr. 2942).

1486.Dr. Michel did not disclose the fact that Mr. Eddie Gomez, a co-author of Dr. Michel's article, marked CCX 164, was financially supported mostly by Myers' contributions to Ohio State University. (Michel, Tr. 2942; CCX 164).

1487.Under an agreement between Dr. Michel, Mr. Gomez, and Myers, Dr. Michel could disseminate data obtained and used in CCX 164 only after revision by Myers. (Michel, Tr. 2943-2944; RX 223 at 15).

1488.Dr. Michel did not disclose to Elsevier the fact that dissemination of the data (described in F. 1487), which was funded by Myers, could only occur after revision by Myers. (Michel, Tr. 2944).

1489.Although Dr. Michel testified that Myers did not approve his article later marked CCX 164 before Dr. Michel sent it to Elsevier, Mr. Gomez sent Dr. Michel's article directly to Myers for approval before sending it to Elsevier. (Michel, Tr. 2945-2947; RX 244).

1490.Dr. Michel did not disclose the fact that Myers approved the article, marked CCX 164, before submitting it for peer review to either Elsevier or in the article itself. (Michel, Tr. 2947).

1491.Mr. Tarang Shah was an employee for Myers at the time Dr. Michel conducted his studies for his article marked CCX 164. (Michel, Tr. 2946-2948).

1492.Mr. Gomez asked Mr. Shah whether he had any suggestions for conducting the research for Dr. Michel's article marked CCX 164. (Michel, Tr. 2948).

1493.Dr. Michel did not disclose to Elsevier, or in the article itself, the fact that Mr. Gomez asked an employee of Myers for suggestions regarding the article marked CCX 164. (Michel, Tr. 2948).

1494.Dr. Michel did not disclose to Elsevier, or in the article itself, the fact that an employee of Myers worked with Mr. Gomez and Dr. Michel on the article marked CCX 164. (Michel, Tr. 2948).

1495.Elsevier's conflicts of interest policy requires that all funding sources be declared. (Michel, Tr. 2951-2952).

1496.Dr. Michel is aware that reputable peer-review publishers, like Elsevier, require disclosures of conflicts of interest. (Michel, Tr. 2950).

F. Materiality

1497.ECM's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years and that that tests prove such claim, were material to ECM Customers, and customers of ECM's

Customers. (F. 1498-1502, 1510, 1512; *see also* F. 245-247, 280, 286, 292-293, 300).

1498.ECM's claim that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years was expressly made. (CCX 3; *see also* CCX 5; CCX 6; CCX 7 at 6; CCX 10, CCX 11; CCX 19 at 5; CCX 24 at 6; CCX 25 at 104, 117, 203, 208; CCX 259A; *see also* CCX 809 (Flexible, Dep. at 20); *see also* CCX 822 (ANS, Dep. at 13); CCX 812 (Kappus, Dep. at 14); F. 245-247).

1499.ECM's claim that tests prove ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, while not an express statement, was clear and conspicuous based on the overall net impression of the marketing materials upon which the claim appeared. (CCX 5; CCX 6; CCX 10; CCX 11; *see* F. 265).

1500.ECM's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim, pertain to the central characteristics of the ECM Additive. (F. 245-246, 265, 1498)

1501.ECM reiterated its claim that independent tests proved its additive caused ECM Plastics to fully biodegrade in 9 months to 5 years in a landfill in its communications with Customers. (CCX 266; CCX 270 at 2; CCX 277 at 4; CCX 281; CCX 296 at 2; CCX 298; CCX 300; CCX 302; CCX 303; CCX 332; CCX 333; CCX 334; CCX 335; CCX 336; CCX 337; CCX 338; CCX 404 at 2).

1502.ECM Customers asked questions about the claim that ECM Plastics would biodegrade in 9 months to 5 years. (CCX 423 at 9 (customer wanting to know if complete biodegradation can be stated to happen by 5 years); CCX 300 at 1 ("Does ECM test, or recommend testing, the end-users' products to ensure that they biodegrade in less than 5 years?"); CCX 269 at 1 ("What determines 9 months vs 5 years as it is such a variance?"); CCX 400 at 4 (asking ECM precisely how much additive it needed to use in its products "to meet your stated degradation timeline of 9 months to 5 years").

1503.ECM's Customers are motivated to produce biodegradable plastics to meet what they perceived to be their

customers' demand for such products. (CCX 809 (Flexible, Dep. at 72) ("There is a lot of backlash against plastic bags. A lot of people don't like plastic bags."); CCX 800 (BER, Dep. at 18) ("[Customers] were looking for a product they could mark as degradable to say that they were being, you know, environmentally sensitive. It's very important in their packaging, that they could . . . print it right on the package, you know, biodegradable."); CCX 822 (ANS, Dep. at 13) ("People . . . don't want to pollute the environment and this [biodegradable plastics] is what they choose to buy.")).

1504.ANS Plastics ("ANS"), an ECM Customer, believes its customers, such as health stores, are interested in purchasing biodegradable plastics because they want to be "green," and that people do not want to pollute the environment. (CCX 822 (ANS, Dep. at 13)).

1505.Flexible Plastics, an ECM Customer, became interested in the ECM Additive because its customers wanted environmentally friendly alternative for plastic bags that were feasible economically, and corn-based bags were too expensive for its customers to sell. (CCX 809 (Flexible, Dep. at 14-16)).

1506.Quest Plastics ("Quest"), an ECM Customer, purchased the ECM Additive to serve its customer, Technical Sourcing Solutions, which wanted to manufacture biodegradable golf tees. Quest found that other additives were not appropriate for the reprocessed styrene the customer wanted, and, also, because other additives were cost prohibitive. (CCX 817 (Quest, Dep. at 19, 22, 25-26)).

1507.In response to Question 2 of the Stewart survey, 71% of the respondents answered yes to the question, "is the fact that a product or package is biodegradable important to you." Although a sizable minority of respondents, 29%, responded that the fact that a product or package is biodegradable is not important to them. (RX 856 (Stewart Expert Report at 24)).

1508.ANS received ECM's literature and certificate, including a flyer, which included the statement "fully biodegrade in 9 months to five years . . . in a landfill." ANS believed that ECM Plastics would biodegrade "[a]nywhere between nine months to

five years that they claim it is." (CCX 822 (ANS, Dep. at 13, 19)).

1509.Flexible Plastics believed that ECM Plastics would biodegrade in 9 months to 5 years. Flexible Plastics believed that the change in ECM's rate language to "some period greater than a year" was due to changes in the FTC's advertising guidelines, not to changes in the ECM Additive. (CCX 809 (Flexible Plastics, Dep. at 28-29); *see also* CCX 800 (BER, Dep. at 33 ("Q. During that time [approximately 2009 to the beginning of 2014], BER understood that plastic treated with the ECM additive should biodegrade in nine months to five years? A. Yes.")).

1510.Down-to-Earth Organic and Natural ("DTE"), a customer of Island Plastic Bags ("IPB"), an ECM Customer, chose to include the 9 Months to 5 Years Claim and related information, as reflected in CCX 44 and 45, on its grocery bags (F. 293, 297-299) because the technology was new and DTE's customers are well informed. DTE wanted to explain why it could make the claim that the bag was biodegradable. DTE also wanted to demonstrate that DTE was doing its part to help the environment. (CCX 803 (DTE, Dep. at 41-43)).

1511.When discussing biodegradation of plastic containing the ECM Additive with Eagle Film Extruders ("Eagle Film"), an ECM Customer, Mr. Sinclair did not discuss any specific time frame regarding how long it takes ECM amended plastics to biodegrade, although Eagle was aware of a claim of biodegradation in 9 months to 5 years in ECM's information. (CCX 804 (Eagle Film, Dep. at 17-18)).

1512.Free-Flow Packaging ("FP"), an ECM Customer, conveyed to its potential customers that its "CELL-O air cushions will decompose completely within 9 to 60 months in the presence of microorganisms whether they are sent to a landfill or end up as litter in the soil" because "[i]t was important to convey a message of biodegradability. . . ." (CCX 810 (FP, Dep. at 24-25); *see also* CCX 565 (FP International advertisement stating "We care about the environment" and that FP's Super 8 brand polystyrene loosefill was, among other things, "biodegradable within 9 to 60 months in the presence of microorganisms when present in a landfill or in soil.")).

1513.ANS does not have anyone on staff that is a materials scientist or environmental scientist, or that is an expert on biodegradability, landfills, or disposal conditions for plastics. ANS does not have an in-house laboratory and did not hire any laboratory to test the biodegradability of ECM Plastics. (CCX 822 (ANS, Dep. at 14-16)).

1514.Mr. Ringley and Mr. Ewasko of BER Plastics ("BER"), an ECM Customer, were the BER employees involved in the decision whether to buy the ECM Additive. Neither of these individuals, or others on the staff of BER, is a polymer, material, or environmental scientist. Neither of these individuals, or others on the staff of BER, is an expert in biodegradability of plastics, disposal conditions for plastics, or landfills. (CCX 800 (BER Dep. at 21-22)).

1515.BER does not have laboratory facilities capable of conducting biodegradability testing, and does not perform any such testing in-house. BER did not hire any outside laboratory to do any testing on the ECM Additive. (CCX 800 (BER Dep. at 23)).

1516.BER reviewed the testing reports provided by ECM, but did not conduct any analysis of the testing or hire anyone else to conduct such analysis. (CCX 800 (BER Dep. at 23-24)).

1517.BER does not have in-house legal counsel, or outside legal counsel, that reviews advertising claims. (CCX 800 (BER Dep. at 25-26)).

1518.IPB, an ECM Customer, has no employees with education or expertise in polymer science, material science, environmental engineering or science, municipal solid waste management, the biodegradability of plastic, and has not engaged outside consultants with expertise in such areas. (CCX 811 (IPB, Dep. at 34-38)).

1519.DTE has never employed anyone with education or expertise in polymer science, material science, environmental engineering or science, municipal solid waste management, the

biodegradability of plastic, or engaged outside consultants with expertise in such areas. (CCX 803 (DTE, Dep. at 13-19)).

1520.Flexible Plastics does not employee any polymer scientists, materials scientists, environmental scientists, or any experts in the biodegradability of plastics, disposal conditions for plastics, or landfills, nor has Flexible Plastics consulted with anyone on such matters. Flexible Plastics does not consider itself to have expertise on the biodegradability of plastics, disposal conditions for plastic or landfills. (CCX 809 (Flexible, Dep. at 35-37)).

1521.Flexible Plastics did not conduct any testing regarding the biodegradability of plastics made with the ECM Additive. Flexible Plastics does not have the equipment to conduct such testing, and would have had to outsource such testing. (CCX 809 (Flexible, Dep. at 37)).

1522.Kappus Plastic ("Kappus"), an ECM Customer, did not have any one involved in the decision to buy the ECM Additive that was a polymer scientist, material scientist, or environmental scientist, or an expert in the biodegradability of plastics, disposal conditions for plastic, or landfills. During the period that Kappus purchased the ECM Additive, Kappus did not have on staff any polymer scientists, material scientists, environmental scientists, or any experts on the biodegradability of plastics, disposal conditions for plastic, or landfills, and Kappus did not consult with anyone on these topics. (CCX 812 (Kappus, Dep. at 18-21)).

1523.Kappus does not have in-house legal counsel or outside counsel that reviews advertising claims. (CCX 812 (Kappus, Dep. at 43)).

1524.Kappus has a limited laboratory that does not do any testing related to the biodegradability of plastics. (CCX 812 (Kappus, Dep. at 43-44)).

1525.No one on Kappus' staff evaluated the testing that ECM provided with respect to the biodegradability of ECM Plastics because Kappus did not have the expertise to determine whether it was accurate or not. (CCX 812 (Kappus, Dep. 21-22)).

1526.Quest, an ECM Customer, does not employ any scientists, researchers, or engineers. Mr. James Bean, president and owner of Quest (*see* F. 77) handles all sales. He has a degree in biology and has no formal education in plastics. Mr. Bean's knowledge comes from his experience working in the plastic molding business. (CCX 817 (Quest, Dep. at 14-17)).

1527.Eagle Film, an ECM Customer, has no in-house expertise regarding the scientific assessment of biodegradability of plastics containing the ECM Additive. From the time Eagle Film began purchasing the ECM Additive to the present, Eagle Film has not employed any polymer scientists, material scientists, environmental scientists, or any experts on the biodegradability of plastics, disposal conditions for plastic, or landfills. (CCX 804 (Eagle, Dep. at 31-32)).

1528.Eagle Film did not have any in-house testing equipment. Eagle Film perceived itself as too small to manage biodegradability testing. (CCX 804 (Eagle, Dep. at 25)).

1529.Quest did not test for biodegradability. Quest did not have staff to conduct such a test. Quest was not aware that there are tests for biodegradability of plastic products. (CCX 817 (Quest, Dep. at 34)).

1530.BioPVC, an ECM Customer, had biodegradability and ecotoxicology testing done on its product. (RX 120; RX 121).

1531.ERL has performed biodegradability testing for ECM Customers. (Poth, Tr. 1481).

1532.NE Labs has conducted testing on plastics infused with the ECM Additive for ECM Customers. (Johnson, Tr. 1576-1577).

1533.3M Company ("3M"), an ECM Customer, conducted in-house biodegradability testing of plastic manufactured with the ECM Additive. 3M does not necessarily rely on third party information with respect to claims regarding biodegradation of a polymer. (CCX 821 (3M, Dep. at 60, 113)).

1534.3M was interested in the ECM Additive because 3M sells plastics and, therefore, wanted to research whether the ECM Additive can help reduce the impact of 3M's products on the environment following disposal. (CCX 821 (3M, Dep. at 42)).

1535.Organic Waste Systems ("OWS") performed biodegradability testing of plastic with the ECM Additive for Covidien, an ECM Customer. (CCX 254; CCX 256).

1536.FP engaged Stevens Ecology to test the biodegradability of their products with the ECM Additive, including testing pursuant to ASTM D5511. (CCX 810 (FP, Dep. at 57-60)).

1537.D&W Fine Pack ("D&W"), an ECM Customer, believed that ECM's former 9 months to 5 years claim was true because of the totality of the information provided by ECM. (CCX 802 (D&W, Dep. at 33)).

1538.D&W has a product development group. (CCX 802 (D&W, Dep. at 155)).

1539.D&W engaged Dr. Timothy Barber and Environ to test the biodegradability of ECM Plastics. (CCX 802 (D&W, Dep. at 95-99)).

III. ANALYSIS

A. Burden of Proof

The parties' burdens of proof are governed by Rule 3.43(a) of the Federal Trade Commission's ("FTC" or "Commission") Rules of Practice for Adjudicative Proceedings ("Rules"), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

It is well established that the preponderance of the evidence standard governs Federal Trade Commission enforcement actions. *In re POM Wonderful LLC*, No. 9344, 2012 FTC LEXIS 106, at *464-65 (May 17, 2012) (Initial Decision); *In re Automotive Breakthrough Sciences, Inc.*, No. 9275, 125 F.T.C. 138, 1998 FTC LEXIS 112, at *38 n.45 (Sept. 9, 1998) (holding that each finding must be "supported by a preponderance of the evidence in the record"); *In re Adventist Health System/West*, No. 9234, 117 F.T.C. 224, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("[e]ach element of the case must be established by a preponderance of the evidence"); *In re Bristol-Myers Co.*, No. 8917, 102 F.T.C. 21, 1983 FTC LEXIS 64, at *143 (July 5, 1983) (Initial Decision) (stating that complaint counsel has "the burden of proving by a preponderance of credible evidence that the challenged advertising claims have not been established or did not have a reasonable basis"). *See also Steadman v. SEC*, 450 U.S. 91, 102, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) (holding that the APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings). Accordingly, FTC Complaint Counsel ("Complaint Counsel") has the burden of proving each factual issue supporting its claims against Respondent in this case by a preponderance of credible evidence. *Bristol-Myers*, 1983 FTC LEXIS 64, at *143-44. *See also FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

As a preliminary matter, Respondent asserts that Complaint Counsel has failed to meet its initial burden of production in this case because Complaint Counsel relied on deposition testimony from 19 fact witnesses, rather than calling such fact witnesses live. *See* RB at 1, 36-37. Complaint Counsel replies that it was not required to call live witnesses and that the introduction of sworn deposition testimony constitutes valid evidence. CCRB at 6. In support of the contention that only live testimony can meet Complaint Counsel's burden of production, Respondent cites *FTC v. Tashman*, 318 F.3d 1273, 1283 (11th Cir. 2003). This is not authority for the proposition that Complaint Counsel was legally required to call live fact witnesses. The portion of the *Tashman* case upon which Respondent relies is a dissenting opinion, and therefore not precedential. Further, the cited portion addresses the persuasive value of certain admitted testimony, and does not

address the proposition urged by Respondent. For all these reasons, the cited authority is legally and factually inapposite.

Moreover, the FTC's Rules expressly authorize introduction of deposition testimony as substantive evidence. 16 C.F.R. § 3.43(b) ("If otherwise meeting the standards for admissibility described in this paragraph, depositions, . . . shall be admissible . . ."). While live testimony does provide a better means to determine the credibility of a witness and is typically more meaningful and persuasive evidence than a deposition transcript, relevant deposition testimony nevertheless constitutes admissible evidence in Commission proceedings. For all these reasons, Respondent's argument that Complaint Counsel failed to meet its burden of production in this case because Complaint Counsel relied upon deposition testimony instead of calling live fact witnesses is rejected.

B. Jurisdiction

Section 5 of the Federal Trade Commission Act ("FTC Act") grants the Federal Trade Commission the authority to prevent "unfair or deceptive acts or practices in or affecting commerce" by "persons, partnerships, or corporations . . . ." 15 U.S.C. § 45(a)(1)-(2) (2012). Section 4 of the FTC Act defines "corporation," in part, as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest . . . ." 15 U.S.C. § 44.

Respondent ECM BioFilms, Inc. ("ECM") is an Ohio-based corporation, with a principal place of business listed as: Victoria Place, Suite 225, 100 South Park Place, Painesville, Ohio. F. 152. Thus, ECM is a corporation over which the FTC has jurisdiction. In addition, the acts and practices alleged in the Complaint are "in or affecting commerce." Respondent is in the business of manufacturing, advertising, offering for sale, selling, and distributing, additives for plastics, including the ECM additive, known as "MasterBatch Pellets" (the "ECM Additive"). F. 156-158. ECM sells the ECM Additive to plastic manufacturers and distributors of plastics ("ECM Customers"). F. 164-166. ECM's Customers, which total approximately 300, are located in various

areas around the United States. F. 4, 9, 14, 23, 37, 46, 53, 64, 68, 78, 167. Accordingly, the acts and practices of Respondent, as alleged in the Complaint, are and have been "in or affecting commerce," within the meaning of Section 4 of the FTC Act. Therefore, the FTC has jurisdiction over the conduct challenged in the Complaint, pursuant to Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45.

C. Overview

The Complaint alleges that Respondent engaged in deceptive trade practices in violation of Section 5(a) the FTC Act. 15 U.S.C. § 45(a). Complaint Counsel charges that Respondent made, and provided others with the "means and instrumentalities" to make, false or unsubstantiated representations to: (1) purchasers of the ECM Additive ("ECM Customers"); (2) "downstream" customers of ECM's Customers, sellers or distributors of plastics made with the ECM Additive ("ECM Plastics"); and (3) "end-use" consumers (hereafter, "consumers").[16] Specifically, Complaint Counsel charges that Respondent made the following false or unsubstantiated claims, "expressly or by implication":

1. ECM Plastics are "biodegradable, *i.e.*, will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal," which time period Complaint Counsel asserts is less than one year after disposal in a landfill;[17]

[16] The FTC Act does not define "consumer." 15 U.S.C. § 41 *et seq.* In addition, in its Post-Trial Brief, Complaint Counsel did not offer any definition of "consumer" from the trial record. At oral argument, not as evidence, Complaint Counsel stated that, as Complaint Counsel uses the term in this case, the "end-use" consumer is anyone "who could walk into a store and purchase a plastic product containing the ECM additive, for instance, a water bottle that has the logo 'ECM Biodegradable.' That would be the end-use consumer that I'm referring to in this action, because they are receiving the claim from ECM through the means and [instrumentalities] of the logo that ECM provided to its customers to pass the claim down to consumers." Transcript of Closing Arguments, Oct. 22, 2014 at 16-17.

[17] Complaint Counsel's position as to what period of time is "reasonably short" has vacillated, with Complaint Counsel asserting such alternative time periods as within 1 year, 2 years, 3 years, and/or "at least within 5 years." *See*

2. ECM Plastics are "biodegradable" in a "landfill";

3. ECM Plastics are "biodegradable in a stated qualified timeframe"; which according to Complaint Counsel was "9 months to 5 years";[18] and

4. Tests prove that ECM Plastics have the characteristics identified in 1, 2, or 3 above pursuant to "various scientific tests including, but not limited to ASTM D5511."[19]

Complaint ¶ 9A-D; CCB at 5-9, 28-30 (collectively the "Challenged Claims").

Section 5(a) of the FTC Act makes it unlawful to engage in a deceptive trade practice in or affecting commerce. 15 U.S.C. § 45(a)(1). "An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision." *In re POM Wonderful LLC*, No. 9344, 2013 FTC LEXIS 6, at *17-18 (Jan. 10, 2013) (citations omitted). The determination of whether Respondent violated the FTC Act as alleged in this case requires a three part inquiry: (1) whether Respondent disseminated advertisements conveying the claims alleged in the Complaint and challenged in this case; (2) whether those Challenged Claims are false or misleading; and (3) whether the Challenged Claims found to be false or misleading are

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Complaint Counsel's Pre-Trial Brief at 22-27. It is appropriate, however, that Complaint Counsel be held to the position taken in its Post-Trial Brief, which contends that the claim "biodegradable" implies complete biodegradation in less than one year. *See* CCB at 29-34.

[18] As noted in Section III.D.3.b., *infra*, the evidence shows that ECM changed its stated biodegradation rate in 2013 to "some period greater than a year," *see* F. 252-253, 256, and it is unclear whether Complaint Counsel challenges this rate claim as false or unsubstantiated.

[19] ASTM International, formerly known as the American Society for Testing and Materials ("ASTM"). F. 650. The ASTM D5511 test is discussed in Section III.E.6., *infra*.

material to prospective consumers. *See Id.* at *18-19, citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D. Mass. 2008), *aff'd*, 684 F.3d 1 (1st Cir. 2010); *see also In re Telebrands Corp.*, 140 F.T.C. 278, 290-92 (2005), 2005 FTC LEXIS 178, at *19-24, *aff'd*, 457 F.3d 354 (4th Cir. 2006).

Moreover, liability can accrue for misrepresentations made by others, under the doctrine of "means and instrumentalities." This doctrine holds that "[t]hose who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act." *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (quoted in *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000)). *See also Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *In re Litton Indus., Inc.*, 97 F.T.C. 1, 1981 FTC LEXIS 94, at *105 (1981) (stating that it is "well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for the resulting deception"), *aff'd*, 676 F.2d 364 (9th Cir. 1982). Thus, the "means and instrumentalities" doctrine ensures that "[t]he author of false, misleading and deceptive advertising may not furnish customers with the means of misleading the public and thereby insulate himself against responsibility for its deception." *Irwin v. FTC*, 143 F.2d 316, 325 (8th Cir. 1944).

Accordingly, this Initial Decision proceeds to analyze whether Respondent made any of the Challenged Claims, including the extent to which any of the Challenged Claims found to have been made were "passed down" the supply chain, including to consumers. Thereafter, the analysis turns to the scientific evidence in the case to determine whether any of the Challenged Claims found to have been made by Respondent are false or unsubstantiated, and if so, whether any such claim is material. Then, whether Respondent can be held liable for any deceptive claims passed "downstream," under the "means and instrumentalities" doctrine, is addressed.

D. Claims

1. General Legal Principles

An advertisement[20] is deemed to "convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message." *In re Kraft, Inc.*, 114 F.T.C. 40, 1991 FTC LEXIS 38, at *10 (1991); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-66 (1984); Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale*, 103 F.T.C. 110, 1984 FTC LEXIS 71, at *176-77 (1984) (the "Deception Statement"). Advertising claims may be conveyed either expressly or impliedly. Express claims directly state the representation at issue. *Kraft*, 970 F.2d at 319 n.4; *Thompson Medical*, 104 F.T.C. 648, 1984 FTC LEXIS 6, at *311; *Cliffdale*, 1984 FTC LEXIS 71, at *108. Because an express claim is stated unequivocally, the statement itself establishes its meaning. *Thompson Medical*, 1984 FTC LEXIS 6, at *311-12. When claims at issue are express, it is appropriate to infer that reasonable consumers interpret the statements to mean what they say. *FTC v. USA Bevs., Inc.*, 2005 U.S. Dist. LEXIS 39075, at *16-17 (S.D. Fla. Dec. 5, 2005). Implied claims are communicated in an oblique or indirect way. *Kraft*, 970 F.2d at 319 n.4.

An interpretation of an advertisement may be reasonable even though it is not shared by a majority of consumers. *Kraft*, 1991 FTC LEXIS 38, at *14; *Deception Statement*, 1984 FTC LEXIS

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[20] Respondent argues that its various promotional materials do not constitute "advertisements" because they were not "widely disseminated" to the public at large. RB at 40-41. This assertion – even if true – is not determinative. The reach of Section 5 is not limited to "advertisements," but reaches deceptive commercial speech generally. *POM*, 2013 FTC LEXIS 6, at *146-48. Commercial speech is determined, *inter alia*, by whether the speech promotes a product, includes information about the product, and is motivated by the speaker's economic or commercial interests. *Id.* at *147. Judged by these standards, it cannot reasonably be disputed that the claims at issue in this case constitute commercial speech within the scope of Section 5. Moreover, the standard for determining deception is the same for "advertisements" as for other commercial speech. *Id.* at *19 n.5.

71, at *177 n.20. It is sufficient that a "significant minority" of reasonable consumers are likely to interpret the advertisement to be making the allegedly misleading claim. *Telebrands*, 140 F.T.C. at 291 (*quoted in POM*, 2013 FTC LEXIS at 6, at *20). The requirement that an interpretation be shared by a "significant minority" of reasonable consumers reflects the principle that "[a]n advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. . . . A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Deception Statement*, 1984 FTC LEXIS 71, at *178. Moreover, the allegedly misleading interpretation need not be the only one that can be drawn from an advertisement. *Id.* at *178. "Where an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if non-misleading interpretations are possible. *See, e.g.*, *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977)." *POM*, 2013 FTC LEXIS 6, at *21.

The primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself. *POM*, 2013 FTC LEXIS 6, at *21. Thus, to determine whether an advertisement conveys an alleged claim, the first step is to examine the advertisement (a "facial analysis"). *Thompson Medical*, 1984 FTC LEXIS 6, at *313; *Cliffdale*, 1984 FTC LEXIS 71, at *108. "If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim. *See Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789." *In re Stouffer Foods Corp*, 118 F.T.C. 746, 1994 FTC LEXIS 196, at *9 (Sept. 26, 1994). If, after a facial analysis, it cannot be concluded with confidence that a particular advertisement can reasonably be read to contain a particular implied message, the Commission "will not find the ad to have made the claim unless extrinsic evidence

allows [the conclusion] that such a reading of the ad is reasonable. *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789." *Stouffer*, 1994 FTC LEXIS 196, at *10. Extrinsic evidence includes, but is not limited to, "reliable results from methodologically sound consumer surveys." *Kraft*, 1991 FTC LEXIS 38, at *13; *Cliffdale*, 1984 FTC LEXIS 71, at *108-09.

Whether examining the advertisement itself, extrinsic evidence, or both, the Commission considers the overall, common-sense, net impression made by the advertisement in determining whether the alleged claim may reasonably be ascribed to it. *FTC v. Tashman*, 318 F.3d at 1283; *Kraft*, 114 F.T.C. at 122; *Thompson Medical*, 104 F.T.C. at 790; *Stouffer*, 1994 FTC LEXIS 196, at *11. Ultimately, "[t]he meaning of an advertisement, the claims or net impressions communicated to reasonable consumers, is fundamentally a question of fact. . . . This question of fact may be resolved by the terms of the advertisement itself or by evidence of what consumers interpreted the advertisement to convey." *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008); *QT, Inc.*, 448 F. Supp. 2d at 957-58, *aff'd*, 512 F.3d 858 (7th Cir. 2008); *see also Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (holding that findings with respect to what representations are made in advertisements are factual).

Applying the foregoing principles, and as more fully explained below, the greater weight of the evidence demonstrates that Respondent claimed that the ECM Additive rendered plastics "biodegradable," including in a "landfill," and that independent testing proved that ECM Plastics are "biodegradable." In addition, prior to October 2012 and ending in 2013, Respondent claimed that ECM Plastics will fully biodegrade in a landfill within a time period of 9 months to 5 years, and that independent testing proved such claim. Further, the evidence shows that, in 2013, Respondent began discontinuing the "9 months to 5 years" claim, and instead claimed that ECM Plastics would fully biodegrade in "most" landfills, "in some period greater than a year." However, the greater weight of the evidence fails to demonstrate that, by representing ECM Plastics are (1) "biodegradable" or (2) "biodegradable in some period greater than a year," Respondent impliedly claimed that ECM Plastics would completely biodegrade in a landfill within one year.

Prior to analyzing the evidence in detail, some background on ECM's business, its Customers, and the supply chain for ECM Plastics, is appropriate for context.

2. ECM's Customers and Supply Chain for ECM Plastics

Respondent sells an additive for plastic manufacturing called "MasterBatch Pellets." F. 156-158 (the "ECM Additive"). The ECM Additive is an industrial product that ECM sells exclusively to companies that manufacture plastic, or companies that have plastic manufactured for them, and to some distributors who sell the ECM Additive to plastic manufacturers ("ECM Customers"). F. 164-165, 168. The ECM Additive is sold in either sixty-five kilogram (65kg) drums or five hundred kilogram (500kg) pallet boxes, and is used only by companies that manufacture plastic. F. 166. It is undisputed that ECM has sold its product to approximately 300 Customers. F. 167. ECM does not advertise or sell the ECM Additive to "consumers." *See* F. 164-165, 168, 172. Hereafter, unless the context dictates otherwise, the terms "consumers" and "end-use" consumers, as used in this Initial Decision, shall mean members of the general public who would be exposed to ECM claims in the marketplace. *See* Section III.C., *supra*, n.16.

Plastics manufactured with the ECM Additive ("ECM Plastics") are sold by plastics manufacturers "downstream," through a multi-level supply chain of distributors or other "middlemen," before eventually reaching consumers. F. 165. Some of ECM's plastic manufacturer customers use the ECM Additive to make products for purchase by retailers that sell consumer products, such as grocery stores and restaurants. F. 171. For example, all products sold by ECM Customer D&W Fine Pack, a manufacturer of plastic dinnerware, are sold to distributors. The distributors then sell the plastic products to retail businesses, such as restaurants. F. 31. Customers frequently buy the ECM Additive to make plastic "films" that are used to make grocery "t-shirt" bags and packaging cushions. F. 11, 54, 193. As an example, ECM Customer Island Plastics Bags, Inc. ("IPB") manufactures and sells high density and low density polyethylene bags to distributors, that in turn sell to businesses such as restaurants, bars, and grocery stores and grocery chains. F. 62,

66. It can be difficult to determine who is the "end-user" of plastics made with the ECM Additive. For instance, when a company such as Amazon ships a product in a box containing an air-cushioned pillow made with ECM Additive-infused plastic, it is unclear whether the "end-user" of the ECM Plastic is Amazon or the recipient of the shipping box containing the product ordered from Amazon. F. 170.

Respondent markets the ECM Additive to potential Customers through its website, flyers, brochures, and sales presentations (hereafter, "Marketing Materials"). F. 206. ECM's website, which is its principal advertising tool, is geared toward plastics manufacturers and people in the plastics industry. F. 207. ECM does not advertise to consumers. F. 172, 207, 210. The process by which a prospective customer becomes an actual customer commonly begins with website inquiries submitted by plastics manufacturers (or companies that subcontract the manufacturing to others). F. 213. The ECM website provides a standard web inquiry form that is automatically emailed to ECM. F. 213. A potential customer contact is generally first handled by Mr. Tom Nealis, ECM's director of sales, and he will provide the potential customer with basic information, such as pricing and sales literature, and address other initial issues. F. 212, 214. As the sales process comes to involve the technical issues, the potential customer is directed to Mr. Robert Sinclair, ECM's president. F. 214.

The ECM Additive cannot be purchased over the Internet. F. 208. Customers place orders directly with ECM, by telephone, with a follow-up email or fax, and the product is shipped directly to the Customer from ECM's manufacturing site in Carpentersville, Illinois. F. 223-224. ECM Customers are normally long-term accounts, as opposed to one-time purchasers, and purchase again from ECM, as needed to meet demand from the Customers' customers for biodegradable plastics. F. 231.

3. ECM'S Claims

a. Claims that ECM Plastics are "biodegradable" and "biodegradable in a landfill" and that "tests prove" the claims

i. "Biodegradable in a landfill"

Respondent has stipulated that it claims that the ECM Additive causes plastics to be "biodegradable" and that plastics treated with the ECM Additive are "biodegradable" in a "landfill." *See* JX 3 at 3. Moreover, the evidence demonstrates that Respondent claims in its Marketing Materials that the ECM Additive renders plastics "biodegradable," and that ECM Plastics will biodegrade in a "landfill." For example, ECM's website states that ECM's additive technology "renders . . . plastic products biodegradable . . . ." F. 234; *see also* F. 237, citing, *inter alia*, CCX 6 (stating "where will it biodegrade? . . . Landfills"). Similarly, the ECM logo expressly represents that ECM Plastics are "biodegradable," as shown below:

F. 239, 256.

It is not clear that the Complaint challenges ECM's claim of "biodegradable" as false or unsubstantiated, except to the extent the term "biodegradable" implies complete biodegradation within one year, and Complaint Counsel's position is that any claim by Respondent that ECM Plastics are "biodegradable" necessarily implies a time period for complete biodegradation; specifically, within one year. *See* CCB at 27-29. Whether ECM's biodegradable claim implies to consumers that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year, is addressed in Section III.D.4., below. Whether "biodegradable" is properly defined, as a scientific matter, as the complete breakdown into elements found in nature, in a landfill, within one year, is addressed in Section III.E.3., *infra*.

Respondent's claims that ECM Plastics are "biodegradable" and biodegradable "in a landfill" were made to its Customers, F. 232-235, 237, and also communicated to customers of ECM's

Customers. F. 280, 284, 287, 291. The representation that ECM Plastics are biodegradable, was also conveyed to consumers through ECM's logo, which the evidence shows was placed on plastic bags and other plastic products to which consumers would potentially be exposed. F. 285, 289.

ii. Certificate of biodegradability

Complaint Counsel argues that Respondent's "Certificate of Biodegradability" claims that ECM Plastics are "biodegradable" and that independent testing proves such claim. The evidence shows that ECM issues, and has issued, a Certificate of Biodegradability, to every Customer who confirms that it will manufacture its ECM Additive-infused plastic in accordance with ECM's manufacturing specifications. F. 266. The Certificate certifies that "numerous plastic samples, submitted by ECM Biofilms, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO [International Organisation for Standardization] and other such standardization bodies . . . "; that these tests "certif[y] that plastic products manufactured with ECM additives can be marketed as biodegradable"; and the certificate itself can be "used by [the Customer] to validate its claims to the biodegradability" of ECM Plastic. F. 269, 272-273. Based on the language and images of ECM's Certificate of Biodegradability, the overall net impression is that ECM Plastics are biodegradable and that testing by independent laboratories proves that ECM Plastics are biodegradable. F. 274.[21]

The Certificate that ECM provided to its Customers, and/or the claims therein, were passed on to customers of ECM's Customers, and at least one such downstream customer posted the ECM Certificate on its website. F. 305-307. However, the evidence fails to show that any consumer saw ECM's Certificate of Biodegradability.

[21] While not denying that the Certificate represents that ECM Plastics are "biodegradable," and that tests prove this claim, Respondent argues that the Certificate defines biodegradability in accordance with the ASTM standard, which does not mirror the "within one year" definition used by Complaint Counsel in this case. *See* RRB at 6-7.

b. Challenged claims that ECM Plastic will fully biodegrade in a landfill in a "stated qualified timeframe" and that tests prove such claims

i. "9 Months to 5 Years"

The evidence demonstrates that Respondent, including through its website, flyers, and brochures, claimed that plastics manufactured with the ECM Additive would fully biodegrade in a landfill within 9 months to 5 years (the "9 Months to 5 Years Claim"). F. 245-247. This conclusion is based upon the express language used in these materials, as well as the overall net impression of each of the advertisements as a whole. F. 246. For example, ECM's Marketing Materials included the following express representations:

Plastic products made with ECM additives

- **Fully biodegrade in 9 months to 5 years.**
- **Fully biodegrade wherever they are disposed of where other things are biodegrading (anaerobically and aerobically):**
  - In Landfills,
  - In Compost (backyard as well as commercial facilities),
  - Buried in the ground or littered,
  - Agricultural and erosion-control settings.
- **Are recyclable.**
- **Can be made with recycled resins.**
- **Do not use heat, light or mechanical stress to break them down.**
- **Do not require special handling (unlike PLA and oxo-degradable products).**
- **Do not contain heavy metals (unlike most oxo-degradable products).**

F. 245.

Respondent contends that it "qualified" its 9 Months to 5 Years Claim, both in its Marketing Materials and in ECM's communications with prospective customers over the course of the sales cycle, to communicate that the rate of biodegradation was dependent on factors such as where the plastic was disposed, the environmental conditions at such disposal site, and the extent

to which other biodegrading matter was present. RB at 35-36. At least some of ECM's Marketing Materials included language advising that the rate of biodegradation was dependent on various factors such as soil conditions and the availability of microbes in the soil. F. 248. ECM's website "Technology Page," for example, immediately after claiming that ECM Plastics "break down in approximately 9 month[s] to 5 years in nearly all landfills . . . ," states: "All sorts of factors determine the amount of microbes available in the soil and the soil conditions determine the rate of degradation. The plastic products made with ECM technology basically rely on the microbes in the soil . . . ." F. 248. The overall net impression, considering the language in context, is that various factors affect the point at which full biodegradation will occur *within* the time range of 9 months to 5 years, and not that such factors will result in a biodegradation rate beyond that time range. F. 249. Thus, such language does not alter the overall net impression conveyed by Respondent that ECM Plastics will fully biodegrade, including in a landfill, within 9 months to 5 years. F. 249.

Further, based on express language and the overall net impression of ECM's Marketing Materials, ECM claimed that independent testing proved that the ECM Additive caused ECM Plastics to fully biodegrade in a landfill in a time period of 9 months to 5 years. F. 265. For example, CCX 6, titled, "Our Technology for the Biodegradation of Plastic Products," refers to specific ASTM testing and further includes the following language: "ECM engaged several renowned testing laboratories to independently establish the biodegradability of plastics made with ECM's additives. The tests concluded that the products were fully biodegradable under both aerobic and anaerobic conditions. . . . The plastic products made with our additives will break down in approximately 9 month[s] to 5 years in nearly all landfills . . ." *See also* CCX 5 (referring to "9 months to 5 years" biodegradation rate and further stating: "[W]e certify the full biodegradation of most all plastic products manufactured with at least a one percent load of our additives. We can certify this situation due to the internal and external studies that have cost us hundreds of thousands of dollars. . . . We have had the various test data analyzed by independent scientists and their conclusions and some of the data have been sent to you in the presentation package and are what we base our certification on."). F. 265.

Based on the foregoing, Complaint Counsel has proven the Challenged Claim that ECM Plastics would fully biodegrade in a landfill "in a stated qualified timeframe," of 9 months to 5 years, and that tests proved such claim.

The claims that ECM Plastics would fully biodegrade in a landfill within 9 months to 5 years and that testing proved such claim were made directly to ECM Customers, including through ECM's Marketing Materials. F. 206, 245, 265, 1508. These claims were also passed downstream to customers of ECM's Customers. F. 280, 286. There is also evidence that at least some consumers visited Respondent's website for information on biodegradable products, and were, or may have been, exposed to the claims on the website about the ECM Additive, including that ECM Plastics would fully biodegrade in a landfill within 9 months to 5 years and that testing proved such claim. F. 279.

Regardless of whether consumers were in fact exposed to claims on ECM's website, the evidence shows that the 9 Months to 5 Years Claim appeared on grocery bags sold by IPB, an ECM Customer, including on bags sold to Down-to-Earth Grocery ("DTE"), a Hawaii grocery store chain and a downstream customer of IPB. F. 32-36, 292-293, 297. IPB manufactured ECM Plastic bags reflecting the 9 Months to 5 Years Claim for 50 to 100 different customers. F. 300. In total, IPB alone manufactured about 10 million such bags. F. 300. DTE purchased about 700,000 plastic bags reflecting the 9 Months to 5 Years Claim, each year for approximately 5 years, for a total of 3.5 million bags. F. 301. Based on the foregoing, it is reasonable to infer that consumers were exposed to the 9 Months to 5 Years Claim. F. 302.

ii. "Some period greater than a year"

As of late 2013, ECM discontinued the 9 Months to 5 Years Claim, in response to the FTC's issuance, in October 2012, of revised Guides For The Use Of Environmental Marketing Claims ("Green Guides"). F. 251-252, 259-261. The Green Guides are not law, but reflect the "Federal Trade Commission's current views about environmental claims . . . . They do not . . . bind the FTC or the public. The Commission, however, can take action

under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act." 16 C.F.R. § 260.1. The October 2012 revision to the FTC's Green Guides added, *inter alia*, the following provision:

> (c) It is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.

16. C.F.R. § 260.8(c).

In response to the 2012 revision to the FTC's Green Guides, ECM undertook to revise its biodegradability claims in an effort to meet the guidelines in the revised Green Guides. F. 251-252. ECM's revised Marketing Materials placed an asterisk next to the word, "biodegradable," which provided the following text: "Plastic products manufactured with [the ECM Additive] will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." F. 253. In addition, Respondent revised its Marketing Materials to omit references to biodegradation within a period of "9 months to 5 years." F. 252. ECM completed the process of revising its website in late 2013. F. 259.

Also in response to the revised Green Guides, Respondent similarly revised its logo, a green tree with the ECM name and the word "biodegradable" printed underneath, by adding the text: "Plastic products manufactured with [the ECM Additive] will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." The revised logo appears as follows:

F. 256.

Although the evidence shows that Respondent claimed that ECM Plastics would fully biodegrade in a landfill "in a stated qualified timeframe" of "some period greater than a year," Complaint ¶ 9C, it is not clear that Complaint Counsel in fact challenges this particular claim as false or unsubstantiated. *See* CCB at 8-9, 27-29. Similarly, although it is not entirely clear, Complaint Counsel does not appear to argue that Respondent deceptively claimed that "tests prove" ECM Plastics would fully biodegrade in a landfill in "some period greater than a year," *see* CCB at 27-29, nor does Complaint Counsel propose a finding of fact on the issue. Thus, these issues are not properly presented, and accordingly, will not be, and are not, decided.

Complaint Counsel's contention that Respondent's claim that ECM Plastics will biodegrade in a landfill in "some period greater than a year," implied to consumers that ECM Plastics would completely break down into elements found in nature within one year, CCB at 29-30, is addressed in Section III.D.4., *infra*.

c. Summary

In summary, as set forth above, the evidence demonstrates that Respondent's Marketing Materials claimed that ECM Plastics are "biodegradable," including in a "landfill"; that ECM Plastics would completely biodegrade, including in a landfill, in a time period ranging from 9 months to 5 years; and that tests proved such claims. These claims were made to ECM's Customers, and passed down to customers of ECM's Customers. To the extent

consumers could visit, and did visit, ECM's website, these claims would also have been passed on to consumers. Respondent's "biodegradable" claim and claim of complete biodegradation in a landfill within 9 months to 5 years were also passed on to consumers via plastic bags printed with the ECM logo, or printed with the ECM logo and the 9 Months to 5 Years Claim. The evidence further shows that, as of late 2013, Respondent revised its Marketing Materials and its logo to state that ECM Plastics were biodegradable within "some period greater than a year."

The following section of the Initial Decision evaluates Complaint Counsel's assertion that, in representing that ECM Plastics are "biodegradable" or "biodegradable in some period greater than a year," Respondent impliedly claimed that ECM Plastics would completely biodegrade, in a landfill, within one year. As shown below, the greater weight of the evidence fails to sustain this proposition.

4. Alleged Implied Claim of Biodegradation Rate of "Within One Year"

a. Introduction

Complaint Counsel argues that Respondent's claims that ECM Plastics are "biodegradable" – what Complaint Counsel refers to as Respondent's "unqualified" biodegradability claim[22] – and "biodegradable" in "some period greater than a year" impliedly claimed to consumers that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year. CCB at 9-12, 30 ("Implied One Year Claim"). Complaint Counsel argues that Respondent communicated this message to consumers because "consumers understood ECM's 'biodegradable' and 'biodegradable in some period greater than a year' claims to mean ECM Plastics will completely biodegrade in a landfill within a year." CCB at 30.[23] Respondent replies that

[22] Although it is not entirely clear, Complaint Counsel at times refers to "biodegradable" claims as ECM's "unqualified" biodegradability claims. Complaint Counsel does not assign any legal definition, or other special definition, to the word "unqualified."

[23] Complaint Counsel, in its briefing and proposed findings of fact, has vacillated regarding whether it is asserting that ECM impliedly claimed a

for the vast majority of products that eventually reach end-use consumers, consumers are exposed only to a generalized "biodegradable" claim in the form of a logo or a small stamp on the packaging, and that the evidence fails to show that consumers would take away the message that ECM Plastics will completely biodegrade in a landfill within a year. RB at 39-43.

To prove the Implied One Year Claim, Complaint Counsel bears the burden of proving that a significant minority of reasonable consumers would interpret ECM's claims of (1) "biodegradable," or (2) "biodegradable" in "some period greater than a year," to be conveying the message that ECM Plastics will completely biodegrade in a landfill within one year. *See POM*, 2013 FTC LEXIS 6, at *44 (finding implied claim where net impression of advertisement "conveyed to at least a significant minority of reasonable consumers" the message that the advertiser had "clinical proof" for disease claims); *Telebrands*, 140 F.T.C. at 291 (holding that an implied claim is demonstrated where "at least a significant minority of reasonable consumers are likely to take away" the alleged claim).

In *POM*, the Commission reiterated the well-established rule that whether an advertisement conveys an implied claim "is a question of fact." 2013 FTC LEXIS 6, at *44 (citing *Removatron Int'l*, 884 F.2d at 1496; *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1189). The process for determining this factual issue was addressed by the Commission in *POM*, as follows:

> To determine whether a particular implied claim has been made, the Commission starts with a facial analysis of the advertisement. A facial analysis of an ad considers "an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the

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biodegradation rate of "within one year," "less than one year," and "one year of less." To this extent, Complaint Counsel should be bound by the definition of the claim that it provided to its proffered expert Dr. McCarthy, for the purpose of Dr. McCarthy's evaluation of scientific support for Respondent's claims, which was "that the unqualified marketing claim 'biodegradable' means that the entire treated plastic will completely break down . . . *within one year*." F. 633; CCX 891(McCarthy Expert Report at 5 n.1) (emphasis added).

> nature of the transaction." *Deception Statement*, 103 F.T.C. at 176. "If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an advertisement can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the advertisement conveys the claim." *Stouffer Foods Corp.*, 118 F.T.C. at 798; *accord Novartis Corp.*, 127 F.T.C. at 680; *Kraft, Inc.*, 114 F.T.C. at 121.

2013 FTC LEXIS 6, at *24-25. However, if, after a facial analysis, it cannot be concluded with confidence that a particular advertisement can reasonably be read to contain a particular implied message, the Commission "will not find the ad to have made the claim unless extrinsic evidence allows [the conclusion] that such a reading of the ad is reasonable. *Kraft*, 114 F.T.C. at 121; *Thompson Medical*, 104 F.T.C. at 789." *Stouffer*, 1994 FTC LEXIS 196, at *10.

Having conducted a facial analysis of the ECM Marketing Materials, Certificate of Biodegradability, and logos at issue, including consideration of associated images, context and other elements, an implied claim that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year is not reasonably clear or conspicuous. F. 241, 242, 275. The word, "biodegradable," on its face, does not state any time period for complete biodegradation, or refer to any disposal conditions or disposal results. The evidence shows that, to the extent that ECM stated any time period for complete biodegradation in its promotional materials prior to ECM's revisions in 2013, that time period was 9 months to 5 years. F. 245-246. ECM's revised stated time period of "some period greater than a year," on its face, is clearly and directly contrary to any message that complete biodegradation would occur "within one year." *See* F. 253, 256. Further, nothing in the images or context surrounding ECM's use of the phrases "biodegradable" or "biodegradable in some period greater than a year" suggests that ECM Plastics would completely biodegrade into elements found in nature, in a landfill, within one year. F. 253, 256. Accordingly, a facial analysis of the ECM Marketing Materials, Certificate of Biodegradability, and logos at issue, including consideration of all their respective elements, does not lead to a

confident conclusion that a significant minority of reasonable ECM Customers, downstream customers, or Consumers would view ECM's claim of "biodegradable" or "biodegradable" in "some period greater than a year," as communicating the message that ECM Plastics completely biodegrade within one year. F. 241, 242, 275. For all the foregoing reasons, it is appropriate in this case to look to extrinsic evidence to determine whether Complaint Counsel has proven an Implied One Year Claim. *See Thompson Medical*, 1984 FTC LEXIS 6, at *357-59.

Regardless of whether extrinsic evidence is necessary as a matter of law, when extrinsic evidence has been introduced, that evidence "must be considered by the Commission in reaching its conclusion" about the meaning of the advertisement. *POM*, 2013 FTC LEXIS 6, at *27 (quoting *Bristol-Myers*, 102 F.T.C. at 319); *see also Thompson Medical*, 104 F.T.C. at 794 (finding that the Commission was "obliged to consider" extrinsic evidence offered by the parties). The Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *See Kraft*, 114 F.T.C. at 122, 1991 FTC LEXIS 38, at *14; *Stouffer*, 1994 FTC LEXIS 196, at *10. Finally, in all cases, evaluating whether an implied claim was made must be guided by the cautionary principle that "the Commission may not inject novel meanings into ads and then strike them down as unsupported; ads must be judged by the impression they make on reasonable members of the public." *Bristol-Myers*, 1983 FTC LEXIS 64, at *249.

Thus, the analysis now turns to the extrinsic evidence on the issue of whether a significant minority of reasonable consumers would interpret ECM's claim of (1) "biodegradable" or (2) "biodegradable in some period greater than a year," to be conveying the message that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year, as argued by Complaint Counsel. In general, extrinsic evidence "might include common usage of terms, expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or 'any other reliable evidence of consumer interpretation.'" *Telebrands*, 140 F.T.C. at 291 (quoting *Cliffdale*, 103 F.T.C. at 166).

b. Extrinsic evidence

i. Common usage of words

Respondent's claims included express representations that ECM Plastics are (1) "biodegradable" or (2) "biodegradable" in "some period greater than a year." It is appropriate to infer that consumers interpreted the words to mean what they say. *USA Bevs., Inc.*, 2005 U.S. Dist. LEXIS 39075, at *16-17; *see also In re Southwest Sunsites, Inc.*, 106 F.T.C. 39, 1985 FTC LEXIS 38, at *324 (1985). It is also appropriate to refer to the dictionary definition of a word as an aid in interpreting the common meanings of words. *Thompson Medical*, 1984 FTC LEXIS 6, at *359 (referring to dictionary definition in determining what reasonable consumers understand the word "aspirin" to mean). Because dictionary definitions are derived from the ordinary usage of words, such definitions are an indication of how reasonable consumers would understand these words. *Id.* Dictionary definitions are particularly useful in this case, where Complaint Counsel appears to base the Implied One Year Claim solely on the how consumers allegedly interpret the words, without reliance on any context surrounding the words that affect their meaning.[24]

In this instance, according to the Merriam-Webster dictionary, "biodegradable" means "capable of being slowly destroyed and broken down into very small parts by natural processes, bacteria, etc." or "capable of being broken down especially into innocuous products by the action of living things (as microorganisms)." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 22 July 2014, *available at* http://www.merriam-webster.com/dictionary/biodegradable); *see also Collins English Dictionary*, 10th Ed. 2009 (July 22, 2014), *available at* http://dictionary. reference.com/browse/biodegradation) (defining

[24] In *Thompson Medical*, the Commission noted that dictionary definitions may be less reliable than survey research as an indicator of how consumers understand advertisements where the specific meanings of the words in a particular context in an advertisement "communicate a meaning at variance with the word's dictionary definitions, such as when it is used as slang. ('You can drive this lovely, late model car home for just two thousand five hundred bananas.')." *Id.* at *360 n.35. Such usage variance has not been shown in this case.

"biodegradable" to mean "capable of being decomposed by bacteria or other biological means"). The plain meaning of the word "biodegradable," therefore, does not include any particular time frame for complete decomposition, much less complete decomposition, into elements found in nature, in a landfill, within one year. The foregoing dictionary definitions constitute extrinsic evidence that reasonable consumers would *not* interpret the words "biodegradable" or "biodegradable" in "some period greater than a year" to have the meaning urged by Complaint Counsel. *See Thompson Medical*, 1984 FTC LEXIS 6, at *359 (relying on dictionary definition of "aspirin" as containing acetylated salicylate to hold that consumers would not interpret the word "aspirin" to mean a generic pain reliever).

ii. Survey evidence – arguments of the parties

Complaint Counsel argues that, according to consumer survey evidence introduced through Complaint Counsel's proffered expert, Dr. Shane Frederick, the percentage of consumers "who believe that 'biodegradable' products will biodegrade within one year or less generally ranges from 25% to 60%," and that Dr. Frederick estimated that, overall, 35% of consumers hold this belief. CCB at 31-32. Complaint Counsel contends that such percentages demonstrate that a substantial minority of consumers "believe that 'biodegradable' means 'biodegradable within one year or less.'" CCB at 30. Therefore, Complaint Counsel concludes, it has met its burden of proving that ECM made the Implied One Year Claim. CCB at 30-31.

In support of the foregoing, Complaint Counsel relies on three surveys addressed by Dr. Frederick: (1) a 2006 survey commissioned by the American Plastics Council (the "APCO" survey); (2) a survey conducted in December 2010 by the research company Synovate (the "Synovate" survey); and (3) a Google Consumer Survey commissioned by Dr. Frederick for purposes of this litigation (the "Google" survey). Specifically, Complaint Counsel relies on the following survey results, as addressed by Dr. Frederick:

(1) based on APCO question 4, 60% of respondents "believe" that a package labeled "biodegradable" "should" biodegrade within one year;

(2) based on Synovate question 19, 25% of respondents "believe" that "less than one year" is a "reasonable amount of time" for a "biodegradable" plastic package to decompose in a landfill; and

(3) based on several questions in the Google survey, between 25% and 52% of respondents believe that a plastic product that is labeled "biodegradable," including with the ECM logo, will take less than one year to decompose.

See CCB at 32 (citing CCFF 194-200); CCX 860 (Frederick Expert Report at 9-11, 15, ¶ 34).[25]

Dr. Frederick opined that the APCO survey, the Synovate survey, and the Google survey were each "reasonably reliable and valid." Frederick, Tr. 1180-1181. He concluded, based on the foregoing surveys, that "at least a substantial minority of end-use consumers understand that a 'biodegradable' product" will completely biodegrade in a landfill, into elements found in nature, "within one year." CCX 860 (Frederick Expert Report at 20, ¶ 47c). In his trial testimony, but not in his expert report, Dr. Frederick further estimated, based on his "research and expertise," that 35% of American consumers believe that a plastic product labeled "biodegradable" will biodegrade completely within one year. Frederick, Tr. 1180-1181; *compare* CCX 860 (Frederick Expert Report at 20). Dr. Frederick also opined, based on responses to questions in the APCO survey, the Synovate survey, and the Google survey, that most consumers believe plastic products labeled "biodegradable" will biodegrade in landfills. Frederick, Tr. 1172; CCX 860 (Frederick Expert Report at 13). In addition, Dr. Frederick opined, based on his Google survey, that at least a substantial minority of respondents believe that a product bearing a "biodegradable" label, including the ECM logo,

[25] Complaint Counsel further asserts that certain results from Dr. Stewart's survey support the Implied One Year Claim. That argument is addressed in Section III.D.4.b.vii., below.

will "completely break down into elements found in nature." CCX 860 (Frederick Expert Report at 16).

Respondent retained Dr. David Stewart to review and comment on the APCO, Synovate, and Google surveys, and to respond to the opinions of Dr. Frederick on those matters. Respondent relies on Dr. Stewart's opinions that the APCO and Synovate surveys suffer from serious flaws that severely limit the conclusions that may be drawn from them with respect to the issues presented by this case, and that the Google survey is so seriously flawed that it cannot be relied on to demonstrate perceptions of representative consumers on the meaning of the term "biodegradable." In addition, on behalf of Respondent, Dr. Stewart designed and implemented a consumer survey regarding consumers' perceptions related to biodegradability. Based on Dr. Stewart's survey and Dr. Stewart's associated opinions, Respondent asserts that consumers have no common understanding of the term "biodegradable," and that the vast majority of consumers understand that the process of biodegradability is "highly varied" and not always, or even often, a rapid process. RB at 43; RX 856 (Stewart Expert Report at 25-26). Specifically, Respondent notes that in Dr. Stewart's survey, when asked how long a degradable item would take to decompose or decay, 39% of survey respondents stated that it depends on the type of product, and a total of 68% of survey respondents' answers indicated recognition that there are differences in the rate of decomposition. RB at 47-48; RX 856 (Stewart Expert Report at 25). Further, Respondent states, when survey respondents were asked if they think that there are differences in the amount of time it takes for different types of products to biodegrade, 98% of survey respondents answered, "yes." RB at 48; RX 856 (Stewart Expert Report at 26).

iii. Expert qualifications

In determining what weight, if any, to assign the survey evidence, for the reasons explained below, greater weight is given to the opinions of Respondent's expert, Dr. Stewart. F. 323-324.

Respondent's expert witness, Dr. Stewart, is highly qualified in the field of consumer surveys. F. 322. Dr. Stewart is currently the president's professor of marketing and business law at Loyola

Marymount University, where he teaches advertising and promotion management, marketing strategy, and introductory MBA marketing. F. 145. Dr. Stewart has taught extensively in the field of conduct and methodology of surveys, teaching marketing research at the undergraduate, graduate, and doctoral levels, and has taught courses on research methodology, psychometrics, and experimental design. F. 146. Dr. Stewart has served as the editor of the Journal of Marketing and the Journal of the Academy of Marketing Science and is currently serving as the editor of the Journal of Public Policy and Marketing. F. 148. In this capacity, Dr. Stewart has reviewed papers submitted to those journals and the survey methodology used in those papers. Approximately half of the papers submitted to those three journals use survey methodology as a basis for empirical presentation. F. 148. Dr. Stewart's work has been published in more than 200 peer-reviewed journals, proceedings volumes, and book chapters, over half of which contained survey research. F. 149.

Dr. Stewart has served as an expert witness for the FTC multiple times, in cases including *Kraft* (Docket No. 9298), *Novartis* (Docket No. 9279), and *POM* (Docket No. 9344). F. 316. Dr. Stewart was retained as an expert by the FTC in matters against *QVC* (Docket No. C-3955), and *John Beck* (FTC Matter No. 072 3138). F. 316. Dr. Stewart has also been retained by various respondents in consumer protection cases brought by the FTC, including *Pantron* (U.S. District Court Case No. CV88-6696 (C.D. Cal.)), *Schering* (Docket No. 9232), and *Guaranty Life* (FTC Matter No. 092 3169). F. 316. In most of the foregoing cases involving the FTC, Dr. Stewart has opined on surveys. F. 317. In approximately half of the cases, Dr. Stewart designed a survey, and in many of the cases, Dr. Stewart gave rebuttal testimony concerning the opposing party's surveys. F. 317. Dr. Stewart is unaware of a single instance in which his testimony or survey was not accepted by either the Administrative Law Judge ("ALJ") or the Commission. F. 319. Indeed, in the *Kraft* decision, Dr. Stewart's survey was accepted by the ALJ and cited by the Commission as supportive of its decision. F. 320; *see Kraft*, 1991 FTC LEXIS 38, at *24-30 nn.13-15. More recently, in the *POM* decision, the Commission agreed with the conclusion of the ALJ that a consumer survey proffered by the respondents was entitled to little weight, based on the opinions of Dr. Stewart. *POM*, 2013 FTC LEXIS 6, at *49-50; *see POM*, 2012 FTC

LEXIS 106, at *506 (Initial Decision). Dr. Stewart has also served as a survey expert in federal court "a couple of dozen times" and in none of those cases has his survey been deemed to be unreliable or been rejected by the court. F. 321.

Complaint Counsel's expert witness, Dr. Frederick, is a professor at Yale University's School of Management, where he has taught courses in consumer behavior, behavioral economics, and marketing. F. 113. Dr. Frederick has studied and published extensively concerning judgment and decision-making, with a focus on the role of cognitive abilities on preferences, preference measurements, and cognitive biases. F. 114. Dr. Frederick's work involves conducting and evaluating survey research, including internet-based research tools, such as Google Consumer Surveys. F. 115. Dr. Frederick has conducted hundreds of studies using both paper and pencil and web-based survey tools. F. 115. Dr. Frederick is affiliated with Yale's Center for Consumer Insights, which partners with corporations and academics to help understand the evolving dynamics of consumer behavior, and has advised corporations including Pepsico, Kimberly Clark, and AMC Networks on incorporating insights from consumer psychology. F. 116.

Having considered and weighed the qualifications of both proffered experts, Dr. Stewart is highly qualified in the field of designing, implementing, reviewing, and evaluating consumer surveys, and is more qualified than Dr. Frederick in these relevant areas. F. 323. In addition, Dr. Stewart's opinions are well supported and are more well reasoned, credible, and persuasive than the opposing opinions of Dr. Frederick. F. 324. Accordingly, Dr. Stewart's opinions in this case are entitled to, and are given, greater weight than the opposing opinions of Dr. Frederick.

iv. Google survey

(a) Introduction

Complaint Counsel argues that Dr. Frederick's Google survey, "standing alone,"[26] "establishes" that "substantial numbers of consumers understand 'biodegradable' claims to imply within one year." CCB at 32. Complaint Counsel asserts that it is not necessary for the Google survey to be perfect, "as long as it is 'reasonably reliable and probative.'" CCB at 33. To the extent Complaint Counsel is asserting that its survey evidence need only be "reasonably reliable and probative" to meet its burden of proof on the Implied One Year Claim, Complaint Counsel's position demonstrates a fundamental misunderstanding of the difference between the standards for the admissibility of evidence, and the standards for assigning it weight.

In *Bristol-Myers*, 1975 FTC LEXIS 218, at *127, the Commission held that consumer surveys need only be "reasonably reliable and probative" in order to be admissible in evidence. The Commission explained:

> [We] must dismiss any contention that the F.T.C. is bound to reject these consumer surveys as inadmissible hearsay. The Commission has on numerous occasions considered the question of the admissibility of surveys which are obviously hearsay, and it is well settled that such surveys will be admitted for the truth of the matters asserted when it is demonstrated that they are reasonably reliable and probative. Upon thorough and independent examination of the record in this proceeding, we find that the surveys in question readily meet these standards; thus, they were properly admitted by the administrative law judge.

Id. at *127-28. To demonstrate that the survey possesses any probative value, and is therefore admissible, the proponent of the

[26] Complaint Counsel's argument that the Google survey, in combination with other surveys, proves the Implied One Year Claim under the theory of "convergent validity," is addressed in Section III.D.4.b.vi., below.

survey must prove the survey is "methodologically sound," which requires proving that the survey draws valid samples from the appropriate population, asks appropriate questions in ways that minimize bias, and analyzes results correctly. *POM*, 2013 FTC LEXIS 6, at *49, citing *Thompson Medical*, 1984 FTC LEXIS 6, at *315. *See also Telebrands*, 140 F.T.C. at 323 (quoting *Thompson Medical*, in part, and stating that "[t]he standard that the Commission applies in determining whether a copy test is methodologically sound is whether it 'draw[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly").[27] "[I]f the methodology of a consumer survey is fundamentally unsound, then that survey cannot assist the Commission in deciding whether an advertisement communicates a particular claim to consumers. . . . The Commission's practice is, in this regard, consistent with that of most federal courts when evaluating surveys purporting to assess the meaning that consumers take from ads." *Stouffer*, 1994 FTC LEXIS 196, at *29.

Of course it is not necessary to prove that a survey is "perfect" in order for the survey to have any probative value. "No survey is perfect." *Stouffer*, 1994 FTC LEXIS 196, at *29 n.27. However, the flaws in a survey's methodology directly affect the evidentiary weight to be given the survey's results. *See POM*, 2013 FTC LEXIS 6, at *49; *Stouffer*, 1994 FTC LEXIS 196, at *29 ("The nature and seriousness of any deficiencies will affect the weight that the Commission assigns to that piece of evidence."). Accordingly, while Complaint Counsel clearly has the burden of demonstrating, at the outset, that the Google survey is "reasonably reliable and probative," this alone does not "establish" any fact in issue, or satisfy Complaint Counsel's burden of proof on any material fact.

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[27] The Commission's standards are substantially the same as those that Dr. Stewart identified as broadly accepted standards, derived from the Manual for Complex Litigation, which require that: "1) the population was properly chosen and defined; 2) the sample chosen was representative of that population; 3) the data gathered were accurately reported; 4) the data were analyzed in accordance with accepted statistical principles; 5) the questions asked were clear and not leading; 6) the survey was conducted by qualified persons following proper interview procedures; and 7) the process was conducted so as to ensure objectivity (the study was double blind)." *See* F. 326.

As more fully explained below, Complaint Counsel has failed to prove that Dr. Frederick's Google survey drew valid samples from the appropriate population, asked appropriate questions in ways that minimized bias, and analyzed results correctly, or that the Google survey should be given any meaningful weight on the issue of whether a significant minority of reasonable consumers would interpret Respondent's biodegradable claims to be communicating a message that ECM Plastics will completely break down into elements found in nature, in a landfill, within one year. The greater weight of the evidence supports Dr. Stewart's opinions that the Google survey conducted for this litigation is not reliable or valid to draw any conclusions about consumer interpretation of "biodegradable" claims, or the validity of other surveys, and cannot even be characterized as a "survey," but rather was the asking of a single question to unidentified individuals who happened to have visited particular websites. F. 431, 434. To the extent that the Google survey can be deemed sufficiently reliable or valid to be admissible, the evidentiary weight to which the Google survey is entitled, given its methodological flaws, is minimal at best.

(b) Analysis of Google survey

Google Consumer Surveys markets its survey product as a new approach to "market research" and as a tool for those who "need to pre-test a marketing campaign, prioritize new product initiatives, or even gauge a reaction about a recent event. . . . Now, with Google Consumer Surveys, you can easily conduct market research or even automatically track your brand to inform important business decisions." F. 356. Google has contracts with internet content providers to present survey questions to internet users who would otherwise need to pay to access content on the providers' websites. F. 360. In a Google survey, an internet user will encounter a "pop-up" survey question when attempting to access desired content on a website. F. 357. The user is blocked from access to the desired content unless the user answers the survey question or pays for access to the desired content without answering the survey question. F. 357, 359.

In Dr. Frederick's Google survey, each respondent was presented with only a single question. F. 371. A single question

survey, such as the Google survey in this case, is called a "micro-survey." F. 358. Dr. Frederick's assertion that 20% to 52% of consumers "infer" that plastic products labeled "biodegradable" "will biodegrade within a year . . ." is based on the responses to 12 open-ended questions that Dr. Frederick crafted for the Google survey, designated as questions 3A–3K.[28] F. 435. These questions asked, in varying ways, that the respondent provide their opinions, beliefs, and/or estimates as to "how long," or "how much time" such a "biodegradable" plastic product "would" or "will" take to decompose. F. 437.

The many, and significant, ways in which Dr. Frederick's Google survey failed to draw valid samples from the appropriate population, ask appropriate questions in ways that minimized bias, and analyze results correctly, are set forth in detail in the Findings of Fact, at Section II.D.3., *supra*. The most significant and persuasive of these failures are discussed below.

- **The "pop-up" survey question design, in exchange for obtaining desired content, is inappropriate because it creates a disinterest bias**

Because questions in the Google survey are answered by respondents in exchange for access to internet-based content in which they may be interested, the questions are a distraction, at best, and a barrier to respondents whose objective is to access information, not to complete a survey. This type of disruptive questioning creates a "disinterest bias." F. 382. Disinterest bias refers to the fact that if people are uninterested in a survey, if they are disengaged, or, even worse, if the survey serves as an interruption of an activity in which they are more interested, those people will be likely to give insincere, random, and often nonsensical responses simply to get past what is essentially an interruption in what they were doing before being confronted by the survey. F. 383. Dr. Frederick agreed that a person who does not take a survey question seriously is more likely to answer that

[28] There appear to be two questions labeled 3G in Dr. Frederick's Google survey. *See* CCX 860 (Frederick Expert Report at 31). The first question 3G will be referred to herein as question 3G(1). The second question 3G will be referred to herein as question 3G(2).

question insincerely, whimsically, or with just a guess. F. 385. Incorporating such "protest" or "bypass" responses into a data set affects the integrity of the data analysis. F. 386; *see also* F. 506 (contrasting a telephone survey "protest" response of hanging up, which is not incorporated into the data set).

Complaint Counsel argues that disinterest bias has not been studied in academic literature and that Dr. Stewart's opinion on the existence of such a bias is based on a "blog post from a [Google Consumer Surveys] competitor." CCB at 46. However, Dr. Stewart testified, without contradiction, that the Greenbook Blog, which Dr. Stewart references on the phenomenon of disinterest bias, is a publication that is well known in the practicing market research community and among well-read researchers. F. 384. Complaint Counsel further contends that the average time that a respondent took to answer the Google survey question was "generally" above 20 seconds, which, according to Complaint Counsel, is evidence that respondents were thinking about the question, rather than merely clicking a random response. *See* CCB at 46. It cannot be assumed that the 20 second response time indicates that the resulting response was serious, sincere, or not a protest response. Dr. Frederick acknowledged that numerous factors may cause survey respondents to take, on average, 20 seconds to answer their "pop-up" question, including performing other computer work in another window or on another screen, or taking a telephone call. F. 389. Dr. Frederick cannot know what caused his survey respondents to wait 20 seconds before keying in a response to his survey questions. F. 389.

Lastly, Complaint Counsel contends that, according to Dr. Frederick, the amount of "protest" responses was very small. CCB at 46. In fact, however, there is no way to know how many responses to Dr. Frederick's Google survey questions were "protest" or "bypass" responses, because all the questions required a response before the respondent could access the desired internet content. F. 388. Dr. Frederick opined that there is "no reason to believe people who [give protest responses] actually have different views about biodegradation times" than the people who gave specific time estimates. CCX 865 (Frederick Expert Rebuttal Report at 6). But it also cannot be assumed that their views would have been the same. Dr. Frederick's opinion on this issue is unsupported and unpersuasive, and is, thus, rejected.

- **The "single question" design was inappropriate and the questions were not asked in a way that would minimize bias in favor of an implied rate claim**

Each Google survey respondent was asked only one question. F. 371. How consumers interpret the term "biodegradable," which is what Complaint Counsel undertook to prove, cannot be addressed and determined with a single question. *See* F. 372-374. A good open-ended question might provide some dimension of consumer perception of the term "biodegradable," but it will not provide other dimensions, such as nuances, dependencies, or context effects. F. 374. Moreover, when there is only one question asked of a survey respondent, a researcher cannot really know what the response means or indicates. F. 373. The researcher cannot know whether it is a sincere response, and/or whether it is a response that would be subject to qualification if there had been a follow-up question. F. 375.

Furthermore, none of the Google survey questions actually asked the survey respondent how the respondent interpreted the word "biodegradable," which is the material issue for purposes of the Implied One Year Claim. F. 381. The Google survey questions 3A-3K, upon which Complaint Counsel relies, did not, for example, present a bag with the ECM "biodegradable" logo and ask whether the "biodegradable" logo communicated any message concerning the rate for complete biodegradation, and if so, what that specific rate message was. F. 436. Instead, the Google survey questions assumed that the representation of "biodegradable" communicates a biodegradation rate, and asked only for the respondents' "best estimate of the amount of time," or for the respondents to report "how long," or "how much time," they think that a plastic product that is labeled "biodegradable" "would" or "will take" to decompose or biodegrade. F. 437. *See generally*, F. 438-447. In this regard, the questions were not asked in a way to minimize bias. *Compare Kraft*, 1991 FTC LEXIS 38, at *24, n.13, in which the Commission found probative a survey by Dr. Stewart that, in order to assess whether certain ads for Kraft Singles implied that one slice of the cheese product contains the same amount of calcium in five ounces of

milk, showed the advertisement to respondents and asked, "Does this ad say or suggest anything about the amount of calcium in a slice of Kraft Singles compared to the amount of calcium in five ounces of milk?" *See In re Kraft, Inc.*, 114 F.T.C 40, 1989 FTC LEXIS 131, at *42-43 (April 3, 1989) (Initial Decision). *Compare also Stouffer*, 1994 FTC LEXIS 196, at *23 n.21, *30 (finding probative, on issue of whether Stouffer's advertisements for Lean Cuisine implied that the entrées were low in sodium, answers to questions about "what point" the advertisement was making and "what reason" the advertisement gives for buying Lean Cuisine).

- **Dr. Frederick did not analyze the results properly**

The process by which survey responses are classified into response categories for the purpose of analysis is referred to as "coding." F. 390. In the Google survey, open-ended questions asking for the respondents' estimated biodegradation times required coding into a time interval, and responses such as "3 months," "6 months," "between 5 and 9 months," "a little less than a year," and "1 year" would be coded as a response falling into the time interval category of "one year or less." F. 390. Dr. Frederick used a "bright-line" coding rule, however, that included only responses that provided a time interval, and only if the time interval reported included both a numeric specification and an accompanying temporal unit. All other responses, including "it depends," or "I don't know," were not coded, and were thereby eliminated from the survey results. F. 392-393. In this way, Dr. Frederick effectively turned open-ended questions into closed-ended questions, by limiting the range of acceptable responses to those that fit Dr. Frederick's pre-determined format, or "bright-line" rule. *See* F. 327-335, 399. [29] Overall, out of 29,000 total responses provided in response to Dr. Frederick's Google survey, only approximately 21,000 (approximately 72%) were coded. F. 395.

[29] Closed-ended questions are questions where a list of possible responses to a question are provided to the respondent, and where the respondent must choose from one of the responses that were provided in order to give an answer to the question. F. 333-334. By contrast, open-ended questions allow consumers to offer responses in their own words, and are far more informative than closed-ended questions. F. 328-331.

By way of illustration of Dr. Frederick's coding methodology described above, question 3K showed the image of a plastic bag, which was digitally edited or altered ("photoshopped") to superimpose the image of a large ECM logo, as shown below:

F. 447. The question asked, "What is your best estimate of the amount of time it would take for this plastic bag (which bears the symbol 'ECM biodegradable') to biodegrade?" F. 447. While Dr. Frederick calculated that 38% of respondents estimated less than one year, the evidence shows that only 176 responses were coded, while 66 responses were not coded. F. 447; *see* CCX 860 (Frederick Expert Report at 33). Thus, out of the 242 actual responses, approximately 27% were eliminated from Dr. Frederick's data analysis.

It is not appropriate for a researcher not to code a response because that response does not fit into the researcher's desired structure, or to "force-fit" responses into a pre-existing structure of biodegradation time categories. F. 396-397. Such methodology is also improper because it limits the range of responses considered, and by definition creates greater homogeneity of responses than would be the case if the respondents were allowed more latitude in responding. F. 399. Dr. Frederick's coding methodology is particularly egregious because it reduces the denominator of the percentage results reported by Dr. Frederick, which has the effect of inflating the reported percentages. F. 398. In summary, the Google survey data was not analyzed in accordance with accepted statistical principles. F. 396-404.[30]

[30] It is also significant that the responses to the Google survey were coded primarily by Dr. Frederick himself, and his assistant, Mr. Meyer, both of whom were aware of the sponsor of the research and its purpose. F. 405-406. Blinding of coders is very important when coding open-ended questions because the coders are, in effect, transforming the data into categories of responses. This is the essence of data analysis. F. 349. To the degree that the

Complaint Counsel argues that the responses excluded by Dr. Frederick's coding are not material because, according to Dr. Frederick, there is no reason to believe that non-coded responses would be different than the responses that were coded. For example, Dr. Frederick opined, it does not matter that he omitted responses of "I don't know" to questions asking how long a biodegradable item will take to decompose, because "there is no reason to believe" that those responding, "I don't know," hold a view about biodegradation times that differs from the rest of the population. CCB at 43. This opinion is unsupported and unpersuasive. It defies logic to assert that, as a group, those asserting no knowledge of how long a "biodegradable" item will take to biodegrade have the same views as those expressing a specific time. Moreover, Dr. Stewart persuasively opined that the distribution of responses "would be different because some of those people actually don't know, and so the fact they don't know will change the overall distribution even if there are a few people who say 'don't know' because they are less certain. But the overall distribution would be quite different." F. 400. Dr. Stewart's opinion on this issue, which is more credible and sensible, is given greater weight than that of Dr. Frederick.

Complaint Counsel further argues that Dr. Frederick's flawed coding methodology is not material because, according to an analysis of the data by Dr. Frederick, the distribution of numeric responses unaccompanied by a "temporal unit," such as "1," or "one," which were excluded from the data, were "very similar to the distribution of numeric responses which did have an accompanying unit." CCB at 43-44. Therefore, according to Dr. Frederick, excluding responses not meeting his "bright-line" rule had no effect on the data. (Frederick, Tr. 1127-1128). However, Dr. Frederick's analysis assumes that those who entered, "1" or "one" intended to convey a temporal unit that was comparable to

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coders have a prior understanding of what the researcher is looking for, that prior understanding can influence what codes the coders arrive at and how they code the data. F. 350, 509. Dr. Frederick's failure to use blind coders for his Google survey deviates from customary practice, may infect the survey with coder bias, and further calls into question the validity of the survey. F. 347, 407-408.

those that did provide a temporal unit – a fact which cannot be known, and will not be assumed.

- **The evidence fails to demonstrate that the Google survey sample was representative of the relevant population**

According to Dr. Frederick, his Google survey was directed at "end-use consumers," CCX 860 (Frederick Expert Report at 5), which are defined for purposes of this proceeding as members of the general public who would be exposed to ECM claims in the marketplace. *See* Section III.C., *supra*, n.16. Thus, Complaint Counsel did not undertake to prove that ECM Customers, or ECM's Customers' customers, interpreted ECM's representations that ECM Plastics are "biodegradable," or "biodegradable in some period greater than a year," to mean completely biodegrade into elements found in nature, in a landfill, within one year, even though this popluation is arguably the most relevant population for ECM's claims. *See* F. 164-165, 168, 172, 207, 210. In fact, there is evidence that ECM Customers did not interpret Respondent's biodegradable claims in this manner. F. 240; *see also* F. 12-13, 50, 1508-1509 (ECM Customer testimony that they believed biodegradation would occur within 9 months to 5 years).

To the extent that end-use consumers are a relevant population, Complaint Counsel has failed to demonstrate that the Google sample was representative of this population. Dr. Frederick opined in his report that Google provides respondents for its surveys that are "demographically representative of U.S. adults, and tend to yield similar results to other internet panels."[31] CCX 860 (Frederick Expert Report at 12). As discussed below, Dr. Frederick's opinions in this regard are not adequately supported, and are outweighed by the more credible and persuasive opinion of Dr. Stewart that there is no way to know whether or not Dr. Frederick's Google survey population was representative of any identifiable population. F. 426-427.

[31] In an internet panel survey, individuals will receive an email requesting participation in a survey, and a link to the survey site. The participants are compensated for their participation. F. 367.

Google provides only indirect information on a survey respondent's demographics. F. 409. Google draws inferences about demographics, such as gender and age, based on the respondent's Internet Protocol ("IP") address and "cookies," as well as other information indicating the respondent's website visits. F. 411. Google infers the respondent's location based on the computer's IP address, and then uses this information to further infer the respondent's income and urban density "by mapping the location to census tracts and using the census data to infer income and urban density." F. 410.

The methodology of "inferred" demographics is subject to numerous flaws, including many readily acknowledged by Dr. Frederick. F. 412-424. Accordingly, Dr. Frederick's Google survey failed to properly choose and define a population, because it is not clear what the population was that he was analyzing. Rather, the population is defined in terms of who participated in the survey, which is not an appropriate way to define a population. F. 425. Google's inferred demographics can be wrong, for example, when multiple members of a household visit websites from a single computer. F. 416. If a question is answered from that computer address, neither Google nor the surveyor can know which of those household members answered the survey question. F. 418. In addition, cookies can be deleted and website history may be insufficient to draw demographic conclusions. F. 416-417. Dr. Frederick was unaware of what percentage of internet users use websites, software, or Google Chrome's features that allow one to browse privately or to mask one's IP address. F. 423-424. A valid IP address of a survey respondent can only tell Google the location, but not the age, nationality, or gender of the person who answered the survey question. F. 419. In addition, Dr. Frederick did not choose the websites, or the number of websites, on which his questions were posted. F. 413. Dr. Frederick also does not know which websites among Google's contracted internet content providers featured his survey questions. F. 412.

Dr. Frederick's opinions about the sampling accuracy of Google Consumer Surveys, set forth on page 12 of his expert report, reference as support an article authored in part and published by Google itself, and also rely on an article from the New York Times *FiveThirtyEight* blog, authored by Nate Silver.

F. 428. Both references, however, were provided to Dr. Frederick by Complaint Counsel. F. 428-430. Dr. Frederick was not even aware of Mr. Silver's blog post or the cited Google reference materials when he drafted his expert report. F. 428. Complaint Counsel also drafted Dr. Frederick's "opinion" on page 12 of Dr. Frederick's expert report that, in predicting the results of the 2012 Presidential election, Google Consumer Surveys "best[ed] better-known rivals such Gallup, CNN, and Rasmussen." F. 430. In addition, Complaint Counsel drafted the "*see*" reference to Nate Silver's blog on page 13 of Dr. Frederick's expert report: "*See* N. Silver, *FiveThirtyEight*, The New York Times (Nov. 10, 2012) ('Perhaps it won't be long before Google, not Gallup, is the most trusted name in polling.')." F. 430.[32]

Moreover, even if, according to Nate Silver, a Google survey was accurate as a polling mechanism for the 2012 presidential election, this is not persuasive evidence that the Google survey conducted for this case is sufficiently reliable and valid to determine how consumers would interpret Respondent's "biodegradable" claim. There is no evidence or opinion that the presidential poll performed using Google Consumer Surveys and the Google survey at issue in this proceeding were similar in any material way, other than that they were both conducted through Google. It is also logical that a binary question on a matter of public debate, such as a presidential candidate preference, is not comparable to the type of open-ended questions that are appropriate to determine consumers' interpretation of the term "biodegradable." *See* F. 328-331.

Complaint Counsel also relies on findings of a Pew Research Center ("Pew") study which, according to Dr. Frederick, found that, with respect to a certain series of questions administered by telephone to a Google Consumer Surveys sample and to Pew's own internet panel, "the Google Consumer Surveys sample appears to conform closely to the demographic composition of the overall internet population." *See* Frederick, Tr. 1069-1070; CCFF 227, 228 (citing CCX 874 at 2). This general conclusion carries little, if any, weight on the question of whether the Google survey

[32] To be sure, one does not expect a retained expert witness to be objective and independent. However, one does expect the expert's opinions and support for those opinions to be the work of the expert witness.

at issue in this proceeding drew valid samples from a representative population. The Pew study did not analyze the Google survey performed for this case. In addition, as noted above, Dr. Frederick did not choose the websites, or the number of websites, on which his questions were posted. F. 413. Dr. Frederick does not even know which websites among Google's contracted internet content providers featured his survey questions. F. 412.

Furthermore, notwithstanding the conclusion cited by Complaint Counsel, Pew also reached a number of conclusions that weigh against a finding that the Google survey at issue in this proceeding drew a valid sample from a representative population, including that: (1) the "sampling frame" used by Google Consumer Surveys is not "the general public"; (2) "[i]t is unknown whether visitors to the network of publisher sites are fully representative of all internet users or what proportion of internet users are covered by the publisher network"; (3) "[f]or approximately 30-40% of [Google Consumer Surveys] users, demographic information is not available – either because their cookies are turned off but more often because the [Google Consumer Surveys] algorithm cannot determine a trend from the websites visited as recorded in their DoubleClick advertising cookie that would suggest what gender or age they are"; and (4) "there can be substantial errors in how individual people are classified using Google's inferred demographics." CCX 874 at 2-5.

Complaint Counsel also contends that Google's own studies of its sampling concluded that its sampling compared well to internet panels. However, there is reason to discount the weight given to Google's own studies of its own surveys, given Google's obvious economic interest in the results. Finally, Complaint Counsel argues, based on the opinion of Dr. Frederick, that Google has "high incentives" to get its demographic information "reasonably accurate." According to Dr. Frederick, "[a]dvertisers value online advertising only to the extent that it works, which gives Google strong incentives to accurately ascertain the demographic characteristics of respondents advertisers target." CCB at 37-38; Frederick, Tr. 1398; CCX 865 (Frederick Rebuttal Expert Report at 3). Dr. Frederick has no personal knowledge in this regard, and he is not an expert in either economic incentives

in general or Google's incentives in particular. Accordingly, his opinions on these issues are given little weight.

(c) Summary and conclusion as to Google survey

In addition to the many, significant, methodological flaws shown by the evidence, there are other reasons to reject the Google survey as evidence supporting the Implied One Year Claim. First, there is no legal precedent for relying on results of a Google Consumer Survey to establish a fact in litigation. Complaint Counsel does not point to any litigation – FTC or otherwise – in which a Google Consumer Survey was accepted as evidence and/or given any significant weight. In addition, the evidence fails to show that Google Consumer Surveys have been become generally accepted as a reliable research tool by market research professionals. F. 361-363. As of the date of Dr. Frederick's deposition in this case, Dr. Frederick had never actually seen a Google Consumer Survey question live on a website. F. 370. When choosing to use a Google Consumer Survey for his research in this case, Dr. Frederick was unaware of any administrative litigation in which the FTC had relied upon Google Consumer Survey data as a basis for decision. F. 369. Moreover, the evidence readily supports a conclusion that Dr. Frederick was motivated to use a Google survey for this litigation, at least in part because it was inexpensive to conduct ($2,000). F. 364-368. Dr. Frederick was paid a flat fee for his work on this case ($40,000) and the less Dr. Frederick had to pay for a survey, on assistants, and on costs, the more money he would net as compensation for his work in this case. F. 364-366.

In summary, Dr. Frederick's Google survey fails to comport with generally accepted standards for survey research, as well as the legal standards used by the Commission, and is insufficiently reliable or valid to draw any material conclusions. F. 431-434. Even if the Google survey is sufficiently reliable or valid to be admissible evidence, the Google survey is so seriously flawed that it is entitled to little, if any, evidentiary weight on the issue of whether a significant minority of reasonable consumers would interpret ECM's biodegradable claims to be conveying the message that the item will completely biodegrade into elements found in nature within one year. A Google Consumer Survey

may well provide helpful information to those who need "to pre-test a marketing campaign, prioritize new product initiatives, or even gauge a reaction about a recent event [or] . . . track your brand to inform important business decisions," as claimed in Google's marketing materials. F. 356. However, the Google survey is not of sufficient methodological quality to constitute probative evidence in litigation, under the Commission's standards or the standards applicable to federal courts in general. Rather, for purposes of this adjudication, the Google survey is weak, at best.[33]

v. APCO and Synovate surveys

(a) Pertinent survey questions and results

As evidentiary support for the Implied One Year Claim, Complaint Counsel relies on a 2006 survey by the American Plastics Council ("APCO" survey). APCO commissioned the APCO survey to investigate consumer perceptions about the terms "biodegradable" and "compostable." F. 455. Complaint Counsel relies on the responses to question 4 from the APCO survey and asserts, based on those responses, that 60% of consumers "believe" that packages labeled "biodegradable" "should" biodegrade within one year. *See* CCB at 32, citing RX 597 at 2; *see also* CCX 860 (Frederick Expert Report at 9); *see* F. 458-459 (noting Dr. Frederick's reliance on question 4 as the most pertinent question in the APCO survey). That question and the distribution of answers are as follows:

> If a package is labeled "biodegradable," what should be the maximum amount of time that it should take for that package to decompose?
>
> One month or less 19.2%

[33] Complaint Counsel points to questions from the Google survey purporting to show that consumers believe biodegradable items will decompose in various periods other than 1 year, including 2 years and 5 years, *see, e.g.*, CCFF 212-213, and that the claim of decomposition in "some period greater than a year" may result in biodegradation time estimates that are faster than 9 months to 5 years. *See* CCFF 308-309. As set forth in detail above, the Google survey is not sufficiently reliable to provide valid conclusions and the cited evidence does not support the Implied One Year Claim.

Three months	6.6%
Six months	8.3%
One year	26.1%
Two to four years	4.7%
Five years or more	16.5%
Other	0.5%
Unsure (not read)	17.4%
Refused (not read)	0.7%

F. 459, 463.

Complaint Counsel also relies on a survey, commissioned by the company EcoLogic and conducted by Synovate ("Synovate" survey). The Synovate survey was a 2000-respondent internet panel survey conducted in 2010. F. 480. EcoLogic procured the Synovate survey in connection with the public comment period for the FTC's proposed revisions to the Green Guides. F. 481. EcoLogic wanted to conduct consumer research into consumer comprehension of packaging that biodegrades in a landfill and/or composting environment, so that it could report findings and recommendations to the FTC. F. 481. Complaint Counsel relies on question 19 of the Synovate survey to assert that 25% of consumers "believe" that less than one year is "a reasonable amount of time" for a biodegradable plastic package to decompose in a landfill. CCB at 32; *see also* F. 483 (citing Dr. Frederick's statement that Synovate question 19 is the "most pertinent" to the issues upon which he was asked to opine). That question and its responses are as follows:

> What do you believe is a reasonable amount of time for a "biodegradable" plastic package to decompose in a landfill?
>
> Please select one:
>
> | | |
> |---|---|
> | Less than 1 year | 25% |
> | Less than 5 years | 45% |
> | Less than 10 years | 17% |
> | Less than 20 years | 6% |
> | Less than 40 years | 3% |
> | 40 years or greater | 4% |

F. 485-486.

In his expert report, Dr. Frederick cites the responses to APCO question 2 and Synovate question 5 as demonstrating that "at least a significant minority of consumers understand that a 'biodegradable' product will biodegrade in a landfill." CCX 860 (Frederick Expert Report at 13). APCO question 2 and its responses are as follows:

> From what you know, if something is labeled "biodegradable," does that mean it will decompose in:
>
> | | Yes | No | Unsure |
> |---|---|---|---|
> | The natural environment | 86% | 8% | 6% |
> | A landfill | 83% | 11% | 6% |
> | Your backyard | 80% | 15% | 5% |

F. 464-465. Synovate question 5 and its responses are as follows:

> If something is labeled "biodegradable," where will it decompose? If you are not sure, please take your best guess. (Select all that apply.)
>
> In the open environment (land or water) as litter 51%
> In a landfill 72%
> When buried in our backyard 43%
> In a home composting device 46%
> In a commercial composting facility 51%
> None of these 2%

F. 490.

(b) Analysis of APCO and Synovate survey results

APCO question 4 and Synovate question 19 ask for consumer beliefs and/or opinions as to what is a "maximum amount of time" or "reasonable amount of time" for a biodegradable product to decompose. F. 460, 485-487. The material factual issue in this case is what message was implied by Respondent's use of the term "biodegradable." This necessarily includes a determination of *whether* the term "biodegradable" communicates to the consumer *any* message as to a rate for complete biodegradation in the first instance, and then, if so, what that rate message is. Evidence of consumer beliefs and/or opinions as to a "maximum amount of time" or "reasonable amount of time" for biodegradable products to decompose sheds little, if any, light on that issue. Therefore, such survey evidence has little probative value regarding whether Respondent, in using the term "biodegradable"– for example on its logo – communicated the message to a significant minority of reasonable consumers that plastics made with the ECM Additive would completely biodegrade in a landfill within one year.

Notwithstanding the foregoing, the evidence fails to prove that either the APCO survey or the Synovate survey is valid for the purpose of drawing conclusions about consumers' beliefs and/or opinions regarding the time a "biodegradable" product will take to decompose. Both Dr. Frederick and Dr. Stewart agree that the APCO and Synovate surveys are flawed because they ask closed-ended questions. F. 489, 492-493. As noted above, closed-ended questions limit the range of acceptable responses, while open-ended questions allow consumers to offer responses in their own words. F. 327-335. The subject of public perception of biodegradation and biodegradation of plastics as a field of consumer survey research has not been researched extensively. F. 327. Given the current understanding and state of knowledge with respect to consumer perception of biodegradation, open-ended questions are much more suitable, appropriate, and informative than closed-ended questions. F. 328, 456. Indeed, when beginning consumer perception work in a new area, open-ended questions are essential. F. 329. Use of open-ended questions and interviews early in the exploration of a topic, such as biodegradability, helps surveyors be sure that, when they do

finally design closed-ended questions, they give people the full array of response options. F. 332. As the Commission noted in *Telebrands*, "[o]pen-ended questions allow survey participants themselves to articulate the central claim or claims in the ad . . . ." 140 F.T.C. at 318. "Marketing experts have found that credible evidence comes in response to open-ended questions, just as in trials where the unbiased testimony comes after direct, non-leading questions." *Stouffer*, 1994 FTC LEXIS 196, at *59.

Closed-ended questions, because they limit the choices for response, can result in a misleading homogeneity of responses. F. 334-335. Misleading homogeneity adversely affects the validity of the answers to both APCO question 4 and Synovate question 19. F. 467-468, 474, 491. By way of illustration, four of the six time period response options to APCO question 4 state a period of one year or less, while only two response options are longer than two years. F. 467-468. APCO survey question 4 is invalid as inherently biased because it offers many more opportunities to select an answer that reflects one year or less than an answer that reflects a longer time period. F. 467, 471. Because two-thirds of the time period response options were one year or less, the response options predisposed people to select a short time frame, rather than a longer time frame. F. 467, 472. Both experts agreed that the allocation of response options for APCO survey question 4 is a significant problem and renders the question inherently biased. F. 467-470. Even random responses to APCO question 4 would result in 66% (two-thirds) of the responses falling into one of the four choices of one year or less. F. 473. Against this background, the fact that 60% of respondents selected one of those options is not entitled to significant weight. Indeed, the evidence supports Dr. Stewart's opinion that the APCO survey is invalid for the purpose of drawing conclusions about people's perceptions about how long biodegradation takes, because it fails to provide adequate opportunity for consumers to offer their perceptions, yet at the same time provides response options that are biased in favor of the "one year" time period. F. 477.

In addition, Dr. Frederick also found fault with the use of the word "should" in APCO question 4 ("what should be the maximum amount of time that it should take" for a package to decompose). F. 476. Use of the word "should" in APCO question 4 could be interpreted by survey respondents "as

referring to what would be desirable, as in, '*Wouldn't it be nice* if packages decomposed this quickly,' rather than assessing their judgment of how long such decomposition would, in fact, take." F. 476. Dr. Frederick ultimately agreed that the validity of the APCO survey could not be determined, notwithstanding his apparently contrary opinion in his expert report. F. 478. For all the foregoing reasons, the APCO survey is entitled to, and is given, little weight. F. 479.

Complaint Counsel's expert, Dr. Frederick, pointed out that Synovate question 19 is also flawed because it asks the respondents what they believe is a "reasonable" amount of time for biodegradation, which creates a potential problem because the word "reasonable" could be interpreted to be asking the respondent what he or she "would like to happen, what kind of product should be produced," or what is "a goal" to which "we should aspire." F. 488. Dr. Frederick and Dr. Stewart agreed that misleading homogeneity also adversely affects the validity of the answers to Synovate question 19, although the response options are biased toward a longer time period for degradation, rather than a shorter time period, as was the case with APCO question 4. F. 491.

It should be noted that the FTC was critical of both the APCO and the Synovate surveys, which it reviewed in connection with its adoption of the "one-year" guideline for "unqualified" biodegradable claims in the revised Green Guides. *See* F. 238, 481, 495-496. Specifically, in connection with the proposition that consumers expect products labeled "biodegradable" to completely biodegrade in a landfill in less than one year, the Commission stated that both the APCO and Synovate surveys "may be faulted for lacking control groups and presenting the timeframe questions with close-ended, rather than open-ended, answers, but they nevertheless are the only studies in the record." F. 496 (citing Statement of Basis and Purpose, Revised Green Guides, available at http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf at 121 n.409 ("Statement of Basis and Purpose")). With respect to the Synovate survey in particular, the Commission found that the "results suggest that respondents' answers may have been not only biased but also influenced by a tendency to avoid extreme answers. As a result, reliable real-

world conclusions cannot be drawn from the Synovate survey." F. 495. The Commission declined to rely on the Synovate survey, finding it less reliable than the APCO survey. Statement of Basis and Purpose, *supra*, at 121.

(c) Summary and conclusions as to APCO and Synovate surveys

For all the foregoing reasons, the APCO and Synovate surveys are entitled to, and are given, little weight. First, none of the survey questions inquired whether or not a claim of "biodegradable" communicates any message to the consumer about a rate for complete biodegradation. Instead, the questions effectively assumed that a representation of "biodegradable" implied a rate for complete degradation, and only assessed consumers' estimates or beliefs as to such biodegradation rate. In this regard, the surveys shed little or no light on the material issue in this case of whether Respondent's claim that ECM Plastics are biodegradable conveys any message about the time period for complete biodegradation in the first instance, much less a time period of less than one year.

Moreover, to the extent consumer beliefs or estimates about how long it takes for a biodegradable item to decompose are indirectly relevant to the material issue in this case, the evidence demonstrates that the APCO survey and the Synovate survey are both so seriously flawed that, for the purpose of drawing conclusions about such consumer beliefs, the surveys are either invalid or, at best, entitled to little weight. Dr. Frederick's opinions that, notwithstanding their many, significant flaws, the APCO and Synovate surveys are "reasonably reliable and valid," are unsupported and unpersuasive, and are rejected. However, even if these opinions were accepted, "reasonable reliability and validity" is not a ringing endorsement of any survey. As noted in Section III.D.4.b.iv.(a), above, reasonable reliability and validity is the *minimum* standard that must be met for a consumer survey even to be considered by the trier of fact, given that consumer surveys are "obviously hearsay." *In re Bristol-Myers Co.*, 85 F.T.C. 688, 1975 FTC LEXIS 218 at *127-128 (Apr. 22, 1975). Meeting this bare minimum does not entitle the surveys to any particular weight, and the extensive flaws in these studies detract from any weight to be given the results. *See POM*, 2013 FTC

LEXIS 6, at *49 (stating that perfect survey methodology is not required, but flaws in the methodology affect the weight that is given to the results). Indeed, in the more credible opinion of Dr. Stewart, the APCO and Synovate surveys have little probative value beyond suggesting that there is variability in what consumers understand about biodegradability. F. 497.

Accordingly, regardless of whether the APCO and Synovate surveys support a conclusion that consumers believe that biodegradable items will biodegrade in a landfill, the APCO and Synovate surveys carry little weight on the question of whether the evidence proves that a significant minority of reasonable consumers would view Respondent's claims that ECM Plastics are (1) "biodegradable" or (2) "biodegradable in some period greater than a year," as conveying an implied claim that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year.

vi. Convergent validity

Based on the opinions of its expert, Dr. Frederick, Complaint Counsel argues that there is "convergent validity" among the Google survey, the APCO survey, and the Synovate survey, such that, taken together, the evidence demonstrates that 35% of consumers believe that plastic products labeled "biodegradable" will biodegrade within one year. CCB at 32.[34] Dr. Frederick testified that he could not determine whether or not the APCO study yielded accurate, *i.e.*, "valid," results regarding people's perception of how long things take to biodegrade, because:

> [Dr. Frederick] I don't know what that answer is. There's no gold standard. I can't go out and knock on doors and actually find out whether there's a cat there or not, for example, from the earlier case to determine

[34] Complaint Counsel also contends that the survey by Respondent's expert, Dr. Stewart, provides "convergent validity" for the results of the APCO, Synovate, and Google surveys; however, as shown below, Dr. Frederick's convergent validity theory was expressly based on the purported "convergence" of results of the APCO, Synovate, and Google surveys, and does not refer to the results of Dr. Stewart's survey. Thus, Complaint Counsel provides no support for relying on Dr. Stewart's survey to support the "convergent validity" of Complaint Counsel's proffered surveys.

> whether those numbers that I've gotten are matching the truth about the world, so I don't know whether that survey is valid or not. I would need to do additional analyses.
>
> Q: You referenced additional analysis. . . . [W]hat, if anything, can be done to ascertain the validity of APCO?
>
> A: So often in cases like this where the construct of interest is not something readily determinable by some other method, you need to compare the results of one survey to the results of other surveys and see whether in fact. . . those results are giving you the same result, the same fact. That's sort of known as convergent validity. Different surveys are yielding the same result. And as you do different surveys -- if different surveys using different designs conducted by different people at different times, independent surveys, are yielding the same results, then you can gain confidence that those results are valid, that they're measuring what they intend to measure.

(Frederick, Tr. 1042-1043). Thus, in an effort to validate the APCO results, Dr. Frederick undertook his Google survey. *See* F. 353.

Dr. Frederick went on to testify as to what he believed were similar results achieved among results from the Google survey, the APCO survey, and the Synovate survey. Dr. Frederick concluded that these three surveys were conducted independently of one another, at different times, and used different designs ("phone, Internet survey, Google Consumer Surveys"), yet yielded "results which are qualitatively comparable to one another and therefore I think providing evidence of convergent validity of the results obtained." Frederick, Tr. 1143-1145, 1155, 1173. *See also* CCX 865 (Frederick Rebuttal Expert Report at 13) ("Though the APCO and Synovate questions differ . . . the important fact remains that both of these studies – and my own [Google survey] – all yield fairly similar results, *despite* those differences. This correspondence – what is known as 'convergent validity' – is

powerful evidence of the validity of the collective results.") (emphasis in original).

With respect to Complaint Counsel's assertion that, based on convergent validity of the APCO, Synovate, and Google surveys, 35% of consumers believe that plastic products labeled "biodegradable" will biodegrade within one year, Dr. Frederick testified as follows:

> Q: [W]hat was the range of percentages of respondents giving year or less responses [to questions 3A-3K of the Google survey]?
>
> A -- that ranged from 20 percent to 52 percent.
>
> Q. Now, Professor, what, if anything, does that range tell you about the validity of APCO and Synovate?
>
> A. Well, if you take the center of that range, you know, 35 percent, this is giving -- this is looking a lot like the results that APCO and Synovate obtained using different methodologies. . . . This can be an illustration of that when you have different studies using different methodologies conducted by different investigators at different times using slightly different question wording, different images, and so forth, and yet in all these cases you're getting estimates that are, you know, on the order of a third.

Frederick, Tr. 1155.

Respondent argues that the Google, APCO, and Synovate surveys do not have "similar" results, but even if they do, the convergent validity theory should not apply because each of the three surveys is fatally flawed. RRB at 24-25. Respondent further argues that accepting the convergence validity theory, based on flawed sources of data, creates an unacceptable risk of "imposing legally binding obligations based on unreliable (and thus likely incorrect) survey data" and that the precedent would result in future cases being focused, not on whether the surveys at issue are valid, but on whether such invalid results are sufficiently

"similar" to become valid. "The exercise invites departure from reason and logic to become institutionalized as the norm." RRB at 26.

For purposes of the weight to be given to the Google, APCO, and Synovate surveys on the issue of whether Respondent made the alleged Implied One Year Claim, the whole is no greater than the sum of its parts. As explained above, *see S*ection III.D.4.b.v.(b)., APCO question 4 and Synovate question 19, the pertinent questions upon which Complaint Counsel relies for convergent validity, are each seriously flawed, and Complaint Counsel's expert, Dr. Frederick, agrees with Respondent's expert, Dr. Stewart, that these questions are flawed. The Commission, in issuing the revised Green Guides, acknowledged the flaws in the APCO and Synovate surveys, and further stated that "[r]eliable real world conclusions cannot be drawn from the Synovate study." F. 495-496. As analyzed earlier, the evidence demonstrates that the APCO survey and the Synovate survey are both so seriously flawed that, for the purpose of drawing conclusions about consumers' beliefs and/or opinions regarding the time a biodegradable product will take to decompose, the surveys are either invalid or, at best, are entitled to little weight. Dr. Frederick's convergent validity theory is based on the assumption that the Google survey results are valid and can thereby somehow cure the APCO and Synovate surveys. However, the Google survey is itself so seriously flawed that no valid conclusions can be drawn from it. *See* Section III.D.4.b.iv. It defies logic to contend that three flawed surveys can somehow rehabilitate one another and create probative weight that otherwise does not exist, on the ground that the results are "fairly similar." Indeed, what is similar in all three surveys is a lack of validity. Accordingly, based on the foregoing, Dr. Frederick's opinions regarding the application of the theory of convergent validity to the survey evidence in this case are unsupported and unpersuasive, and are, therefore, rejected.

In addition, the evidence does not show that results of the three surveys are similar with respect to whether consumers believe biodegradable items will biodegrade in less than one year, such that the convergent validity theory would even be applicable. As noted above, 60% of the responses to APCO question 4 indicated they "believe" that less than one year "is a reasonable

amount of time" for a plastic product to biodegrade in a landfill, while only 25% of the responses to Synovate question 19 indicated less than one year. F. 463, 486. The Google responses to similar questions about estimated biodegradation times for plastic products, as calculated by Dr. Frederick, yielded a range from 20% to 52%. F. 435-447. Accordingly, the results are not similar for purposes of the convergent validity theory.

Moreover, there is also no legal precedent for permitting the results of seriously flawed surveys to validate one another for purposes of evidentiary proof in an adjudication. Complaint Counsel relies on *In re Bristol-Myers Co.*, 85 F.T.C. 688, 1975 FTC LEXIS 218 (1975), and *In re American Home Products*, 98 F.T.C. 136, 1981 FTC LEXIS 21 (1981) (Initial Decision) for the proposition that the Commission and ALJs have recognized that convergence of results from different consumer perception studies "confirms that they are 'reasonably reliable and probative.'" CCB at 31. In *Bristol-Myers*, the Commission held that the results of test marketing reports conducted by the respondents were properly admitted for their truth, over any hearsay objection, because they were "reasonably reliable and probative." 1975 FTC LEXIS 218, at *127. The Commission relied on ten supporting factors cited by the ALJ, including that all three research organizations were experienced in taking such surveys; the respondents had used the research organizations to perform similar work for years; the surveys appeared to have been performed in the usual manner for surveys of that type; those conducting the interviews were experienced and trained; the surveys employed controls and validation procedures; the samples were drawn to be reasonably representative; there was no incentive to be biased; and, finally, "the surveys are from independent sources and [the results] tend to confirm one another." 1975 FTC LEXIS 218, at *128 n.14.

In the instant case, in contrast to *Bristol-Myers*, the evidence fails to show that the APCO, Synovate, and Google surveys are valid for the evidentiary purposes urged by Complaint Counsel. Moreover, the characteristics of these surveys have little in common with the characteristics cited by the Commission as supporting the reliability and validity of the test reports in *Bristol-Myers.* Among other things, Google is not an experienced survey organization, and Google surveys are a relatively new and

untested product, F. 363; closed-ended questions as used in the APCO and Synovate surveys are not an appropriate way of conducting consumer perception surveys on the meaning of biodegradability, F. 327-335; it is not appropriate to use a single question to assess consumer perception of biodegradability, as used in Dr. Frederick's Google survey, F. 372, or to eliminate survey responses that do not meet predetermined acceptable responses, F. 396-399, 403-404; there were no interviewers for the Google survey, much less "experienced and trained interviewers," F. 368; and the Google survey sample was not demonstrated to be representative of the relevant population. F. 409-430. Accordingly, even if it could be argued that the results of the three surveys in this case are similar – which is not apparent – this is not a sufficient basis for assigning the surveys greater probative weight than they would otherwise have.

In *American Home Products*, cited by Complaint Counsel, the ALJ held that the respondent made numerous express and implied claims as to the efficacy of its over-the-counter pain reliever, Anacin, without adequate substantiation. 1981 FTC LEXIS 21, at *316-408. As a remedy for this violation, Complaint Counsel sought an order for corrective advertising, which required a showing that members of the purchasing public held images of Anacin's superior efficacy and as a tension-reliever, that such images were attributable to the respondent's false advertisements, and that the images would endure without corrective advertising. 1981 FTC LEXIS 21, at *241. Complaint Counsel relied on certain "consumer image" studies to support the requested remedy. The ALJ found that "[t]he various methodological flaws in each of" the relevant consumer image studies were "not fatal," and accepted expert opinion testimony that, even though "each of the commercial image studies could not, standing alone, serve as the basis for any conclusion regarding Anacin's image . . . the four studies could, standing together, provide a basis from which to make conclusions regarding Anacin's image." *Id.* at *251-52.

The ALJ concluded, however, that the fact that respondents had disseminated the challenged advertising for a long period of time supported the conclusion that consumers held an image of Anacin as being a superior pain reliever and a tension reliever, and that the inference was only "confirm[ed] by some empirical data in this case although such empirical evidence is less than

overwhelming." *Id.* at *410. Thus, to the extent that the ALJ in *American Home Products* gave any weight to the flawed consumer image studies, it was not for the purpose of finding that the respondent made the challenged claims, as urged in the instant case, but for determining the appropriate remedy. Moreover, the ALJ cited the flawed studies only as "confirming" what other evidence already established, while in the instant case, Complaint Counsel urges reliance on seriously flawed studies as the sole evidence establishing an implied claim that is not at all inferable from the most significant evidence in the case – the challenged advertisements themselves. Accordingly, *American Home Products* does not support applying the theory of convergent validity to the flawed APCO, Synovate, and Google survey results.

vii. Dr. Stewart's survey

(a) Introduction

In the spring of 2014, in connection with his work for Respondent in this case, Dr. Stewart performed a 400-participant landline telephone survey, which included questions designed to ascertain how representative consumers who purchase products made from or packaged in plastic perceive the meaning of the term "biodegradable." F. 498-502.

Complaint Counsel contends that Dr. Stewart's data proves Complaint Counsel's factual assertion that substantial numbers of consumers "understand 'biodegradable' to imply within one year," CCB at 48-50, and at the same time argues that Dr. Stewart's survey "is grossly flawed," for the purposes of supporting Respondent's contrary factual position. CCB at 51-54. Specifically, Complaint Counsel argues that: (1) 33% of survey respondents who reported an estimated rate for biodegradation in response to question 4 of Dr. Stewart's survey, believe that a biodegradable product will take one year or less to decompose or decay (Complaint Counsel's "33% calculation"); and (2) question 5b of Dr. Stewart's survey, which presented respondents with the text of ECM's claim of biodegradation in "some period greater than a year," shows that 50% of survey respondents that perceived any biodegradation rate message in the claim, estimated one year or less (Complaint Counsel's "50% calculation"). CCB at 32,

citing CCFF 201-207. Respondent rejects Complaint Counsel's calculations as a grossly inappropriate manipulation of Dr. Stewart's raw data. RRB at 61-63.

Based on the results of Dr. Stewart's survey and Dr. Stewart's opinions associated therewith, Respondent asserts that no significant percentage of consumers thinks that products labeled "biodegradable" will degrade within one year, or any specific time frame; consumers have no shared understanding of the meaning of the term "biodegradable"; most consumers recognize differences in the rate of decomposition, and that the rate is dependent on the type of material, context, or disposal environment; and consumers understand that biodegradation is not necessarily a rapid process. RB at 43-44, 47-48. Respondent argues that Dr. Stewart's survey was well-designed, relied on clear, open-ended questions, and closely adhered to established principles of survey research. RB at 44-47. Complaint Counsel responds that Dr. Stewart's questions were confusing and that the survey sample was "psychographically and demographically unrepresentative" because it consisted only of landline telephone users. CCB at 51-54.

(b) Complaint Counsel's statistical analysis of Dr. Stewart's data

Complaint Counsel cites question 4 of Dr. Stewart's survey, which asked: "If something is biodegradable, how long do you think it would take for it to decompose or decay?" CCB at 48. However, Complaint Counsel asserts that of the 400 survey respondents, "a majority (206) gave codeable estimates," and of those respondents, 33% "gave estimates of one year or less." *Id*. Complaint Counsel does not explain what it means by "codeable estimates." In Dr. Stewart's survey, unlike in Dr. Frederick's Google survey, every response was coded, and his codes classified the actual responses of the survey participants. F. 392-395, 507. Complaint Counsel's 33% calculation excludes the many responses of "I don't know" and "it depends," as well as all other responses that did not give a "quantifiable time estimate." CCB at 48 n.49. In this regard, it is clear that Complaint Counsel is applying Dr. Frederick's flawed "bright-line" numerical coding rule to Dr. Stewart's data. *See* F. 392-393. As noted above, it is inappropriate to ignore survey responses that do not fit into the

desired result, or to "force-fit" responses into a pre-existing structure. F. 396-397. Ignoring significant portions of data in computing statistics misrepresents the data. F. 397, 403. Complaint Counsel's 33% calculation eliminates nearly half of the responses to question 4, including facially legitimate answers, such as "I don't know," or "it depends," and misleadingly inflates the percentage of survey responses allegedly supporting Complaint Counsel's position. *See* F. 398-400. Therefore, in this regard, Complaint Counsel's manipulation of Dr. Stewart's survey is improper and is rejected.

To support its 50% calculation, Complaint Counsel relies on responses to question 5b of Dr. Stewart's survey. Question 5b read the following to survey participants: "Plastic products manufactured with our additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." The interviewer then asked: "In your own words, what does this claim mean to you?" *See* RX 602 (Stewart Expert Report Appendix B). Complaint Counsel asserts that out of the 400 survey respondents, 150 included a time component in their answer, and that 50% of these mentioned "one year." However, this 50% calculation that Complaint Counsel derived from the responses to question 5b fails for the same reasons as the 33% calculation that Complaint Counsel derived from the responses to question 4. Complaint Counsel eliminates from the sample over half of the responses, and ignores survey responses that do not fit into its desired structure. F. 396-397. This selective data analysis misleadingly inflates the percentage of survey responses allegedly supporting Complaint Counsel's position, and misrepresents the data. F. 396-398.[35] Accordingly, Complaint Counsel's data analysis of question 5b of the Stewart survey is rejected.

[35] The distribution of the total responses to question 5b are set forth in Appendix D to Dr. Stewart's Expert Report, RX 605 at 26-27. Complaint Counsel does not argue that any percentages derived from the total responses to question 5b constitute a "significant minority" of consumers who would interpret Respondent's claim that ECM Plastics are biodegradable in "some period greater than a year" to mean "less than one year."

(c) Dr. Stewart's findings and conclusions

The evidence shows that Dr. Stewart's survey was designed and conducted in accordance with generally accepted principles of survey research, F. 542, 552, including, among other things, the drawing of a representative sample of a relevant population, F. 515-528, 543-544; the use of open-ended, non-leading questions, F. 537-539; the use of trained interviewers, F. 512, 532-534; and the use of trained and experienced coders who were "blind" to the sponsor and purpose of the research and who coded all responses received. F. 508-509, 529-531, 535-536.

Of all the survey evidence introduced in this proceeding, only Dr. Stewart's survey asked survey respondents to describe what "biodegradable" means to them. Specifically, question 1 of Dr. Stewart's survey asked, "When you hear the term 'biodegradable' what does that mean to you?" Eighty-two percent of the survey respondents replied with something about disintegration, decomposition, or breakdown. The remaining 26% of survey respondents mentioned something about safety, but the majority of these respondents also mentioned something about breaking down or decomposition. F. 546. These findings weigh heavily against a conclusion that a significant number of reasonable consumers would interpret a biodegradable claim to be communicating that the biodegradable item will biodegrade completely within one year.

In addition, the responses to question 4 of Dr. Stewart's survey, which asked, "[i]f something is biodegradable, how long do you think it would take for it to decompose or decay," weigh against Complaint Counsel's assertion that a significant number of reasonable consumers believe a biodegradable item will biodegrade completely within one year. Question 4 elicited a very wide range of responses. F. 548. The most common answer by far, offered by 39% of the survey respondents, was that biodegradation time depends on the material or type of product. No other single response was offered by more than 6% of the respondents. F. 549. Other responses referred to differences in materials or context: 6% stated that paper degrades faster; 6% stated that plastic does not degrade or takes a long time to degrade; 5% indicated that it depends on the climate or other conditions, or on the method of disposal; 3% indicated that

vegetation decomposes more quickly; and 3% stated that it depends on size. F. 549. In total, 68% of the survey respondents gave answers to question 4 that indicate recognition of differences in the rate of decomposition related to type of material and/or the context. F. 549. This evidence is contrary to the notion that consumers believe "biodegradable" items will decompose completely within one year, and fails to support a conclusion that a significant minority of reasonable consumers would interpret a claim that an item is "biodegradable" to be communicating the message that the biodegradable item will biodegrade completely within one year.

Based on the foregoing, Dr. Stewart's survey amply supports Dr. Stewart's conclusions that consumers interpret the term "biodegradable" to mean the process by which a product breaks down or decays; and consumers understand that the time for this process varies depending on the materials involved and that the process of biodegradability is not always, or even often, a rapid process. F. 554. In fact, based on Dr. Stewart's survey, no significant minority of Americans define "biodegradation" to mean that a product will completely biodegrade into elements in nature within one year after customary disposal. F. 555. In addition, based on Dr. Stewart's survey, there is little evidence that consumers' understanding of biodegradability is restricted to decomposition processes that occur within one year or less. F. 556. Indeed, not one respondent to Dr. Stewart's survey understood biodegradation to mean the complete breakdown of the substance into elements in nature within one year after customary disposal. F. 553. The foregoing credible and persuasive evidence weighs heavily against Complaint Counsel's contention that a significant number of reasonable consumers interpret a "biodegradable" claim to mean the item will completely decompose into elements found in nature, in a landfill, within one year.

(d) Complaint Counsel's objections to Dr. Stewart's survey

Complaint Counsel asserts that Dr. Stewart's survey does not provide probative evidence that is contrary to Complaint Counsel's Implied One Year argument. Complaint Counsel argues that Dr. Stewart failed to ask "the most important

question," which to Complaint Counsel is, "how much time will it take for plastic labeled 'biodegradable' to degrade?" CCB at 52. As noted above, however, the preliminary, fundamental question for purposes of the Implied One Year Claim is whether a claim of "biodegradable" implies any rate for complete biodegradation at all. The question, "how much time will it take for plastic labeled 'biodegradable' to degrade," improperly presumes that a claim of "biodegradable" implies a rate for complete biodegradation and assesses only what the survey respondent thinks, believes, or estimates is a correct rate. Moreover, question 4 of Dr. Stewart's survey did, in fact, ask respondents to state "how long" they think it will take for a biodegradable item to decompose or decay. Complaint Counsel offers no support, including any expert opinion, for finding that question 4 of Dr. Stewart's survey is not probative, merely because it did not specifically ask "how much time will it take for plastic labeled 'biodegradable' to degrade?"

Complaint Counsel further contends that Dr. Stewart's survey used a sample that was not psychographically or demographically representative. CCB at 53-54. With respect to demographic representativeness, Complaint Counsel asserts that 40% of households do not have landline telephones (*see* CCX 865 (Frederick Rebuttal Expert Report at 4); Frederick, Tr. 1086); that 4,000 potential survey respondents hung up and declined to participate in Dr. Stewart's survey (Stewart, Tr. 2702); that 58% of respondents to Dr. Stewart's survey were over age 50, while only 48%-50% of Americans are over age 50 (Stewart, Tr. 2728); that older Americans are primarily white, which resulted in a survey sample that undersampled Hispanics and other minorities (*see* Stewart, Tr. 2728-2729); and that Dr. Stewart limited participants to those over the age of 18. F. 522. Even if it is accepted as fact that Dr. Stewart's survey sample was slightly older than the population-at-large, Complaint Counsel fails to demonstrate how this flaw is so significant that it detracts significantly from the weight to be given to the survey results. It is also noteworthy that, even if Dr. Stewart's sample was slightly older than the population-at-large, the sampling was at least based on actual demographic information, which is better than the inferred demographics methodology employed by Dr. Frederick's Google survey. *Compare* F. 522, 526-528, 542-543 *with* F. 409-425. Thus, even if flawed, Dr. Stewart's survey sampling

methodology is clearly superior to the methodology of the Google survey.

Complaint Counsel contends that Dr. Stewart's telephone landline sample is psychographically unrepresentative because "relatively few consumers are willing to take a survey lasting as long as twenty minutes without compensation." CCB at 53. However, the evidence cited by Complaint Counsel to support this proposition is inapposite. *See* CCFF 390. Dr. Frederick defined "psychographic representativeness" to mean that the "sample reflects the psychological characteristics – those might be beliefs or attitudes or opinions – of the population about which you're trying to draw an inference." (Frederick, Tr. 1395). Regarding the psychographic representativeness of Dr. Stewart's survey sample, Dr. Frederick opined that the sample was "probably not psychographically representative. One of the psychographic characteristics that would likely differ is their attitudes towards technology, for instance. I would expect that they would have less familiarity with . . . technology, cellular devices, Web browsing, so forth." (Frederick, Tr. 1391). Dr. Stewart's survey, however, did not seek to assess attitudes toward any of the foregoing topics. Thus, Dr. Frederick's opinion is immaterial and does not support rejecting Dr. Stewart's survey results as "psychographically unrepresentative."

(e) Summary and conclusions as to Dr. Stewart's survey

Dr. Stewart's survey does not support a finding that a significant number of reasonable consumers would interpret Respondent's claims that ECM Plastics are (1) "biodegradable," or (2) "biodegradable" in "some period greater than a year," to convey the message that ECM Plastics will completely biodegrade in a landfill within one year, as argued by Complaint Counsel. Rather, Dr. Stewart's survey constitutes substantial contrary evidence that consumers interpret the term "biodegradable" to mean the process by which a product breaks down or decays, which is not restricted to decomposition processes that occur within one year.[36]

[36] Complaint Counsel also alludes to the results of a 10 respondent survey of certain ECM Customers (the "Manufacturers Pilot Study"), asserting that 3

c. Totality of the evidence on Implied One Year Claim

Complaint Counsel contends that Respondent's claim that ECM Plastics are (1) "biodegradable," and (2) "biodegradable" in "some period greater than a year," impliedly claimed that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year. Whether an advertisement conveys an implied claim "is a question of fact," derived from a review of the advertisements themselves, and an evaluation of any extrinsic evidence introduced by the parties. *POM*, 2013 FTC LEXIS 6, at *44; *Thompson Medical*, 104 F.T.C. at 794. The primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself. *POM*, 2013 FTC LEXIS 6, at *21.

In the instant case, the plain language used in Respondent's Marketing Materials and logo does not state that ECM Plastics will completely breakdown into elements found in nature, in a landfill, within one year. Moreover, there are no additional elements of the materials at issue, such as the juxtaposition of phrasing or associated images, that support a finding that the language, (1) "biodegradable" or (2) "biodegradable" in "some period greater than a year," is reasonably interpreted to be conveying the Implied One Year Claim. Based on a facial analysis alone, Respondent's "biodegradable" and "biodegradable" in "some period greater than a year" claims do not, in fact, imply that ECM Plastics completely biodegrade into elements found in nature, including in a landfill, within one year. [37] F. 243, 258. As the primary evidence of the meaning of Respondent's representations, the fact that the advertisements

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out of the 10 manufacturer respondents indicated "that they understood biodegradation as something that happens in less than a year or referenced tests (ASTM D5511 and D6400) that are run for less than a year." CCB at 54, citing CCFF 412. The Manufacturers Pilot Survey upon which Complaint Counsel relies is too small from which to draw any valid conclusions. F. 557-565.

[37] Indeed, it is arguably absurd to suggest that reasonable consumers would infer that a claim that a product is "biodegradable in some period greater than one year," means that a product will completely biodegrade into elements found in nature, in a landfill, in less than one year.

themselves do not support the Implied One Year Claim is given substantial weight.

In addition, the foregoing facial analysis is supported and confirmed by the ordinary meanings of the term "biodegradable," based on the dictionary definitions, as "capable of being slowly destroyed and broken down into very small parts by natural processes, bacteria, etc." or "capable of being broken down especially into innocuous products by the action of living things (as microorganisms)." *Merriam-Webster.com*, *supra*. *See Thompson Medical*, 1984 FTC LEXIS 6, at *359. Nothing in the foregoing definitions supports a conclusion that a significant minority of reasonable consumers would interpret "biodegradable," to mean completely breakdown into elements found in nature, in a landfill, within one year. This evidence also weighs heavily against finding an Implied One Year Claim.

Accordingly, given the strength of the evidence summarized above, it was incumbent on Complaint Counsel to demonstrate with probative, persuasive evidence that Respondent's claim that ECM Plastics are "biodegradable," and "biodegradable" in "some period greater than a year," notwithstanding the plain language, conveyed to a significant number of reasonable consumers the message that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year. Complaint Counsel's survey evidence fails to accomplish this task. First, Complaint Counsel did not provide any "copy test" evidence indicating that consumers viewing Respondent's "biodegradable" claims take away the message that ECM Plastics completely breakdown into elements found in nature within one year. *Compare Telebrands*, 140 F.T.C. at 316-17 (noting that survey participants were shown an advertisement twice and asked a series of open-ended questions which "asked consumers to state in their own words what they perceived in the ads"); *Stouffer*, 1994 FTC LEXIS 196, at *23 n.21, *30 (describing questions about "what point" the advertisement was making and "what reason" the advertisement gives for buying Lean Cuisine). *See also Kraft*, 1991 FTC LEXIS 38, at *24, n.13 (relying in part on consumer survey that showed the advertisement to respondents and asked: "Does this ad say or suggest anything about the amount of calcium in a slice of Kraft Singles compared to the amount of calcium in five ounces of milk?"). Such copy test

evidence is direct evidence of what consumers actually think upon reading an advertising claim in issue, and, therefore, is "[t]he extrinsic evidence we prefer to use and to which we give great weight . . . ." *Thompson Medical*, 1984 FTC LEXIS 6, at *315. Regardless of whether such copy test evidence is legally required, the absence of this preferred, direct evidence of consumer claim interpretation amplifies the weakness of Complaint Counsel's position.

Second, Complaint Counsel's survey evidence – which purports to show that consumers "understand" or "expect" or "believe" that items labeled "biodegradable" will completely breakdown into elements found in nature, in a landfill, within one year – is weak. This consumer "perception" evidence did not, in fact, assess whether consumers "perceived" ECM's claims to imply any particular biodegradation rate. Rather, the evidence proceeds from the assumption that a biodegradation rate is necessarily implied by use of the term "biodegradable," and does not address the question of whether Respondent made any implied rate claim in the first place.

Furthermore, to the extent that consumer beliefs about biodegradation rates are indirectly material to the implied meaning of Respondent's claims, the APCO, Synovate, and Google surveys are of insufficient methodological quality to draw any reliable conclusions in this regard. *See Kraft*, 1991 FTC LEXIS 38, at *30-34 (holding that evidence failed to show that advertising impliedly claimed Kraft Singles' superiority over imitation cheese where conclusion was not apparent on the face of the advertisement, or supported by reliable survey evidence or persuasive expert testimony); *Thompson Medical*, 1984 FTC LEXIS 6, at *365-67 (holding that complaint counsel failed to meet burden of proving that certain advertisements implied that Aspercreme is superior to aspirin, where ads did not refer to attributes of aspirin and expert testimony did not support implied claim); *In re Coca Cola Co.*, No. 8839, 1973 FTC LEXIS 245, at *114-24 (Oct. 5, 1973) (holding that evidence failed to prove that claims in "Hi-C" fruit drink advertisements that Hi-C was "high" in Vitamin C and a "sensible" drink implied that Hi-C was comparable to citrus juices, including orange juice, where advertisements did not mention other juices and consumer survey failed to support the implied claim, notwithstanding survey

evidence showing that consumers identified orange juice as the one beverage believed best fit the phrase, "highest in Vitamin C").

In addition, the responses to Dr. Stewart's survey show that consumers interpret the term "biodegradable" to mean the process by which a product breaks down or decays, and do not infer from the term any particular time period, much less a rapid time period. This survey evidence, which is of high methodological quality, is consistent with the common meaning of the term "biodegradable," noted above, and inconsistent with the Implied One Year Claim. For this reason as well, the extrinsic evidence in the case fails to prove the Implied One Year Claim.

Accordingly, based on the totality of the evidence, Complaint Counsel has failed to prove the Implied One Year Claim. Rather, to find such an implied claim would be to "inject novel meanings into ads," which is improper. *Bristol-Myers*, 1983 FTC LEXIS 64, at *249.

E. Substantiation

1. Overview

As analyzed above, the evidence shows that Respondent made the Challenged Claims that ECM Plastics are "biodegradable," including in a "landfill," and, that ECM Plastics would fully biodegrade in a landfill within "9 months to 5 years." The evidence also shows that Respondent claimed that independent testing proves ECM Plastics are "biodegradable" and would fully biodegrade, including in a landfill, within "9 months to 5 years."

Having determined that Respondent disseminated advertisements conveying claims alleged in the Complaint and challenged in this case, the second step in the analysis of whether Respondent violated the FTC Act is to analyze whether the Challenged Claims are false or misleading. *POM*, 2013 FTC LEXIS 6, at *18-19 (citations omitted). In order to analyze whether the Challenged Claims are false or misleading, a review of the evidence presented on landfill conditions and a determination of the meaning of the term "biodegradable" is necessary. Following that evaluation, the legal standards for analyzing whether a claim is false or misleading are addressed.

Then, the Initial Decision analyzes what constitutes competent and reliable scientific evidence to substantiate the Challenged Claims and whether Respondent possessed competent and reliable scientific evidence substantiating its claims.

2. Landfill Conditions

Landfilling is the largest management option for municipal solid waste ("MSW") in the United States, with about 54 percent of solid waste managed in that capacity. F. 566. Both parties' experts agree that landfills are dynamic and heterogeneous environments. F. 569-573. It is very difficult to describe a "typical" landfill. F. 571. The range of moisture content, temperatures, and oxygen levels in landfills can be considerable. F. 572. Thus, with respect to microbial composition, it would be unreasonable to expect or identify a "one-size-fits-all" description of an MSW landfill; the diversity of potential environments presented in landfills is vast, with many variables, which, in turn, leads to proliferation of many different types of microorganisms. F. 573.

Landfills often have major temperature variations, even within the same landfill. F. 575. A landfill in a hot climate, such as Florida, would have a higher temperature than a similar landfill in a cold climate, such as Alaska. F. 574. Landfills often also have major variations in moisture content. F. 586. A landfill in Florida, where it rains a lot, will have a higher moisture content than a landfill in Arizona, where there is hardly any rain. F. 587. In addition, within each landfill, there can be pockets of dry areas as well as pockets of very moist areas. F. 588.

Researchers have identified many specific microorganisms that populate MSW landfills. F. 601. Biodegradation processes are highly variable in the heterogeneous landfill environment, where there are different microenvironments throughout the landfill. F. 599. Because landfill environments are highly variable with respect to moisture content and temperature, even within a single landfill, landfill conditions can support many different rates of biodegradation, including accelerated rates of biodegradation in areas of high moisture or temperature. F. 630.

3. Definition of Biodegradable

Complaint Counsel has taken the position that, in order to claim that an item is "biodegradable," one must show that the item completely degrades into elements found in nature, in a landfill, within one year. That position permeates this case and is patterned after the position presented by the FTC in the 2012 revised Green Guides. Under the FTC's revised Green Guides, "[i]t is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal." 16 C.F.R. § 260.8(c); F. 238; *see also* F. 671. Mirroring that position, the definition of "biodegradable" that Complaint Counsel provided in this case to its degradable polymer expert, Dr. Stephen McCarthy, is as follows: "[T]he unqualified marketing claim 'biodegradable' means that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling)." F. 633.

The Complaint charges that Respondent made express or implied claims that ECM Plastics are "biodegradable," which the Complaint, in effect, defines as: "will completely break down and decompose into elements found in nature within *a reasonably short period of time* after customary disposal." Complaint ¶ 9A (emphasis added). Through its arguments on the consumer survey evidence in this case (Section III.D.4., *supra*) and the opinion offered by its expert, Dr. McCarthy (discussed below), Complaint Counsel has defined the phrase, "a reasonably short period of time," to mean "within one year." *See* Transcript of Closing Arguments, Oct. 22, 2014 at 26-27, 36 (Complaint Counsel stating that Respondent's "biodegradable" claim is false because "[n]othing biodegrades in a landfill in . . . one year"). In its Proposed Order, Complaint Counsel specifically explained that "[f]or unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed." Proposed Order, Definitions, ¶ 4A.

As determined in Section III.D.4., *supra*, the evidence fails to prove that, as a matter of claim interpretation, a significant minority of reasonable consumers would interpret Respondent's "biodegradable" claim to mean the complete break down into elements found in nature, in a landfill, within one year. In this section, the Initial Decision analyzes whether the scientific evidence demonstrates that "biodegradable" means complete degradation in a landfill within one year.

It is noteworthy that, although Complaint Counsel's position throughout this case has been that, in order to claim that an item is "biodegradable," one must be able to substantiate that the item degrades completely in one year, in its proposed findings of fact, Complaint Counsel does not seek a factual determination that "biodegradable" is defined in such a manner. Rather, Complaint Counsel urges only a finding that "[b]iodegradation is described as the chemical process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source." CCFF 6.

As explained below, the evidence fails to prove that, as a scientific matter, the term "biodegradeable" means that an item will completely break down and decompose into elements found in nature within one year after customary disposal. Rather, the scientific evidence in this case demonstrates that the term "biodegradable" refers to the biological process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source, and does not necessarily include a time requirement for completion.

a. The testimony of Complaint Counsel's expert fails to prove the contention that "biodegradable" means complete decomposition within one year

To support its allegation that "biodegradable" means the complete break down and decomposition into elements found in nature within one year after customary disposal, Complaint Counsel relies upon its expert, Dr. Stephen McCarthy. Dr. McCarthy is a professor of plastics engineering at the University of Massachusetts Lowell and is the director of the University's Biodegradable Polymer Research Center, where he coordinates and supervises research on biodegradable polymers. F. 108-109.

His research has led to seven patents related to polymers or plastics engineering. F. 109. Dr. McCarthy is also the editor of the Journal of Polymers and the Environment, the official journal for the BioEnvironmental Polymer Society, which promotes research to develop degradable polymers. F. 110. He has authored or co-authored more than a hundred publications related to polymer or plastics engineering, including peer-reviewed articles specifically on biodegradable blends. F. 110.

In his expert report, Dr. McCarthy defined "biodegradable" as follows:

> Complaint Counsel asked me to assume that the unqualified marketing claim "biodegradable" means that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling). I use this definition and the scientific definition of biodegradable interchangeably in this Expert Report, because there is no substantive difference between the two that affects my analysis or my opinions.

F. 633; CCX 891 (McCarthy Expert Report at 5 n.1). However, Dr. McCarthy's expert report does not contain any citations to any scientific literature to support the definition proposed in footnote one of his report. F. 639.

Dr. McCarthy testified that he prepared his expert report as a "collaborative effort between [himself] and complaint counsel."[38] F. 634. Dr. McCarthy further testified that Complaint Counsel wrote the first sentence of the definition of biodegradable set forth in footnote one of his expert report. F. 635; McCarthy, Tr. 482-483.

Dr. McCarthy has been inconsistent with respect to the definition of biodegradable. Dr. McCarthy initially testified that the definition in footnote one of his expert report was equivalent

[38] *See* footnote 32, *supra*.

or interchangeable with the scientific definition of biodegradable; however, he later testified that his definition in footnote one and the scientific definition of biodegradable were "similar," but were not the same. F. 633, 638. Later in his expert report, Dr. McCarthy defines biodegradation as "a chemical process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as an energy source (*i.e.*, as a food source)." F. 636. This definition of biodegradation does not incorporate any temporal element, and clearly does not include a requirement of complete biodegradation within one year. F. 637. Furthermore, in his rebuttal expert report, Dr. McCarthy agreed "that 'biodegradable' is not always used to describe complete mineralization in a specific timeframe," but that he had "evaluated the evidence in terms of whether it satisfies that definition of biodegradation provided to [him], which does include those concepts." CCX 892 (McCarthy Rebuttal Expert Report at 3).

It is worth noting that Dr. McCarthy criticizes Respondent's proffered substantiation for its biodegradable claims in part, because, in Dr. McCarthy's opinion, ECM could have performed confirmatory testing to show biodegradation "by conducting a gas evolution test showing at least 60% conversion to methane and carbon dioxide within 18 months." F. 644. Eighteen months is obviously more than twelve months and thus inconsistent with Dr. McCarthy's contention that Respondent's testing must show complete biodegradation "within one year."

Furthermore, although Dr. McCarthy has previously defined the term "biodegradable" in articles he has authored, he has never, in any of his published scientific literature, defined "biodegradable" to mean that the entire plastic will completely break down and return to nature within one year after customary disposal. F. 646. Indeed, Dr. McCarthy authored and/or co-authored numerous articles wherein he concluded that certain test samples were proven to be biodegradable without demonstrating that the samples would completely break down into elements found in nature within one year of customary disposal. F. 647.

In addition, Dr. McCarthy has invented some polymer blends that are the subject of a United States patent, patent number 5,883,199 ("'199 patent"). F. 659. In the '199 patent, Dr. McCarthy does not define biodegradation as something that

should be complete in one year and also does not say that the blend will completely biodegrade within one year. F. 664-665.

Dr. McCarthy has also admitted that he was unaware of any instance in which a peer-reviewed article concerning plastics biodegradation ever defined the term biodegradable as entailing a complete break down and return to nature within one year after customary disposal. F. 645. Dr. McCarthy has acknowledged that "[t]he definition of biodegradable polymer varies greatly among scientists, manufacturers, and consumers" and, because of this disagreement, ASTM International, formerly known as the American Society for Testing and Materials ("ASTM"), needed to come up with an agreed-upon definition. F. 649-650.[39] In an article published in 2003, Dr. McCarthy relied upon the ASTM definition of biodegradable polymers as a "'plastic designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties'. . . 'in which the degradation results from the action of naturally-occurring micro-organisms such as bacteria, fungi, and algae.'" F. 651-652. As Dr. McCarthy acknowledges, that ASTM definition does not define "biodegradable" to mean that there must be a complete breakdown and return to nature of the plastic within one year after customary disposal. F. 653.

The definition provided to Dr. McCarthy by Complaint Counsel is inconsistent with commonly accepted definitions, which do not require complete degradation within one year.[40] The requirement that, to be called "biodegradable," an item must completely break down and return to nature within one year after customary disposal is also inconsistent with practical experience. Commonly recognized "biodegradable" substances, such as banana peels, orange peels, tree trunks, and paper, do not reliably break down completely into elements in nature within one year

[39] The ASTM definition is discussed below.

[40] As discussed in III.D.4.b.i., *supra*, the Merriam-Webster dictionary defines "biodegradable" as something "capable of being slowly destroyed and broken down into very small parts by natural processes, bacteria, etc." or "capable of being broken down especially into innocuous products by the action of living things (as microorganisms)." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 22 July 2014, *available at* http://www.merriam-webster.com/dictionary/biodegradable).

after customary disposal. F. 673. Indeed, Complaint Counsel's own expert in landfills, Dr. Thalbet Tolaymat, explained that even "rapidly degrading wastes," such as food waste and sewage sludge, might take between 9 and 14 years to biodegrade fully. F. 674, 699. Dr. Tolaymat also explained that, in one part of a landfill that he went to, a newspaper was "really gooey, black waste," but that on the other side of the same landfill, he was able to read a newspaper that was ten years old. F. 588. The notion that items that are commonly thought of as biodegradable, such as food wastes or paper, cannot be considered biodegradable if they do not fully degrade within one year belies common sense.

Furthermore, drawing a "bright line" at one year leads to arbitrary results. When asked whether a product could be considered "biodegradable" if it degraded to only 95 percent in 364 days, but then degraded to 100 percent on day 366, Dr. McCarthy testified that that scenario "would not satisfy the definition" provided to him by Complaint Counsel and used in his expert report. F. 672.

For the above stated reasons, Complaint Counsel did not prove the allegation in the Complaint ¶ 9A, as refined through Complaint Counsel's Post-Trial Briefing and Proposed Order ¶ 4, that, for purposes of evaluating whether Respondent's claims are false or unsubstantiated, the term "biodegradable" means that an item must completely break down and decompose into elements found in nature within one year after customary disposal.

b. The greater weight of the scientific evidence shows that biodegradable means the process by which microorganisms decompose materials

The greater weight of the scientific evidence presented in this case establishes that there are many scientifically accurate definitions for term "biodegradable" and that these definitions describe a biological process of breakdown which does not include either a time limit for completion of the process or a specified degree of disintegration or elimination of the degrading product. *See* F. 676-696. A summary of the scientific evidence presented in this case regarding the definition of biodegradation follows.

ASTM develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services. F. 677. Standards are developed within committees, and membership in the ASTM is open to anyone with an interest in its activities. F. 677. The ASTM defines biodegradation, as related to plastic products, as the process by which natural biota decompose a plastic product into different chemical materials. F. 678. Based on the record evidence, the ASTM D883-12 definition of biodegradability as it pertains to plastics is:

> A degradable plastic is defined as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.

F. 679. The ASTM definition does not include any specific time period or require complete degradation. *See* F. 679, 683.

Respondent called Dr. Ranaji Sahu to testify concerning the mechanisms of action involved in plastics biodegradation and the totality of the scientific evidence concerning biodegradation of plastics in general and biodegradation of ECM Additive-infused plastics in particular. RB at 17-19. Dr. Sahu has more than 20 years of experience in environmental, mechanical, and chemical engineering, and has performed numerous projects over the past 16 years involving aspects of polymer behavior in the environment. F. 124-126. Dr. Sahu supported his opinion in this case with his knowledge of chemistry and material science and peer-reviewed literature, much of which is quoted in his expert report. F. 893. He reviewed hundreds of scientific publications concerning the degradability of plastic polymers and the biological mechanisms that support those mechanisms. F. 894.

Dr. Sahu opined that "[t]here is no one generally accepted definition of biodegradation. There are different variants of this

definition, but they all speak to the same idea . . . of degrading the object . . . of interest using biological means." F. 680. He further opined that "biodegradation means different things to different researchers . . . or in different contexts." F. 680. "[I]n all contexts [biodegradation] simply means the breakdown of whatever is the object of interest using biological means, using essentially biota such as bacteria or fungi or other type of naturally occurring or evolving biota in the environment." F. 681. There is not a scientific definition that constrains this any further, especially with regard to completeness or an arbitrarily selected time frame. F. 683-684.

Respondent also called Dr. Morton Barlaz, a civil and chemical engineer, to testify on biodegradation of plastics in landfills and biodegradation testing. RB at 19-20. Dr. Barlaz is the head of the Department of Civil, Construction, and Environmental Engineering at North Carolina State University; has published at least 115 articles in peer-reviewed journals, most of which concern landfill science, biodegradation, landfill gas, or similar issues related to waste disposal and material degradation; and has been involved in researching solid waste issues. F. 133-135. Dr. Barlaz has been hired by the United States Environmental Protection Agency ("EPA") as an expert in the fields of waste management and biodegradation. F. 136. As a leading authority in the field of waste management, Dr. Barlaz has advised Complaint Counsel's own expert witness, Dr. Tolaymat, on issues of biodegradation. F. 139.

Dr. Barlaz opined that, to his knowledge, no scientist who has published in the publicly available peer-reviewed literature has ever defined the term "biodegradable" to be limited to a complete breakdown of plastic into elements found in nature. F. 640. A product that is "biodegradable" will biodegrade at various rates and to various extents based on the external environmental conditions, but will remain "biodegradable" regardless. F. 686-687.

In addition, Respondent called Dr. Ryan e to offer an opinion concerning the various laboratory test environments used to assess biodegradation of materials. RB at 20-22. Dr. Burnette regularly consults on issues of microbiology, including anaerobic microbiology, and has worked as an environmental consultant for

multi-national companies. F. 141-142. He has performed substantial work in industrial, commercial, and landfill environments characterizing soil and groundwater. F. 142-143.

Dr. Burnette testified that there are several definitions of biodegradation used to describe a biological process. F. 691. Based on his review of the peer-reviewed literature, Dr. Burnette thinks that most biologists would agree that biodegradation means the biological activity resulting in the breakdown of a substrate of a product. F. 690, 692. In general, biodegradation refers to the chemical alteration, or "break down," of any material as a consequence of biological action. F. 691. From a microbiological standpoint, biodegradation really is the conversion of one substance to another substance as the result of biological activity. F. 692. Based on his review of publicly available peer-reviewed literature, Dr. Burnette knows of no scientist who has defined the term "biodegradation" as the complete breakdown of a plastic or material into elements found in nature within one year after customary disposal. F. 641 (further explaining, "in microbiology and in biochemistry, it's rare that we think of things in terms of completion. We certainly don't put rates on things that we don't have a clear definition for.").

In addition to Dr. McCarthy, Complaint Counsel called Dr. Tolaymat, as a landfill expert. CCB at 56. Dr. Tolaymat has been employed by the EPA from 2004 to the present as an environmental engineer and researcher in the fields of solid waste management, bioreactor landfills, waste containment performance, construction and demolition waste landfills, and the fate and transport of environmental pollutants. F. 102. A significant part of Dr. Tolaymat's education, training, and experience has involved conducting and evaluating tests that purport to show biodegradation and/or replicate landfill conditions. F. 106. Dr. Tolaymat testified that "[b]iodegradation is the conversion of organic matter through the action of bacteria and fungi into more elementary components or elements." F. 693. Dr. Tolaymat's definition of biodegradation includes no time limit or time constraint. *See* Tolaymat, Tr. 130; CCX 893 (Tolaymat Expert Report at 8).

Complaint Counsel also offered Dr. Frederick Michel, a microbiologist and expert in enzymatic and microbial polymer

conversion, as a rebuttal expert to the testimony offered by Dr. Sahu and Dr. Burnette. CCB at 64, 68. Dr. Michel has conducted research on a wide range of environmental topics, including the biodegradation of plastics, bioplastics, biofoams and natural fibers in anaerobic digesters, composting systems and soils. F. 119. Dr. Michel has authored over 40 peer-reviewed publications and many other reports and papers in these areas. F. 119. Dr. Michel testified that "[b]iodegradation is the mineralization of materials as a result of the action of naturally-occurring microorganisms such as bacteria and fungi." F. 694. In his expert report, Dr. Michel opined that "[b]iodegradation in the context of disposable consumer products . . . means that a material will biodegrade to natural products over a time frame used for municipal waste management via composting, anaerobic digestion and/or land filling. It also implies that materials will biodegrade rapidly if they end up in natural environments and will not accumulate." CCX 895 (Michel Rebuttal Expert Report at 11). While Dr. Michel offered that opinion in this case, he acknowledged that he has not defined biodegradation as requiring a complete breakdown of material into elements found in nature within one year after customary disposal, or within any specific time period, in any of his peer-reviewed articles. F. 642. Indeed, Dr. Michel recognized in his testimony concerning cellulose that a biodegradable material is still "fully" biodegradable even if it biodegrades only to 44% in a test environment, and reported in a published article that cellulose, a material known to be biodegradable, degraded roughly 74% in approximately 400 days. F. 675. These positions are clearly inconsistent with the notion that, to be "biodegradable," an item must completely decompose within one year.

c. Summary

As analyzed above, Complaint Counsel did not prove its contention that the term "biodegradable" means that the entire treated plastic will completely break down and return to nature (*i.e.*, decompose into elements found in nature) within one year after customary disposal (*i.e.*, incinerator, landfill, or recycling). Complaint Counsel's attempt to graft a temporal element, especially a "within one year" requirement, onto the scientific meanings of "biodegradable" fails. Instead, the greater weight of the evidence supports the conclusions that biodegradation is the

mechanism of degradation via biotic or biological agents such as bacteria, fungi, or other living organisms, and that the scientific literature defining biodegradation does not require completion or impose a time restraint.

Consistent with the greater weight of the credible scientific evidence and with Complaint Counsel's Proposed Finding of Fact number 6, biodegradation is defined as the biological process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source. Thus, for the purpose of analyzing whether Respondent's claims, that ECM Plastics are "biodegradable," including in a landfill, or that tests prove the same, are false or unsubstantiated, this definition is employed.

4. Applicable Legal Standards

Respondent's claims that ECM Plastics are "biodegradable," including in a "landfill," and that ECM Plastics will fully biodegrade in a landfill within "9 months to 5 years," are "efficacy claims" or "non-establishment claims," which are claims about a product's attributes, performance, or efficacy, without indicating any particular level of support for such claim. *Thompson Medical*, 1984 FTC LEXIS 6, at *368; *Removatron*, 884 F.2d at 1492 n.3 ("'Non-establishment' claims are statements to the effect that a product works."). Respondent's claims that "tests prove" that ECM Plastics are "biodegradable," including in a "landfill," and that ECM Plastics will fully biodegrade in a landfill within "9 months to 5 years," are "establishment claims" – statements to the effect that scientific tests establish that a product works as represented. *Removatron*, 884 F.2d at 1492 n.3.

Two approaches have been used to prove that an advertisement is deceptive: (1) the "falsity" theory, or (2) the "reasonable basis" or "substantiation" theory. *POM*, 2013 FTC LEXIS 6, at *52-53; *Pantron*, 33 F.3d at 1096; *Thompson Medical*, 1984 FTC LEXIS 6, at *380-81.

The first approach, the falsity theory, requires Complaint Counsel to demonstrate that the express or implied message conveyed by the advertisements is false. *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 135 n.11 (D. Conn. 2008); *POM*, 2013 FTC LEXIS 6, at *53; *Thompson Medical*, 1984 FTC

LEXIS 6, at *382. The burden is on Complaint Counsel to prove that the Challenged Claims are false. *FTC v. QT, Inc.*, 512 F.3d 858, 861 (7th Cir. 2008).

A claim of product effectiveness is "false" where evidence developed under accepted standards of scientific research demonstrates that the product does not work as represented. *Pantron*, 33 F.3d at 1097. A claim that "studies prove" that a product works as represented is "false" where a respondent represents expressly or implicitly that there is scientific proof for its claims, but the respondent lacked such proof at the time the representations were made. *POM*, 2013 FTC LEXIS 6, at *53. "Because Complaint Counsel bears the burden of showing that these claims are false, . . . Complaint Counsel must demonstrate that Respondent[] did not have the amount and type of substantiation [it] claimed to have had. . . . To meet this burden, Complaint Counsel must establish the standards that [scientific tests] must meet to pass muster in the view of the relevant scientific . . . communities as support for the claims Respondent [was] making, and then show that the studies Respondent[] possessed did not meet those standards." *POM*, 2013 FTC LEXIS 6, at *67. If the respondent does not possess the level of studies demanded by the relevant scientific communities, then the respondent's claims of scientific proof establishing its biodegradability claims are false. *POM*, 2013 FTC LEXIS 6, at *67.

The second approach, the "reasonable basis" or "substantiation" theory,[41] requires Complaint Counsel to demonstrate that a respondent did not possess and rely upon a "reasonable basis" for asserting that the Challenged Claims are true. *Pantron*, 33 F.3d at 1096; *Bronson Partners*, 564 F. Supp. 2d at 135 n.11; *QT, Inc.*, 448 F. Supp. 2d at 959; *POM*, 2013 FTC LEXIS 6, at *53; *Thompson Medical*, 1984 FTC LEXIS 6, at *380. "This theory rests on the principle that an objective claim about a product's performance or efficacy carries with it an express or implied representation that the advertiser had a reasonable basis of support for the claim." *POM*, 2013 FTC LEXIS 6, at *54 (citing *Thompson Medical*, 104 F.T.C. at 813

[41] A claim that lacks a reasonable basis is also sometimes referred to as "unsubstantiated." *E.g.*, *QT, Inc.*, 448 F. Supp. 2d at 959.

n.37). Thus, failure to have such reasonable basis renders that claim deceptive. *Removatron*, 884 F.2d at 1498; *POM*, 2013 FTC LEXIS 6, at *119.

The first step in the evaluation of Respondent's substantiation is to "determine what level of substantiation [Respondent was] required to possess . . . . [T]his determination is a question of fact." *QT, Inc.*, 448 F. Supp. 2d at 961. "Then, the Court must determine whether [Respondent] possessed that level of substantiation." *Id.* Respondent bears the burden of establishing what substantiation it relied on for its product claims. *Id.* Next, "[t]he FTC has the burden of proving that [Respondent's] purported substantiation is inadequate, and the FTC need not conduct or present clinical studies showing that the product does not work as claimed." *Id.* (citing *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1008-09 (N.D. Ill. 1998)).

To determine what constitutes a "reasonable basis" substantiating a claim of product effectiveness, the *Pfizer* factors are evaluated. *POM*, 2013 FTC LEXIS 6, at *54 (citing *In re Pfizer*, 81 F.T.C. 23 (1972); *Substantiation Statement*, 104 F.T.C. at 840 (the "determination of what constitutes a reasonable basis depends . . . on a number of relevant factors relevant to the benefits and costs of substantiating a particular claim . . . [including,] the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable")).

To determine what constitutes a "reasonable basis" substantiating a "tests prove" claim, "complaint counsel [is] required: (1) to establish the particular evidence that would pass muster in the . . . scientific community for the types of claims made; and (2) demonstrate that the proffered substantiation failed to meet these standards." *In re Removatron Int'l Corp.*, 111 F.T.C. 206, 1985 FTC LEXIS 21, at *195-96 (Sept. 30, 1985) (citing *Thompson*, 104 F.T.C. at 820), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Pantron*, 33 F.3d at 1096; *QT, Inc.*, 448 F. Supp. 2d at 959. Unlike efficacy claims, an evaluation of the various factors set out in *Pfizer* is not required to establish the appropriate level of substantiation for Respondent's establishment claims. *POM*,

2013 FTC LEXIS 6, at *65 n.18. Instead, Respondent is held to the level of substantiation that the advertisements claim. *Id.*

"[W]here advertising expressly or impliedly represents that [a claim] is based on scientific evidence, the advertiser must have that level of substantiation, and, in particular, must satisfy the relevant scientific community that the claim is true." *Removatron*, 1985 FTC LEXIS 21, at *195; *In re Sterling Drug*, 102 F.T.C. 395, 1983 FTC LEXIS 66, *436 (July 5, 1983) ("when an advertiser represents in its ads that there is a particular level of support for a claim, the absence of that support makes the claim false"). *Accord QT, Inc.*, 512 F.3d at 862 (holding that a representation that a product's efficacy had been "test-proven" is misleading unless a reliable test has been used and statistically significant results achieved). In this case, Respondent's claim that ECM Plastics "have been shown" to be biodegradable, including in a landfill, within 9 months to 5 years under "various scientific tests including, but not limited to ASTM D5511," F. 265, 272, "is inherently a substantiation claim[. Thus,] the falsity and reasonable basis theories collapse into the same inquiry: did [Respondent] possess adequate substantiation to make such a claim?" *QT, Inc.*, 448 F. Supp. 2d at 966.

The net impression of ECM's Marketing Materials and its Certificate of Biodegradability is that ECM Plastics are biodegradable and that testing by independent laboratories proves that ECM Plastics are biodegradable. F. 265, 272. In this case, the efficacy claims made in ECM's Marketing Materials and Certificate of Biodegradability need the same level of substantiation as is needed for Respondent's establishment claims. In *Removatron*, where the net impression of the advertisements and promotional materials was that respondents' claims were based on competent scientific proof, the Commission stated it did not need to apply the *Pfizer* analysis in determining the appropriate level of substantiation for respondents' claims. *Removatron*, 1985 FTC LEXIS 21, at *193-94. In *POM*, for advertisements where respondents made efficacy claims without also representing that there was clinical proof of the challenged products' efficacy, the Commission applied the *Pfizer* factors and concluded that "appropriate scientific testing" was required for efficacy claims and noted that under that analysis, it expected the

same level of scientific testing as it required for respondent's establishment claims. *POM*, 2013 FTC LEXIS 6, at *107, 118.

In the instant case, the parties agree that, applying the *Pfizer* factors, the appropriate level of substantiation for Respondent's claims is "competent and reliable scientific evidence." CCB at 61-62 (arguing that under the *Pfizer* factors, "the appropriate level of substantiation is competent and reliable scientific evidence . . . [which] requires well-controlled, well-conducted studies"); RB at 87 (arguing that "[i]n assaying what is 'reasonable' to prove efficacy claims, the proper point of reference is what the scientific community considers reliable proof"). At issue in this case is what constitutes "competent and reliable scientific evidence" and, then, whether Respondent's substantiation evidence constitutes "competent and reliable scientific evidence." The evidence presented on those issues is analyzed below.

5. Tests Showing Complete Biodegradation in a Landfill Within One Year Not Required

Both parties agree that Respondent must possess and rely on "competent and reliable scientific evidence" in support of its claims. CCB at 62; RB at 89-90; F. 704 (McCarthy and Sahu). "Competent and reliable scientific evidence" means "tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *POM*, 2013 FTC LEXIS 6, at *109; *Removatron*, 884 F.2d at *1493 n.5; *Automotive Breakthrough Sciences*, 1998 FTC LEXIS 112, at *55; F. 705.

Complaint Counsel's theory that Respondent's claims that ECM Plastics are biodegradable and biodegradable in a landfill are false or unsubstantiated is based on Complaint Counsel's assertion that competent and reliable scientific evidence fails to show that ECM Plastics will completely biodegrade after customary disposal within one year. *See* CCX 891 (McCarthy Expert Report at 5 n.1). Complaint Counsel's position on substantiation is, in turn, driven by its theory that Respondent's "biodegradable" claims are "unqualified" biodegradability claims

that necessarily imply to consumers that complete biodegradation will occur, in a landfill, within one year. Thus, Complaint Counsel contends, Respondent must substantiate such implied claim with competent and reliable scientific evidence demonstrating that ECM Plastics will completely biodegrade after customary disposal within one year. (*See* CCB 29-34, 95-96; Transcript of Closing Arguments, Oct. 22, 2014 at 36-37).[42]

Respondent's position is that, in order to show that materials are "biodegradable," the scientific community does not require proof that materials fully biodegrade within a year. Instead, the primary scientific concern related to biodegradability is whether the item is intrinsically biodegradable. RB at 88. Respondent further argues that Complaint Counsel offered no proof of what scientific evidence would be sufficient to support biodegradable "rate" claims in landfills. RB at 91.

As analyzed above, the evidence fails to prove that Respondent's biodegradability claims implied complete biodegradation, including in a landfill, within one year. Surely, Respondent cannot be required to substantiate a claim that has not been proven by Complaint Counsel. For this reason alone, Respondent need not produce competent and reliable scientific evidence showing complete biodegradation, in a landfill, within one year. Moreover, the evidence in this case fails to show that the scientific community requires competent and reliable scientific evidence demonstrating complete decomposition within one year in a landfill in order to substantiate a claim that ECM Plastics are "biodegradable." Section III.E.3., *supra*. The evidence at trial, instead, shows that biodegradability of a product describes a property of the material, much like its color or weight or density. F. 686. A product is either biodegradable, or it is not. F. 686. A product that is biodegradable will biodegrade at various rates and to various extents based on the external environmental

[42] Complaint Counsel's theory that Respondent's "biodegradable" claims are deceptive because they imply complete biodegradation in a landfill within one year is further conveyed in its Proposed Order, which would require that Respondent substantiate future "unqualified" biodegradable claims by competent and reliable scientific evidence that "must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed." CCB at 95.

conditions, but will remain biodegradable regardless. F. 687. Changes in temperature and moisture do not influence intrinsic biodegradability of a material. F. 688. For example, a piece of paper in a dry environment, at 70 degrees Fahrenheit, will biodegrade because that is an intrinsic property of paper. F. 688. The moisture and temperature affect the rate of biodegradability, but not whether it will biodegrade. F. 688. This evidence weighs against a conclusion that the scientific community would require Respondent's biodegradable claims to be substantiated by proof that ECM Plastics fully biodegrade in a landfill within one year.

In addition, the evidence at trial shows that no one test can support a rate of biodegradation of plastics in landfills and the rate of biodegradation is a matter of scientific judgment. F. 712. When Complaint Counsel's expert, Dr. Tolaymat, was questioned concerning which tests, if any, could be used by a company to prove the rate of biodegradation in an MSW landfill, Dr. Tolaymat did not have one test to recommend. F. 712.

Respondent's expert, Dr. Sahu, testified that in the publicly available peer-reviewed literature and in his experience, he has not seen a study that has taken a rate derived from a laboratory test and then extrapolated from that rate to attempt to state a time period for complete biodegradation. F.714. Rates change due to many factors, and there are good reasons not to extrapolate that far. F. 715.

The difficulty in projecting rates is even more difficult when applied to a landfill environment. Any test fundamentally is trying to capture in a lab environment a very complex ecosystem. F. 706, 711. A landfill, by its nature, is different from a controlled laboratory reactor; a landfill cannot be standardized or homogenized. F. 706. It would be scientifically impractical to design a perfect closed-system test that would be representative of all the potential microenvironments in an MSW landfill. F. 709. Further, it is not practical to try to simulate the landfill ecosystem at that time scale in a laboratory. F. 708. Because landfills are heterogeneous, one has to be cautious in projecting rates that one gets from a lab environment, which tends to be homogeneous. F. 711. While laboratory experiments are useful to assess whether a material is biodegradable and to assess the relative rate of biodegradability for multiple materials, there is not a uniformly

utilized method to extrapolate rate data as measured at laboratory-scale to field-scale landfills. F. 713.

Having weighed the scientific evidence, Complaint Counsel has not proven its contention that, in order to claim that a product is biodegradable, the scientific community demands competent and reliable scientific evidence that assures complete decomposition within one year in a landfill environment.

6. Competent and Reliable Scientific Testing Methods to Prove Biodegradability

a. Gas evolution reactor tests

The expert testimony in this case establishes that "gas evolution" test data is the most practical and widely used measure of biodegradation in the scientific field. F. 743. The scientific community does not consider weight loss tests alone sufficient for determining biodegradation. F. 741. In addition, aerobic tests (with oxygen) do not provide scientific support for claims of biodegradation in landfills. F. 1045 ("To begin, for purposes of biodegradability under landfill conditions, only anaerobic biodegradability is of relevance.").[43]

Tests that rely on gas evolution to detect biodegradation measure the carbon dioxide (CO2) and methane (CH4) that evolve as a result of biodegradation. F. 744. In a gas evolution test, the laboratory exposes test articles to conditions that theoretically favor biodegradation, and then monitors the gas emissions. F. 745, 763. By comparing the levels of gas emitted from the test vessel, the laboratory can measure the amount of gas produced from the test articles themselves. F. 744-745, 764, 767.

In gas evolution tests, within a closed, watertight vessel, test articles are exposed to "inoculum"[44] that is comprised, in part, of

[43] For this reason, only the anaerobic tests offered into evidence by Respondent are evaluated. Section III.E.10.a., *supra*.

[44] Inoculum is source material used to introduce microorganisms to an environment. As used in anaerobic test methods, inoculum is an anaerobically digested organic waste that includes all groups of microorganisms required to convert a substrate to methane and carbon dioxide. F. 763.

leachate from local municipal waste stations and thus contains microbes that would also be present in the landfill environment. F. 763-764, 766. Gas collection tubes are connected to the test vessel, and gas produced by the vessel is gathered and later measured. F. 767. The laboratory records the total amount of gas produced and the ratios of methane gas to carbon dioxide. F. 764, 765, 768.

In gas evolution tests, items are tested against negative controls, positive controls, and inoculum blanks. F. 764. The laboratory can determine the proper gas level attributable to the test vessel by comparing the overall gas levels of the inoculum blank to those of the test article and negative control. F. 1069. The laboratory can calculate the percentage of biodegradation by comparing the level of gas attributable to the test sample with the theoretical maximum yield of gas from that same sample. F. 764-765, 1069.

One gas evolution test for biodegradability of plastics is the ASTM D5511 test, titled, a "Standard Test Method for Determining the Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions." F. 759-760. The ASTM sets forth protocols established by the scientific community to evaluate materials. F. 758. The ASTM D5511 test is a gas evolution test and laboratory-scale reactor test performed in a "high-solids environment." F. 759. The ASTM D5511 test is designed to record data under accelerated conditions. F. 731. Thus, materials are tested under conditions designed to enhance the rate of decomposition, including the incubation temperature and the use of leachate neutralization and recirculation. F. 722.

Although the ASTM D5511 test is not representative of all possible MSW landfill conditions, it is an appropriate microcosm characteristic of an MSW landfill subset. F. 778. The ASTM D5511 test prescribes a methodology that creates an environment that is found in MSW landfills. F. 778. From a microbiological perspective, ASTM D5511 or similar laboratory reactor testing is a competent and reliable scientific method to assess biodegradability of materials in landfills. F. 775.

The more credible and persuasive expert testimony in this case establishes that the ASTM D5511 test is generally recognized in

the field as a competent and reliable scientific method to show biodegradability, including in a landfill:

- Complaint Counsel's expert, Dr. Michel, acknowledged that the ASTM D5511 test is generally recognized in the field as a competent and reliable scientific method to show biodegradation and that he has utilized the ASTM D5511 test because it resembles the environment in a biologically active landfill. F. 769, 780.

- Complaint Counsel's expert, Dr. McCarthy, used a gas evolution test similar to the ASTM D5511 test to support claims of biodegradability for his bioplastic polymers. F. 731.

- Respondent's expert, Dr. Sahu, opined that, with proper controls (such as the positive, negative, and inoculum controls), as required and included in the ASTM D5511 method, an ASTM D5511 test should be able to indicate, via gas evolution, if biodegradation of the test article has occurred; and that the ASTM D5511 test is the closest, most practical, and standardized test currently available for mimicking landfill conditions. F. 771, 779.

- Respondent's expert, Dr. Barlaz, opined that the ASTM D5511 test method is capable of assessing intrinsic biodegradability and that data from gas evolution testing is broadly accepted by the scientific community of evidence of anaerobic biodegradation. F. 749, 773.

- Respondent's expert, Dr. Burnette, testified that ASTM D5511 or similar laboratory reactor testing is a competent and reliable method evidence to assess biodegradability of materials in landfills. F. 775-776.

b. BMP testing

A biochemical methane potential ("BMP") test is a gas evolution test that evaluates the decomposition of various materials by measuring the amount of carbon that is decomposed in an anaerobic environment. F. 750. The BMP test is performed in a liquid environment, with very high moisture content. F. 751. BMP testing varies significantly from one laboratory to another. F. 752. In BMP tests, laboratories can choose to follow different protocols when adding types of vitamins and minerals and can make adaptations to the temperature or duration of the test, and modifications to the preparation of the test sample. F. 754. In many instances, BMP testing calls for grinding the test product and screening it through a 1 millimeter screen. F. 754. When a laboratory grinds material to be small enough to pass through a 1 millimeter screen, it becomes the consistency of whole wheat flour. F. 754.

Although Dr. Tolaymat testified that the BMP test is competent and reliable scientific evidence to show that a product degrades in a landfill, he also testified that the BMP test environment differs dramatically from the typical landfill in the United States, that the protocol for BMP tests are highly variable from one laboratory to another, and that the BMP test has a much higher moisture content than the typical landfill. F. 750-754. Dr. Barlaz opined that the "BMP is an appropriate screening tool for biodegradability in landfills," but explained that BMP tests are not appropriate for testing slower degrading materials, and that the amount of biodegradation observed through the BMP testing is likely to be only a fraction of the total biodegradation possible. F. 755-756.

c. Testing showing 60% conversion and C14 testing are not required

Complaint Counsel argues, through its expert witness, Dr. McCarthy, that to have competent and reliable scientific evidence, "at least one confirmatory test must be conducted to establish that the plastic component of the ECM Plastics will biodegrade" and that "ECM could have performed confirmatory testing by radiolabeling or by conducting a gas evolution test showing at least 60% conversion to methane and carbon dioxide within 18 months." CCX 891 (McCarthy Expert Report) at 27. The greater weight of the scientific evidence does not support this position.

Carbon 14 ("C14") testing is radiolabeling testing involving tagging radioisotopes of carbon of a high-molecular weight plastic, such as polyethylene ("PE"), before conducting a gas evolution test. F. 828. Although Dr. McCarthy opines that to scientifically prove a claim that the plastic – not merely the additive and inoculum—is biodegrading, the claimant must support its claim with at least one test with positive results from C14 labeling of the conventional plastic, Dr. McCarthy does not explain how C14 testing could be done as a practical matter. F. 829. He does not explain how one can formulate materials with the ECM Additive in small batch quantities, just for C14 testing purposes. Further, Dr. McCarthy does not address the practical impediments associated with such a task, including handling the radiological materials and their proper disposal; contamination and decontamination issues in the manufacturing plant and the laboratory when such tests would be done; or the time and cost involved. F. 829. In the pre-complaint phase of this case, Dr. Sahu searched for a commercial laboratory that could perform radiolabeled testing for ECM and could not find any company able to radiolabel the polymer or create the radiolabeled polymer that would then be subject to further laboratory testing. F. 834.

Carbon 14 testing is not the industry standard or reasonably required by any expert in the field as necessary evidence to show biodegradation of materials. F. 832-833 (Dr. Barlaz would be "surprised" if any expert had performed C14 testing on plastics because it is very difficult to find a company that could properly make the test article, and the impracticalities outweigh any benefit.). At his deposition, Dr. Tolaymat explained that radiolabeled testing "could be as expensive as . . . doing the study in a landfill environment" and that "it's not used frequently." F. 840.

Despite opining that Respondent ECM should have performed C14 testing, Dr. McCarthy has not used C14 radiological testing in any biodegradation experiments that he has performed at UMass Lowell. F. 842. In addition, the C14 radiolabeled test method was not used to test biodegradation of the polymer blends claimed to be biodegradable in Dr. McCarthy's '199 patent. F. 841. In several of Dr. McCarthy's articles pertaining to biodegradability of polymer blends, Dr. McCarthy did not use

C14 radiological testing to measure degradation. F. 843-845. Complaint Counsel's rebuttal expert, Dr. Michel, similarly has never performed a radiolabeled test to measure biodegradation of plastic polymers or products. F. 846-847.

Alternatively, Dr. McCarthy opined, in order to scientifically establish that the plastic component of the ECM Plastics will biodegrade, ECM could have conducted a gas evolution test showing at least 60% conversion to methane and carbon dioxide within 18 months. F. 848. However, Dr. McCarthy provided no literature or documentary evidence showing that scientists in the field require 60% or greater biodegradation within 18 months before a product can be deemed biodegradable. F. 849. Moreover, Dr. McCarthy did not perform tests showing at least 60% biodegradation to support biodegradable claims in his '199 patent and, in fact, labeled a substrate biodegradable even though the rate of biodegradation was lower than 60%, reaching only 14% in 45 days. F. 850, 852. There is no consensus in the peer-reviewed literature that a gas evolution test should produce 60% biodegradation within 18 months before a test article can be deemed biodegradable. F. 860.

d. Summary

Having weighed and considered the scientific evidence, the preponderance of the more persuasive and credible expert testimony presented at trial establishes that ASTM D5511 tests can provide competent and reliable scientific evidence of biodegradability of plastics in a landfill.

7. Whether Respondent's "9 Months to 5 Years Claim" and Tests Prove "9 Months to 5 Years Claim" Are False or Unsubstantiated

Before evaluating whether Respondent had adequate substantiation for its claims that the ECM Additive rendered plastics "biodegradable," including in a "landfill," and that independent testing proved that ECM Plastics are "biodegradable," the evidence regarding Respondent's 9 Months to 5 Years Claim and the claim that tests proved Respondent's 9 Months to 5 Years claim is discussed.

All of the experts in this case agreed that ECM Plastics do not fully biodegrade in 9 months to 5 years in a landfill. F. 697. Notably, Respondent's plastics expert, Dr. Sahu, confirmed that ECM Plastics would take 30 years, and possibly up to 100 years, to completely biodegrade. F. 701. Complaint Counsel's plastics experts, Dr. McCarthy and Dr. Michel, concurred, opining that ECM Plastics will not completely biodegrade in periods of time as short as five years. F. 698, 700.

In addition, both parties' landfill experts agree that landfill conditions do not support the biodegradation times of less than five years. F. 699, 702. Complaint Counsel's landfill expert, Dr. Tolaymat, opined that even the most biodegradable material would not completely biodegrade in a landfill within 5 years, even under optimum conditions for biodegradability. F. 699. Dr. Barlaz confirmed that plastics generally biodegrade slower than food waste and that even most of the most readily degradable municipal solid waste will not completely biodegrade in five years or less. F. 702.

Because the expert testimony convincingly establishes that ECM Plastics are not fully biodegradable in a period of 9 months to 5 years in a landfill, Complaint Counsel has demonstrated that this claim, and the claim that tests prove as much, are both false and unsubstantiated.

8. Whether Respondent's Efficacy Claims Are False

Complaint Counsel argues that ECM Plastics are not biodegradable at all, without regard to rate, and for this reason as well, Respondent's "unqualified" biodegradability claims are false or unsubstantiated. CCB at 54-76. In support of its position that Respondent's biodegradable claims are false, Complaint Counsel asserts: (1) physical blends do not affect plastic recalcitrance; and (2) tests show no biodegradation of ECM Plastics. CCB at 56-61. The arguments and evidence on these two points are set forth below.

a. Evidence on how the ECM Additive works

Complaint Counsel asserts that "[a] physical blend of 1% ECM Additive and 99% conventional plastic cannot change the

underlying recalcitrance of the remaining 99% plastic – and ECM offers no reliable expert opinion the contrary." CCB at 55. Complaint Counsel further asserts that there is no real disagreement that conventional plastics – high molecular weight, synthetic polymers derived from petrochemicals – are not biodegradable. CCB at 56. Finally, Complaint Counsel asserts: "The ECM Additive is mostly a synthetic biodegradable polymer like polycaprolactone (PCL). ECM recommends that a small concentration, about 1%, of its Additive be melt-batch blended with a non-biodegradable conventional plastic, such as polyethylene. This type of physical blend does not alter the chemical structure of the plastics. Therefore, the Additive does not alter the chemical characteristics that make conventional plastics resistant to biodegradation and the non-biodegradable plastic component is no more susceptible to biodegradation after blending than it was before." CCB at 58.

Respondent argues that its experts have presented many scientific papers discussing the biodegradability of conventional plastics and scientific support for the position that, although conventional plastics biodegrade very slowly, they still biodegrade. RRB at 76 (citing Sahu, Tr. 1848-1859; RX 855 (Sahu Expert Report at 24-40); Burnette, Tr. 2426-2429; RX 854 (Burnette Expert Report at 16-22)). Respondent further argues that Complaint Counsel offered no support for its claim that microbes have not evolved to biodegrade plastics, aside from speculation from its experts that is lacking peer-reviewed journal support. RRB at 76. In addition, Respondent argues that Complaint Counsel's theory that the ECM Additive does not chemically alter conventional plastic conflicts with the scientific record, including Complaint Counsel's own expert's work. RRB at 77. Finally, Respondent argues that the ECM Additive, when melted uniformly throughout the plastic, creates weak points in the conventional plastic that can be broken down by enzymatic digestion; that the ECM Additive serves as an attractant that helps bacteria develop, mature, reproduce, and thus metabolize the ECM Additive, along with the conventional plastic in which the ECM Additive is integrated; and that because the ECM Additive appears throughout the plastic, the plastic is completely biodegradable and biodegradation of the plastic substrate would continue until completion. RRB at 81-82.

As an initial matter, Complaint Counsel's experts have conceded that conventional plastics can and will, in fact, biodegrade – albeit over a significant period of time. *See* Complaint Counsel's Proposed Finding of Fact No. 7 ("Given enough time, all things are 'biodegradable'") (citing Michel, Tr. 2869 ("[d]oes polyethylene biodegrade over thousands of year. Well, yes, it does . . ."). Complaint Counsel's expert Dr. Tolaymat also conceded that, over time, plastic biodegrades. (CCX 893 (Tolaymat Expert Report at ¶ 73) ("given enough time … *anything* will biodegrade") (emphasis in original). While Dr. McCarthy opines in his expert report that there is "overwhelming scientific consensus that conventional plastics are not biodegradable after customary disposal," he cites no support for that statement and has acknowledged that there are peer-reviewed scientific publications that conclude that conventional plastics are, in fact, biodegradable. F. 900.

Contrary to Dr. McCarthy's opinion, Respondent's experts presented many scientific papers discussing the biodegradability of conventional plastics. *E.g.*, F. 901, 914-915. Dr. Sahu opined that although conventional plastics biodegrade very slowly, they still do biodegrade, and cited to peer-reviewed scientific literature revealing specific proof that conventional plastics do biodegrade. *Id.*; *see also* RX 855 (Sahu Expert Report at 24-40) (citing peer-reviewed literature). Similarly, Dr. Burnette's research revealed peer-reviewed publications demonstrating that there are organisms that make an enzyme that can degrade plastics. F. 895.

In support of its statement that the ECM Additive is mostly a synthetic biodegradable polymer like polycaprolactone ("PCL"), Complaint Counsel cites to the report of its expert, Dr. McCarthy, CCX 891 ¶ 61. Dr. McCarthy has not tested the ECM Additive, or obtained the proprietary trade secret formula from ECM in discovery. F. 160, 931. Moreover, Dr. McCarthy's opinion, that the physical blend of a synthetic biodegradable polymer like PCL does not alter the chemical structure of the plastics and does not alter the chemical characteristics that make conventional plastics resistant to biodegradation, is not adequately supported by the record or his underlying work in this case. As an initial matter, Dr. McCarthy does not provide support for his opinion that the physical blend of a biodegradable polymer with a conventional plastic does not alter the chemical structure of the conventional

plastic. *See* CCX 891 ¶ 64. Studies, including those relied on by Dr. McCarthy himself outside of this litigation, do address this point on blending. F. 927-928. For example, in the article, "*A Review on Recent Trends and Emerging Perspectives*," published in the Journal of Polymers and the Environment, which Dr. McCarthy edits, the authors specifically discussed the methods to create "biodegradable polymer blends," and one of the methods they cited was "blending a thermoplastic resin with a biodegradable one." F. 928. In addition, Dr. McCarthy wrote in his own article that "binary blends of bacterial polyesters with polyethylene (PE) and polystyrene (PS)" can result in a biodegradable 'blend.'" F. 930. Furthermore, in an article he co-authored, Dr. McCarthy specifically addressed the "reactive compatabilization of biodegradable blends of poly(lactic) acid and poly(e-caprolactone)." RX 944. Thus, contrary to the opinion offered by Dr. McCarthy in this case, the manufacture of immiscible biodegradable blends is supported by peer-reviewed literature. *See* F. 915, 927-928.

Dr. McCarthy testified that "co-polymers" and blends (like the technology used in his '199 patent (F. 659)) were distinct chemical blends of the material, while ECM's Additive is simply two independent materials never combining. (McCarthy, Tr. 387; CCX 891 (McCarthy Expert Report at ¶ 64); CCX 895 at 13). Dr. McCarthy further testified that the ECM Additive would not alter the chemical characteristics of the conventional plastic, unlike the co-polymer technology identified in his '199 patent, which he claimed was biodegradable. *Id.*; F. 661-662. But Dr. McCarthy also explained in his '199 patent how he created these "blends," which method uses the same manufacturing processes that manufacturers use when introducing the ECM Additive into plastics. (*See* RX 756 at column 6). According to Dr. McCarthy in sworn statements made to the United States Patent and Trademark Office (F. 660):

> Standard melt processing equipment and processing conditions can be used to prepare the new blends. Examples of polymer melt processing equipment that can be used to make the new blends include melt mixers (Banbury mixer), blenders, extruders for sheet, film, profile and blown-film extrusion, vulcanizers,

> calenders, and spinnerets for fiber spinning, molding, and foaming.

RX 756 at column 6. In that section of his patent, Dr. McCarthy described the method by which one makes a "biodegradable blend," whereby the blending process alters the chemical characteristics of the plastic, which process is the same manufacturing process used by ECM. *Compare* RX 756 and F. 665, *with* F. 870-874, 891-892. *See also* F. 663.

ECM Plastics are made when the ECM Additive, a biodegradable component, is melt-compounded into a conventional plastic, in a manner similar to that used by Dr. McCarthy in his '199 patent. *Compare* F. 183-191, 870-880 *with* RX 756 at column 6. Dr. McCarthy does not explain why melt-compounding of a co-polymer alters the chemical composition of plastics when using the manufacturing process used by Dr. McCarthy in his '199 patent, but does not alter the chemical composition of ECM Plastics when used with the ECM Additive. By contrast, Respondent's experts, Dr. Sahu and Dr. Burnette, credibly and persuasively explained the mechanism of action of the ECM Additive in detail, as set forth in F. 870-1005 and summarized below. Dr. Sahu explained that the ECM Additive is uniformly melted throughout the plastic, and it becomes part of the entire plastic matrix. F. 871. As Dr. Sahu explained:

> The ECM Additive goes into the blend uniformly no matter whether it has a high or low weight distribution. It will be present along with varying chain lengths of original polymers that were there in the plastic and as they have cooled down and formed crystalline and amorphous regions.

F. 871.

Dr. Sahu further explained that the process of "blending" the ECM Additive with the plastic resin involves heat blending, so that the two components become one. F. 872. Dr. Sahu compared the ECM Additive to colorants, which are usually introduced into plastics at a 0.5% to 2% load rating (where the ECM Additive is introduced at a 1% load rate). F. 874, 885. The ECM Additive is dispersed within the plastic and the additive

becomes one with the plastic, uniform throughout. F. 871. By comparison, when viewing a common colored plastic product, such as a red water bottle or a blue plastic coffee mug, each one of those products does not look like two separate components (*i.e.*, a plastic and a distinct color additive), but instead, each looks like one uniform material. Even when those plastics are cut into pieces, the plastic remains one uniform color inside.

When the ECM Additive is melted into the plastic, it necessarily alters the structure of the plastic. F. 891-892. As Dr. Burnette explained, the ECM Additive likely promotes biodegradation in two ways: by serving as an attractant for microbial growth on and within plastics; and/or by weakening or perturbing the carbon-carbon bonds through weaknesses in the chain or the addition of more weak points in the form of the additive. F. 918.

Dr. Sahu and Dr. Burnette explained that the presence of biofilms on the plastic serves as an attractant that helps bacteria develop, mature, reproduce, and thus metabolize the additive along with the conventional plastic into which the additive is integrated. *See* RX 855 (Sahu Expert Report at 27-28); RX 854 (Burnette Expert Report at 21-23); F. 892, 910-951. Dr. Sahu further explained that the biological digestion of the substrate (plastic and additive) continues indefinitely as the biota slowly peel back layers of plastic and continue to find the ECM Additive that is melted throughout the plastic material. *Id.*

Dr. Sahu and Dr. Burnette also explained that the ECM Additive, when melted uniformly throughout the plastic, creates weak points in the conventional plastic that can be broken down by enzymatic digestion, identifying the precise kinds of microbial life, microbial colony formation on plastic (so-called biofilms) and enzymes responsible for that degradation. *See* RX 855 (Sahu Expert Report at 27-28); RX 854 (Burnette Expert Report at 21-23); F. 892, 910-951. As Dr. Burnette explained, when the ECM Additive is added to the plastics mixture, it perturbs the plastics mixture. Enzymes look for points of weakness. If there is a way to take a bond that is already favorable for an enzyme and make it even more favorable, it would be to further reduce that bond strength. *See* RX 854 (Burnette Expert Report) at 21-23; F. 918-919, 956-981.

While Dr. McCarthy did not support his opinion with peer-reviewed literature (F. 900), the opinions offered by ECM's experts were supported by peer-reviewed literature. F. 604, 607, 735, 894-895, 901, 914-916, 926-927, 943-947, 951. For instance, the authors of the article titled, "*A Review on Recent Trends and Emerging Perspectives*," published in the Journal of Polymers and the Environment, edited by Dr. McCarthy, state: the insertion of weak links into polymers can cause biodegradation; compounding polymers with photosensitizers can cause biodegradation; and "the most frequently adopted approach to degradability design of [Low Density Polyethylene] LDPE has been to introduce pro-degradant additives such as starch and cellulose into synthetic polymers." F. 928.

In summary, a claim of product effectiveness is "false" where evidence developed under accepted standards of scientific research demonstrates that the product does not work as represented. *Pantron*, 33 F.3d at 1097. Having fully considered and weighed the expert testimony presented in this case, and the underlying support for the proffered expert opinions, Complaint Counsel has not proven its factual assertions that "[a] physical blend of 1% ECM Additive and 99% conventional plastic cannot change the underlying recalcitrance of the remaining 99% plastic" and "does not alter the chemical characteristics that make conventional plastics resistant to biodegradation." Complaint Counsel's argument that Respondent's claims are false, however, rests not only on these factual propositions, which Complaint Counsel failed to prove, but also on certain tests upon which Complaint Counsel relies. The Initial Decision next turns to the evidence on those tests.

b. Evidence on the tests upon which Complaint Counsel relies

In further support of its position that Respondent's claims are false, Complaint Counsel argues that "tests show no biodegradation of ECM Plastic." CCB at 59-61. This section of the Initial Decision analyzes only the tests that Complaint Counsel points to in its post-trial briefing as support for its argument that Respondent's "biodegradable" claims are false because "tests show no biodegradation of ECM Plastic." An analysis of the tests

that Respondent relies upon to support its claims, and whether those tests are adequate to substantiate Respondent's biodegradability claims, judged by the requirements of the relevant scientific communities, is addressed in Section III.E.10., *infra*.

Complaint Counsel points out tests performed by Dr. Barlaz, Dr. Michel, Stevens Ecology, Advance Material Center, and Organic Waste Systems. The arguments and evidence on each of these tests follows. Thereafter, Complaint Counsel's testing evidence is considered as a whole, based on the totality of the evidence presented at trial.

- Dr. Barlaz's BMP tests

Complaint Counsel asserts that Dr. Barlaz conducted at least four biodegradation tests of ECM Plastics under the Biochemical Methane Potential ("BMP") test. Complaint Counsel further asserts that Dr. Barlaz's BMP results showed no or negligible amounts of methane production and, in no case, an amount of methane exceeding the amount of gas attributable to the additive alone. CCB at 59-60.

Respondent points to the shortcomings of BMP testing (discussed in Section III.E.6.b., *supra*[45]); argues that the presence of inconclusive tests does not nullify favorable tests; and states that in one of Dr. Barlaz's BMP tests, Dr. Barlaz obtained data showing that the plastic article had biodegraded substantially more than the amount reasonably attributed to the ECM Additive. RB at 99.

Dr. Barlaz, ECM's expert witness, has performed several tests on ECM Plastics. *See* F. 1433-1436. Respondent states that Dr. Barlaz performed those tests prior to, and independent of, his role as an expert witness in this case. RB at 99. Dr. Barlaz opined that the "BMP [test] is an appropriate screening tool for

[45] In BMP tests, laboratories can choose to follow different protocols when adding types of vitamins and minerals; make adaptations to the temperature or duration of the test; or make modifications to the preparation of the test sample, such as screening the material by passing it through a 1 millimeter screen. F. 754.

biodegradability in landfills." F. 755. However, he also explained that BMP tests are not appropriate for testing slower degrading materials, and that the amount of biodegradation observed through the BMP testing is likely to be only a fraction of the total biodegradation possible. F. 756. *See also* F. 1447.

Of the four BMP tests that were run by Dr. Barlaz on ECM Plastics, one showed no methane production; two showed negligible amounts of methane production; and one showed significant methane production. F. 1434-1436. In the test that showed that the plastic article had biodegraded substantially more than the amount reasonably attributed to the ECM Additive (CCX 952), Dr. Barlaz observed that the gas production was consistent throughout the 60-day test window, indicating that when he stopped the test at 60 days, the product had likely not finished biodegrading. F. 1442-1446. With respect to tests that showed no or negligible amounts of methane production, Dr. Sahu, Dr. Burnette, and Dr. Barlaz each testified that the presence of inconclusive tests does not nullify favorable tests. F. 800-807.

Dr. Barlaz acknowledged, as did Dr. Sahu, that many variables can affect the test results in a biodegradation study, including the manufacture of the plastic artifact tested. F. 800-801, 805. The few inconclusive BMP tests produced by Dr. Barlaz did not affect Dr. Barlaz's ultimate opinion in this case, discussed in Section III.E.10.a., *infra*, which, based on the totality of competent and reliable scientific evidence, was that plastics infused with the ECM Additive are anaerobically biodegradable. F. 1041.

Dr. Barlaz's BMP tests were only a few datasets among a much larger body of scientific evidence. F. 1044. The proper analysis must consider the evidence as a whole. For the reasons discussed above, Dr. Barlaz's BMP tests are not given significant weight on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent's claims are false.

- Dr. Michel's study

Complaint Counsel asserts that the only published, peer-reviewed study to address whether ECM Plastic is biodegradable concluded that "plastics containing additives that supposedly

confer biodegradability to polymers such as polyethylene and polypropylene did not improve the biodegradability of these recalcitrant polymers." CCB at 60-61 (citing CCX 164 (E. Gomez & F. Michel, *Biodegradability of conventional and bio-based plastics and natural fiber composites during composting, anaerobic digestion and long term soil incubation*, 98 Journal of Polymer Degradation & Stability 2583-91 (2013)). This study ("Dr. Michel's study"), published by E. Gomez and F. Michel, Complaint Counsel's rebuttal expert witness, reports that the authors ran a soil test lasting over two years and an ASTM D5511 test on polyethylene and polypropylene treated with the ECM Additive. *Id.*

Dr. Michel's study was funded in part by Myers Industries ("Myers"), a company that produces products marketed as compostable. F. 1467, 1480. The ECM Additive competes in the marketplace with compostable technologies. F. 1481. Myers prepared the two sample materials said to contain the ECM Additive. F. 1471. Dr. Michel does not have a certificate of ingredients regarding those samples and his study does not identify the conditions for the injection molding or the particular processing conditions that were used in the injection molding of the blends containing the ECM Additive. F. 1472-1474. Dr. Michel did not conduct an investigation of the inoculum used in his study to determine if the inoculum remained viable halfway through the test. F. 1476.

When he submitted his study to Elsevier for publication, Dr. Michel did not disclose that Myers funded his study, or that Mr. Eddie Gomez, a co-author of Dr. Michel's article on the study, was financially supported mostly by Myers' contributions to Ohio State University. F. 1467, 1485-1486. Furthermore, Dr. Michel did not disclose to Elsevier or in the article itself, that, under an agreement between Dr. Michel, Mr. Gomez, and Myers, Dr. Michel could disseminate the data from the study only after revision by Myers; that Mr. Gomez asked an employee of Myers for suggestions regarding the article; or that Myers approved the article before Dr. Michel submitted it to Elsevier. F. 1487-1494.

When Dr. Michel submitted his article on the study to Elsevier for peer-review publication, he submitted only the article itself, and no other documentation, such as the underlying data upon

which the study was based. F. 1483. Dr. Michel's article does not report the methane levels, the percentages of total gas composition, or the triplicate data. F. 1483. That absence of data would have precluded the peer reviewers from assessing the accuracy of his test. F. 1484.

Respondent contends that Complaint Counsel is incorrect in asserting that Dr. Michel's study produced "no biodegradation," because the study revealed 3.1% biodegradation as an average of the test vessels. RRB at 98-99 (citing CCX 164). Respondent further asserts that the data projected in Dr. Michel's test report demonstrates a progressive, steady increase in biodegradation of the ECM test plastic over time, until the entire laboratory system failed around the 30-day mark. RRB at 98-99 (citing CCX 164 at 2590 (showing system-wide plateau)). Respondent argues that because every test vessel, including the cellulose (which has been shown in other tests to biodegrade beyond 90%), plateaued right around the exact same time in the test, the system-wide plateau relates to the environmental conditions in the test. RRB at 99. Respondent's experts explained that a plateau in a test environment means that the test is simply no longer capable of sustaining biodegradation testing. F. 798-799. Respondent further asserts that Dr. Michel performed no statistical analysis to determine if the percent of biodegradation was more than what would be sourced from the ECM Additive during the period when the test was actually viable and that Dr. Michel did not investigate to identify the actual cause for test failure. RRB at 100 (citing Michel, Tr. 2961-2962).

Having evaluated the evidence and the arguments of the parties, and as discussed above, the Michel study and evidence presented at trial thereon is not given significant weight on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent's claims are false.

- Stevens Ecology

Complaint Counsel next asserts that Stevens Ecology, an independent lab in Oregon, ran several anaerobic tests, each finding no biodegradation under anaerobic conditions. CCB at 61 (citing CCX 174-CCX 176). In support of that assertion, Complaint Counsel cites only to the tests themselves. *Id*. *See*

also CCPFF 144, 174, 453 (proposing, without explanation, that studies that show very little or no biodegradation of ECM Plastics were conducted by independent or reputable laboratories, were well-documented, and included other necessary information necessary to interpret the results). The only trial testimony offered on the Stevens Ecology tests was provided by Complaint Counsel's expert, Dr. McCarthy, who opined that the tests performed by Stevens Ecology are reliable because they used the proper standards, the test samples were exposed to the proper period of time, and the testers performed the proper standard deviation and included information on the loading rate, the inoculum, the length of time, the temperature, the moisture, and volatile solids. (McCarthy, Tr. 467-468).

With respect to CCX 174, Stevens Ecology, 2008 Test of FP International's Loose Fill Product, Respondent asserts that the laboratory claimed to follow the ASTM D5511 test protocol, which says that "[f]or the test to be considered valid, the positive control must achieve 70% biodegradation within 30 days," RRB at 88 (citing CCX 84 at 3 ¶ 11.2.1.1), but that none of the test procedures in CCX 174 produced the 70% value within the 30-day period and, thus, the tests are invalid. RRB at 88. Respondent further asserts that the purpose of that requirement is to ensure that the test environment is viable enough to actually measure biodegradation. RRB at 88.

Respondent next asserts that it is clear by looking at the test environment, as pictured by the laboratory on page 9 of CCX 174, why those tests reported little biodegradation – the test materials are not even contacting the inoculum that contains the microbes responsible for biodegrading material. RRB at 89-90 (citing CCX 174 at 9). Respondent contends that the laboratory recognized that problem, and decided to remedy that design error by shaking the vessels every now and then. RRB at 89 (citing CCX 174 at 9 ("[T]his arrangement introduced a potential difficulty, since most of the test material in treatments T was not in contact with the compost inoculum. To alleviate this, and to ensure even aeration, the vessels were physically agitated each day.")). Respondent further argues that neither Complaint Counsel nor its experts attempted to explain how this type of test could be valid when the inoculum is not in continuous contact with the test material, and

when whatever contact that does occur is constantly broken by agitating the test material. RRB at 90.

With respect to CCX 175, Stevens Ecology 2008 Biodegradation Testing of Plastic Film Product, Respondent raises the same point it did in relation to CCX 174, that the anaerobic testing failed to reach 70% biodegradation of the positive control within 30 days and, thus, the test is considered invalid under the ASTM D5511 test protocol. RRB at 91 (citing CCX 84 at 3 ¶ 11.2.1.1).

Respondent next asserts that the collection system used by Stevens Ecology, apparently manufactured out of PVC tubing, is not permitted by the ASTM D5511 standard. RRB at 91-92 (citing CCX 175 at 17; CCX 84; RX 356). Respondent contends that there is no evidence or discussion in the record supporting the competence or accuracy of this testing method, how this system works, or how the laboratory could calibrate its testing system. RRB at 91-92. Respondent points out that Complaint Counsel's expert, Dr. Tolaymat, criticized ECM's tests because the laboratories had used a graduated cylinder to record gas totals, even though the ASTM D5511 standard itself calls for the use of a graduated cylinder for that purpose. RRB at 92 (citing Tolaymat, Tr. 206; CCX 84 at 2 ¶ 6.1 (requiring the use of an "inverted graduated cylinder or plastic column")) and that Complaint Counsel also criticized NE Labs' use of metal canisters, instead of glass vessels, during biodegradation testing. RRB at 92 (citing CCX 891 at 34). Respondent contends that Complaint Counsel is inconsistent in its criticism of the collection systems used in tests relied upon by ECM (analyzed in Section III.E.10.b., *infra*), while accepting what Respondent calls "makeshift gas totalizers" used in the Stevens Ecology test, as appropriate vessels.

With respect to CCX 176, Stevens Ecology 2008 Biodegradation Testing of Plastic Film Product, Revision A, Respondent points out that this test report is a revised version of the test report marked CCX 175, and asserts the same issues and concerns with CCX 176 as it does with CCX 175.

Having evaluated the evidence and the arguments of the parties, and as discussed above, the Stevens Ecology studies and evidence presented at trial thereon are not given significant weight

on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent's claims are false.

- Advance Material Center

Complaint Counsel next asserts that two tests conducted by Advance Material Center, Inc., showed no biodegradation under both aerobic and anaerobic conditions. CCB at 61 (citing CCX 173). In support of that assertion, Complaint Counsel cites only to the tests themselves. *Id*. *See also* CCPFF 453 (proposing without explanation that studies that show no biodegradation of ECM Plastics were conducted by independent or reputable laboratories, were well-documented, and included other necessary information necessary to interpret the results). No trial testimony was offered on the Advance Material Center tests. Respondent objects to the use of these tests as they were never discussed by Complaint Counsel's experts at the hearing, was subject to no testimony to explain the tests, and had no sponsoring witness to explain any flaws or information gaps. RRCCFF 453.

The Advance Material Center studies, with no supporting fact or expert testimony, and as discussed above, are not given significant weight on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent's claims are false.

- Organic Waste Systems, Inc. ("OWS")

Finally, Complaint Counsel asserts that Organic Waste Systems, Inc. ("OWS") conducted several composting studies and several anaerobic tests that report no biodegradation. CCB at 61 (citing CCX 156; CCX 157; CCX 163; CCX 169-CCX 171). In support of that assertion, Complaint Counsel cites only to the exhibits themselves. *Id*. *See also* CCPFF 144, 453 (proposing without explanation that the studies that show very little or no biodegradation of ECM Plastics were conducted by independent or reputable laboratories, were well-documented, and included other necessary information necessary to interpret the results). Respondent charges, with respect to each of these OWS exhibits, that Complaint Counsel failed to support the documents with any fact witness or expert testimony of any kind (at deposition or at the hearing). RRCCFF 143, 453.

With respect to CCX 156, Respondent asserts that this exhibit is a collection of emails between non-parties and that the piecemeal reports submitted through email do not disclose the methane content of the test vessels or the triplicate data. RRB at 92 (citing CCX 156). Respondent further states that because the laboratory reported a negative amount of biodegradation in the test vessel over the short duration test and because Complaint Counsel has stipulated that the ECM Additive is biodegradable (JX 3 at 3), if the laboratory records negative amounts of biodegradation showing that the test article inhibited biological activity, that data strongly suggests that (a) the ECM Additive was not present in the test plastic; (b) the test plastic contained other components that are antimicrobial or inhibitory of biodegradation; (c) the ECM Additive was not properly manufactured in the test article, either due to burning or scorching; or (d) the lab environments for the various test plastics were not biologically conducive to biodegradation testing. RRB at 92-94 (internal citations omitted). Respondent argues that without exploring those possibilities, a result of the kind seen in CCX 156 is inconclusive and highly suspect. *Id.*

With respect to CCX 157, OWS 2010 Biodegradation Test for Covidien, Respondent asserts that CCX 157 is not a valid test under the ASTM D5511 standard because the test environment plateaued prematurely, demonstrating that the environment was not competent to permit assessment of biodegradability, and that the test never reached the minimum 70% biodegradation for the positive control, as required by the test standard. RRB at 94 (citing CCX 157 at ECM114737; CCX 84 at 3 ¶ 11.2.1.1). *See also* F. 1458-1462.[46] Furthermore, Respondent asserts, the test environment ostensibly plateaued, even for the cellulose control, around the sixth day of testing, which strongly suggests that the test was not conducive to protracted biodegradability testing. RRB at 94 (citing Burnette, Tr. 2401-2402, 2412-2413, 2442-2443; Barlaz, Tr. 2272-2273). *See* F. 1461-1464. Respondent also asserts that the test reported as CCX 157/RX 268 included none of the data necessary to evaluate the tests themselves – no

[46] The OWS 2010 Biodegradation Test for Covidien was entered into evidence as both CCX 157 and RX 268.

data concerning the methane production in the anaerobic test, no gas readings or triplicate data, and no information as to the nature of the plastic or the load rating of the ECM Additive. RRB at 94-95 (citing CCX 157). The OWS test marked CCX 157 and RX 268 revealed 3.9% biodegradation of the test sample in 15 days of anaerobic degradation. F. 1463.

With respect to CCX 163, OWS 2009 Biodegradation Test for Masternet, Respondent notes that this test demonstrated a biodegradation of -3.7% in the test article and reiterates the same concerns with CCX 163 as with CCX 157. RRB at 95. Respondent also states that because OWS did not include a negative control in its tests, it is impossible to determine whether that inhibitory effect was also observed in an untreated plastic. RRB at 95-96. Respondent argues that because of these flaws, this test is not sufficiently reliable. *Id.*

Regarding CCX 169, OWS Review of Several Documents, Reports and Statements on Biodegradation of ECM Masterbatch Pellets, Respondent asserts that this document is not a "test," as described by Complaint Counsel, but a review of other materials, and that the document does not include any original test data considered by OWS, or any of the statements and marketing materials relied on by OWS in its review letter. RRB at 96-97 (citing CCX 169). Respondent thus asserts that CCX 169 is unreliable hearsay and should be given no weight. *Id.*

As to CCX 170, 2007 Aerobic Biodegradation Test of Plastic Bag Under Composting Conditions, Respondent asserts that the study authors provided no data from the study that would be necessary to verify the testing method used or to determine the amount of biodegradation recorded in the study. RRB at 97 (citing CCX 170). For example, Respondent states, this OWS test did not report total gas volume data, provide percentages of carbon dioxide, provide information concerning the calculation of the theoretical gas yields from the sample, and did not report information concerning the test plastic itself, including the load rating of the ECM Additive, or if the ECM Additive was even involved. RRB at 97 (citing CCX 170). Thus, Respondent argues, CCX 170 is an inconclusive test with serious methodological flaws. *Id.*

With respect to CCX 171, OWS 2012 Anaerobic Biodegradation Study for Shields, Respondent reiterates its previous concerns noted above with the OWS laboratory testing, including the lack of supporting data, particularly the absence of any methane data. RRB at 98 (citing CCX 171). Respondent further states that CCX 171 failed to use a negative control, which is significant because the reported biodegradation in the sample vessel was -4.4%, meaning that the test plastic actually inhibited rather than promoted biodegradation, and that the test therefore reveals a high likelihood that the plastic contained a component that was inhibitory of biodegradation, or that the test plastic containing the ECM Additive was not properly manufactured. RRB at 98. Respondent argues that CCX 171 is unreliable hearsay and inconclusive, as it fails to include any identification or scientific evaluation of the actual cause for test failure. RRB at 98.

The OWS studies, with no supporting fact or expert testimony, and as discussed above, are not given significant weight on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent's claims are false.

- Summary of tests cited by Complaint Counsel

Without expert testimony or a sponsoring witness, it is not possible to evaluate the reliability or validity of many of the tests relied upon by Complaint Counsel. Respondent has pointed out numerous flaws in those tests. In addition, Respondent's experts testified that many variables could influence the outcome of a gas evolution test, and that an inconclusive test is expected in light of those variables and must be examined and assessed to determine what, if anything, those tests reveal. F. 800-806. Moreover, Complaint Counsel disregards every single positive ECM test in the record which Respondent's expert, Dr. Barlaz, explains. Section III.E.10.a., *infra*. It should also be noted that, while Complaint Counsel criticizes tests relied upon by Respondent as flawed because they "look to the ASTM D5511 method to support ECM's biodegradation claims," (CCB at 68) several of these tests cited by Complaint Counsel also look to the ASTM D5511 method to assess biodegradability.

Complaint Counsel, as the proponent of its charge that "tests show no biodegradation of ECM Plastic," CCB at 59, has the burden of proving that assertion. Weighing the evidence presented and for the reasons set forth above, Complaint Counsel has failed to meet that burden.

In alleging that the Challenged Claims are false, Complaint Counsel "must carry the burden of proving the claims to be false" and the fact finder is "required to determine whether the evidence put on by [Complaint Counsel] shows the claims to be false." *Thompson Medical*, 1984 FTC LEXIS 6, at *381-82. As set forth above, and based on the totality of the evidence presented at trial, Complaint Counsel has not met its burden of showing that the ECM Plastics are not biodegradable, including in a landfill. Therefore, Complaint Counsel has not proved that Respondent's efficacy claims are false.

9. Whether Respondent's Establishment Claims Are False

Complaint Counsel, in its Post-Trial Brief, argues that Respondent's "claims" (generically and without further specification) are both false and misleading. The allegation in the Complaint that "ECM Plastics have been shown to be biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe under various scientific tests, including, but not limited to, ASTM D5511," (Complaint ¶ 9D), is an establishment claim.

As noted above, Complaint Counsel can prove an establishment claim is "false" where Respondent represents expressly or implicitly that there is scientific support for its claims, but Respondent lacked such proof at the time the representations were made. *POM*, 2013 FTC LEXIS 6, at *53. If Respondent's substantiation does not meet the level of studies demanded by the relevant scientific communities, then Respondent's claims of scientific proof establishing its biodegradability claims are false. *See POM*, 2013 FTC LEXIS 6, at *67. When a respondent makes a claim that "tests prove" that its product works, because such a claim "is inherently a substantiation claim, the falsity and reasonable basis theories collapse into the same inquiry: did Defendants possess adequate

substantiation to make such a claim?" *QT, Inc.*, 448 F. Supp. 2d at 966. Thus, to evaluate whether the challenged establishment claim is false, the analysis turns to Respondent's proffered substantiation and whether it constitutes competent and reliable scientific evidence.

10. Whether Respondent Possessed Adequate Substantiation For Its Claims

Complaint Counsel can prove a claim that "studies prove" that a product works as represented is "unsubstantiated" by demonstrating that the proffered substantiation fails to meet the standards required in the scientific community for that type of claim. *Removatron*, 1985 FTC LEXIS 21, at *195-96; *QT, Inc.*, 448 F. Supp. 2d at 959. Respondent is held to the level of substantiation that the advertisements claim. *POM*, 2013 FTC LEXIS 6, at *65 n.18.

This section of the Initial Decision analyzes, first, the evidence presented by Respondent as its proffered substantiation. This section analyzes, second, the evidence presented by Complaint Counsel in support of its position that Respondent's proffered substantiation fails to meet the standards required in the relevant scientific community, and is therefore inadequate to substantiate Respondent's claims.

a. Tests relied upon by Respondent

To support its position that competent and reliable scientific evidence supports its efficacy claims that ECM Plastics are biodegradable, including in a landfill, and that it has the level of substantiation that ECM claimed in its Certificate of Biodegradability and Marketing Materials ("various scientific tests, including, but not limited to, ASTM D5511") (Complaint ¶ 9D; F. 265, 272), Respondent relies upon the reports and testimony of its experts who reviewed the tests offered by Respondent including ASTM D5511 tests on ECM Plastics. Extensive findings on these tests and the experts' evaluations of these tests are set forth in F. 1006-1424 and summarized below.

The ASTM D5511 test method is a competent and reliable scientific method for assessing intrinsic biodegradability. Section

III.E.6., *supra.* As detailed in F. 1043-1424, Respondent introduced numerous ASTM D5511 anaerobic gas tests upon which ECM relied to substantiate its claims. Dr. Barlaz reviewed many of the gas evolution studies involving the ECM Plastics. F. 1008, 1043. He examined the raw data produced by Northeast Laboratories ("NE Labs") and Eden Research Laboratories ("ERL"), particularly the data concerning methane generation from the test substrate and methane generation from the inoculum that would be the background methane. F. 1008, 1011, 1043. For those tests where Dr. Barlaz had raw data or triplicate data, Dr. Barlaz performed statistical analyses, including t-tests,[47] to determine whether there were statistically significant differences between the methane generation in the reactor with test substrate and the methane attributable to the inoculum alone. F. 1012; *see also* F. 1014.

For other studies where triplicate data was not available, Dr. Barlaz examined the ratios of methane generation in the test material plus inoculum to methane generation from the inoculum only. F. 1016. Dr. Barlaz concluded for those studies, that ratios varied, but the ratios were generally significant, even at the lower end. F. 1015. From those ratios, Dr. Barlaz determined that the methane generation in the test vessels could be attributable to the test substrate, which suggests that the substrate was undergoing anaerobic biodegradation and conversion to methane. F. 1017. Dr. Barlaz prepared a spreadsheet of his statistical calculations and updated his spreadsheet to include additional calculations based on the data. F. 1018-1019.

To address the question of whether only the ECM Additive had biodegraded, Dr. Barlaz estimated the amount of methane that could theoretically be produced by the ECM Additive alone. F. 1020. Dr. Barlaz made certain conservative assumptions about the ECM Additive when calculating the amount of potential methane. F. 1021. Dr. Barlaz's conservative calculation was that one gram of ECM Additive would produce 933 mL of methane gas. F. 1022. Based on that calculation of 933 mL, Dr. Barlaz

[47] The t-test is a statistical procedure that allows one to determine the significant difference between two sets of data. A t-statistic is the most common statistical test after a calculation of the average. F. 1013.

looked at the methane yields in the test vessels during biodegradation testing, and determined that the amount of biodegradation exceeded the amount that could potentially be sourced from the ECM Additive. F. 1023. Dr. Barlaz's calculation of the potential methane yield of the ECM Additive is likely conservative because of the assumptions he made. For example, Dr. Barlaz assumed the ECM Additive was 50% carbon because most items are about 50% carbon. F. 1024. Polyethylene, by contrast, is almost 90% carbon. F. 1025.

In addition, Dr. Barlaz calculated the methane yield of the ECM Additive based on the formula for the ECM Additive that Dr. McCarthy used in his expert report at page 24, footnote 17, which was stated to be the result of reverse engineering of the ECM product. F. 1026-1027. Based on Dr. McCarthy's assumptions about the ECM Additive's contents, Dr. Barlaz calculated a methane yield for the ECM Additive of 838 mL per gram. F. 1027. Using Dr. McCarthy's assumptions, the data produced in the gas evolution tests suggests that even more of the substrate plastic (not the additive) biodegraded because the ECM Additive would have had a lower potential methane yield. F. 1028.

Using the test performed by NE Labs on behalf of Minigrips, conducted on a plastic amended with 1.5% ECM Additive as an example ("NE Labs Minigrips test") (F. 1286-1312), [48] Dr. Barlaz explained the arithmetic summarized in his spreadsheet. F. 1029. Dr. Barlaz calculated the weight of the ECM Additive (in grams) by multiplying the percentage of the ECM Additive load rating (in the Minigrips test, 1.5%) by the starting weight of the entire test plastic. F. 1030. Once Dr. Barlaz had calculated the amount of total methane potential from one gram of ECM Additive, he was then able to determine the total amount of methane possible in the ECM Additive in each specific test by multiplying the actual

[48] In the NE Labs Minigrips test, marked RX 838, from May 2011 through August 2012, NE Labs reported biodegradation test data from an anaerobic ASTM D5511 biodegradation test in laboratory reactors. F. 1286. The NE Labs Minigrips test included the use of an inoculum blank, a negative control (untreated plastic), a positive control (cellulose), and a test sample, all of which were run in triplicate. F. 1289. The test sample was plastic amended with 1.5% ECM Additive. F. 1290.

weight of the ECM Additive by the conservative 933 mL calculation (or 838 mL if using Dr. McCarthy's assumptions). F. 1031. Dr. Barlaz's calculation of the ECM Additive's methane potential shown in the NE Labs Minigrips Testing (RX 838) is set forth in F. 1298-1303.

Dr. Barlaz also calculated the net methane for each test vessel, which he did by subtracting the mean triplicate methane data from the inoculum blanks from the test vessels. F. 1032. For those studies where Dr. Barlaz had raw data or triplicate data, he calculated t-tests and standard deviations. F. 1012, 1014. Dr. Barlaz looked for a 95% certainty in the statistics that he ran, which would mean that the researchers are 95% "certain that you got the right answer." F. 1033. Dr. Barlaz's t-statistics were generally well below the .05 that indicates statistical significance at the 95% level. F. 1034. Dr. Barlaz's mathematical process is explained in his testimony. F. 1035.

Dr. Barlaz explained convincingly that where the methane produced from the test vessel is not attributable to the inoculum, and not attributable to the ECM Additive, then the biodegradation must come from the plastic substrate itself. F. 1036. Dr. Barlaz also analyzed the ratios of methane to carbon dioxide in the lab tests. F. 1037. A ratio of methane to carbon dioxide that is greater than 1:1, respectively, is a good indication that the anaerobic environment was behaving properly. F. 1038. Dr. Barlaz explained that gas evolution testing also does not account for carbon that may have been cleaved from the substrate but converted to cell mass instead of gas. F. 1039. Therefore, Dr. Barlaz persuasively testified, the biodegradation numbers calculated by the laboratories based on gas data alone are a lower limit of the carbon conversion than was actually realized. F. 1040.

In the NE Labs Minigrips test, the test results were confirmed through other standards, including the ASTM D6579, which is a standard for calculating molecular weight averages and molecular weight distribution in the test sample vs. the negative control. F. 1305-1309. The NE Labs Minigrips test had reported approximately 17% biodegradation of the test sample after 365 days of testing. F. 1310. The test sample consisted of LLDPE (linear low density polyethylene) plastic bags with a 1.5% ECM

Additive. F. 1291. In its August 1, 2012 Analytical Report (RX 838), NE Labs demonstrated that the plastic "zip bags" treated with the 1.5% ECM Additive had a molecular weight that was approximately 16% less than the untreated test sample. F. 1307. Both the number average and the weight average molecular weights of the 1.5% ECM treated plastic had declined by about 16%. F. 1037. Thus, the results of the ASTM 6579 test confirmed the results of the ASTM D5511 test in the NE Labs' Minigrips study. NE Labs reported in its analysis that the "change in molecular weight is a measure of bulk deterioration. As an analytical method it indicates that polymer chains are breaking down or cleaving during biodegradation." F. 1309.[49]

Results from ASTM D5511 tests in evidence showed net methane yields greater than the amount of biodegradation that could have possibly been sourced from the ECM Additive alone. *E.g.*, F. 1128, 1149, 1162, 1181-1182, 1196, 1215-1216, 1283, 1302, 1328, 1353, 1379, 1402-1403. Dr. Barlaz credibly and persuasively testified that "[b]ased on checking of the lab reports, there were numerous examples where specific plastics were shown to anaerobically biodegrade to methane." F. 1043. Thus, Respondent has met its burden of producing the scientific evidence upon which it relies.

While Respondent has the burden to produce the evidence upon which it relies to substantiate its representations, Complaint Counsel bears the burden of proving that the substantiation is inadequate. *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 259, at *63 (Dec. 24, 2009). After Respondent meets its burden of establishing what substantiation it relied on for its claims, under the reasonable basis theory, "[t]he FTC has the burden of proving that [Respondent's] purported substantiation is inadequate," *QT, Inc.*, 448 F. Supp. 2d at 961; and, under the falsity theory, Complaint Counsel must show that the studies Respondent possessed did not pass muster in the view of the relevant scientific communities. *POM*, 2013 FTC LEXIS 6, at *67. The next section, thus, analyzes whether Complaint Counsel has met its burden of proving that Respondent's substantiation is

[49] The biodegradation of plastic polymers involves hydrolytic cleavage of polymer bonds. F. 920.

inadequate or that Respondent's tests do not meet the standards demanded by the scientific community.

b. Complaint Counsel's challenges to Respondent's substantiation

In support of its position that Respondent's substantiation is inadequate or does not meet the standards demanded by the scientific community, Complaint Counsel contends: (1) the tests that Respondent relies upon are fatally flawed; and (2) the tests that Respondent relies upon cannot support claims of complete biodegradation in landfills. The arguments and evidence on these points are discussed below.

i. Challenged flaws in Respondent's tests

Complaint Counsel contends that many of Respondent's tests are so methodologically flawed that they are not reliable evidence. As discussed above, the ASTM D5511 test is a competent and reliable method to show whether a material is biodegradable in a landfill. The critiques of the anaerobic gas evolution tests conducted by Eden Research Labs ("ERL") and Northeast Labs ("NE Labs") and a determination on whether these tests were well-conducted and well-controlled are discussed below.

- Eden Research Labs' Testing

Complaint Counsel criticizes the anaerobic gas evolution ASTM D5511 tests conducted by ERL, stating, first, that Mr. Thomas Poth, the owner of ERL, testified that: ERL does not report statistical information, so it does not know if the test results are statistically significant. CCB at 69 (citing Poth, Tr. 1512-1513, 1538). Respondent responds to this criticism, stating: although ERL did not report standard deviations, it did report triplicate data in its final reports, and it reported detailed findings concerning the amount of biogas produced in the studies. RRB at 119 (citing RX 248; RX 839; RX 403; RX 402; CCX 548; CCX 546; CCX 534; CCX 547). As analyzed in III.E.10.a., *supra*, for those gas evolution studies on ECM Plastics where Dr. Barlaz had raw data or triplicate data, he performed statistical analysis, including t-tests, to determine whether there were statistically significant differences between the methane generation in the

reactor with the test substrate and the methane attributable to the inoculum alone. F. 1012.

Second, Complaint Counsel asserts that ERL provides primarily "quick-and-dirty" updates that are not given the same level of rigorous review as the reports. CCB at 69 (citing Poth, Tr. 1499-1500). Respondent asserts that ERL's "update" reports, which note the progress of studies (instead of full reports that would issue at the end of a study, or upon request by a customer), do not include all of the information relevant to the studies, but that is not an indication that the data is unreliable. RRB at 119 (citing Poth, Tr. 1475; RX 403; CCX 548; CCX 546; CCX 534; CCX 547). ERL produces update reports to keep customers abreast of the status of testing. Update reports do not include all of the information relevant to the test, or all of the information included in a final report. F. 1118.

Third, Complaint Counsel asserts that ERL adjusts the biodegradability percentage of positive control to 100% even though ASTM D5511 does not provide for the adjustment and Mr. Poth is aware that cellulose will never reach 100% biodegradation. CCB at 69 (citing Poth, Tr. 1505-1507). Respondent asserts that while ERL provided adjusted calculations, ERL also provided the unadjusted percentage without any additional calculations, *e.g.*, the pure percentage of biodegradation based on the loss of methane from the test vessel. RRB at 120 (citing, *e.g.*, RX 403 at 1 (listing "Percent Biodegraded (%)" immediately above "Adjusted Percent Biodegraded (%)"). Respondent states that ECM relies on that pure "percent biodegraded" number in this case, rendering the criticism of the adjusted number immaterial (citing the spreadsheet prepared by Dr. Barlaz, RX 968) and, thus, argues there is no basis to suggest that ERL's adjusted number calculation affected the test results, affected ECM's experts' opinion of the tests, or affected the underlying data. RRB at 120.

In addition to those criticisms of the ERL tests noted above, Complaint Counsel asserts that in his expert report, Dr. McCarthy, based on the deposition transcript of ERL, finds at least four things that call into question the validity of ERL's test results. CCB at 70. While Dr. McCarthy posits these four criticisms of ERL's testing in his report, he did not convincingly explain those

points in his testimony at trial. *See generally* McCarthy, Tr. 359-680.

First, Dr. McCarthy contends that ERL "is run by a person lacking the proper credentials" to run biodegradation tests. CCX 891 ¶ 89(i). However, Dr. McCarthy had never visited ERL, or spoken with its owner, Mr. Poth. *See* CCX 891 ¶ 89 (McCarthy Expert Report) (basing his opinion on the deposition transcript provided to him). The evidence at trial shows that ERL's tests are performed by Mr. Poth and Dr. Brian Esau. F. 1048. Dr. Esau has a master's degree and a Ph.D. in biochemistry from the University of Illinois at Champaign-Urbana. F. 1049.

Second, Dr. McCarthy discounted the ERL testing because, according to Dr. McCarthy, ERL replaced the inoculum during long-term testing. CCX 891 ¶ 89(ii). However, when asked about replacing inoculum, Mr. Poth testified unequivocally at the hearing that "[w]e don't do that." F. 1074.

Third, Dr. McCarthy opined that ERL "conducted tests for periods well-beyond the validation period of the test." CCX 891 ¶ 89. However, contrary to Dr. McCarthy's opinion, the ASTM D5511 method does not specify a cutoff time or duration for the test and, in fact, the method specifically contemplates tests of varying durations: "The incubation time shall be run *until* no net gas production is noted for at least five days from both the positive control and the test substance reactors." F. 785 (RX 356 at 3 § 11.2.1.2) (emphasis added). Moreover, Dr. Sahu persuasively testified that extending the duration of an ASTM D5511 test does not render the data unreliable. F. 787. Dr. Sahu testified that, consistent with the ASTM D5511 standard itself, as long as the conditions of the test are maintained, there is no reason to simply reject a test based on an increase in study duration. F. 787. Although Dr. Tolaymat rejected ECM's ASTM D5511 tests that were run longer than 60 days because those tests did not "follow the standard test method," he acknowledged that an ASTM D5511 test could be conducted for several years while remaining viable. F. 789. Moreover, Dr. Tolaymat acknowledged that the BMP test, which he himself used and recommended to test biodegradability of plastics, does not even have a standard test method. F. 753. In addition, Complaint Counsel's rebuttal expert, Dr. Michel, has performed

biodegradation gas evolution studies in his laboratory that exceeded 500 days. F. 790.

Fourth, Dr. McCarthy stated, without explanation, that ERL "improperly modifies the raw data." CCX 891 ¶ 89(iv). Without any explanation, it is unclear as to how, if at all, ERL has "improperly modified" the data, and Dr. McCarthy has not supported that statement in his report with any record evidence that would suggest any "improper modification" of the data. *See id.* By contrast, as found in F. 1008-1042, Dr. Barlaz examined and assessed the raw data produced by ERL. Dr. Barlaz's evaluation of the data is summarized in Section III.E.10.a., *supra*. In addition, almost all of ERL's tests employed negative controls. *E.g.*, F. 1084, 1103, 1119, 1139, 1154, 1166, 1186, 1200. Respondent's experts persuasively explained that the use of negative controls in those tests undercuts Complaint Counsel's asserted criticisms of the methodology. *See* F. 764, 772, 1011-1041.

Dr. Barlaz further testified that he had visited ERL in an unrelated trip before this case began. F. 1077. Dr. Barlaz reviewed ERL's testing model and procedures, and was satisfied that ERL's testing was strictly under anaerobic conditions and that ERL had the appropriate capability to accurately monitor gas volume and composition. F. 1078-1079. By contrast, Dr. McCarthy's opinion was based on his review of the deposition of ERL's representative. CCX 891 ¶ 89.

Weighing the criticism offered by Complaint Counsel's expert, Dr. McCarthy, against the more credible and persuasive evidence offered by Respondent's experts, the greater weight of the evidence fails to show that the anaerobic gas evolution tests performed by ERL are so fatally flawed as to not constitute reliable and competent scientific evidence substantiating that ECM Plastics are biodegradable, or that these tests are inadequate to substantiate ECM's "biodegradable" or "tests prove" claims.

- NE Labs' Testing

Complaint Counsel and its expert, Dr. McCarthy, criticize the anaerobic gas evolution ASTM D5511 tests conducted by NE Labs on a number of grounds. Dr. McCarthy based his opinion on

the deposition of NE Labs' corporate designee, Ms. Alyssa Ullmann. CCX 891 ¶ 88.[50]

First, Complaint Counsel states that Mr. Alan Johnson, the current owner and laboratory director of NE Labs, testified at trial that NE Labs does not undergo any audits, does not hold any certifications, and has never been evaluated. CCB at 68 (citing Johnson, Tr. 1580-1581). Respondent replies to this criticism stating, although it is true that NE Labs' biodegradable testing group was not audited, the rest of NE Labs was audited by state and federal authorities. RRB at 115 (citing Johnson, Tr. 1559-1560). NE Labs passed its audits, and it holds several certifications relevant to sensitive testing areas. F.1220-1221. NE Labs' chemistry lab, which performs services for the biodegradation laboratory during the biodegradation testing, is audited. F. 1221. Respondent further argues that whether or not NE Labs is audited is not a substitute for proof of invalidity of the specific tests performed, is highly speculative because the absence of an audit is not the same as an audit failure, and has no bearing on the accuracy or reliability of NE Labs' tests. RRB at 115. In addition, Respondent argues that Complaint Counsel has not produced evidence that the auditing of biodegradation labs is common, that Complaint Counsel's own experts' labs have been audited, or that other biodegradation labs are audited. RRB at 115.

Second, Complaint Counsel argues that NE Labs did not maintain anaerobic conditions throughout the duration of the extended anaerobic ASTM D5511 tests. CCB at 68 (citing Johnson, Tr. 1574). Dr. McCarthy, in his expert report, also opines that NE Labs replaced the inoculum, which "would likely lead to overestimation of biodegradation, expose the inoculum to oxygen, thus not simulating anaerobic conditions. This deviates

[50] Ms. Ullmann testified in her deposition that Mr. Alan Johnson and Mr. Garrett Johnson, counsel for NE Labs, determined that Ms. Ullmann was the best person to provide deposition testimony in response to Complaint Counsel's subpoena because she handles all the clients, puts clients' reports together, and has "been doing biodegradation stuff the longest," but that Alan Johnson would be the most knowledgeable person in NE Labs to answer questions concerning scientific issues, tests, and protocols. RX 873 (Ullmann, Dep. at 130).

from the ASTM method and calls into question the credibility of those conducting the lab." CCX 891 ¶ 88.

Respondent first asserts that no evidence supports the contention that NE Labs re-inoculated its canisters in the ECM testing, but, even if NE Labs did do that, the use of nitrogen gas to sparge canisters clearly maintained an environment that produced methane gas. RRB at 116; *see also* F. 1255. Respondent next asserts that Complaint Counsel failed to acknowledge that NE Labs sparged its canisters with nitrogen (an inert gas that does not affect biodegradation testing) after re-inoculating. RRB at 116 (citing Johnson, Tr. 1573-1574; Barlaz, Tr. 2276).

For longer-term extension testing over 45 days past the planned termination date, NE Labs would assess whether the activity in the triplicate vessels had leveled off. F. 1251. If the activity in the test vessels had leveled, and the positive control had already been digested, NE Labs would remove the test materials and negative controls from the stale testing environment, and place those materials into a new reactor canister with fresh inoculum. F. 1252. To maintain anaerobic conditions during a long-term extension test, NE Labs would sparge (or flush) the new canisters with nitrogen to remove excess atmospheric gases. F. 1253-1254. Dr. Sahu expressed no concern with the process of replenishing the inoculum. F. 1265.

Relying on Dr. Barlaz, Respondent notes that the percentage of biodegradation recorded in the test environments is based on methane production. RRB at 115; F. 764-765; *see also* F. 744. Methane can only be produced by an anaerobic system. F. 1077. The presence of oxygen either destroys or severely limits an anaerobic system. F. 1262. Thus, Respondent argues, even assuming the NE Labs tests were aerobic at times, the amount of anaerobic biodegradation would be minimized as oxygen kills off the anaerobes. RRB at 115. Respondent further points to the evidence that NE Labs' tests consistently produced methane during the course of the tests. F. 1282-1285, 1301-1304, 1321-1328, 1337, 1349-1353, 1372-1379, 1394-1402. Because the amount of biodegradation in the ASTM D5511 test is calculated based on methane production, which is exclusive to anaerobic systems, F. 744, 759, 764, 1007, this evidence undermines

Complaint Counsel's theory that aerobic conditions either existed or factored into the data from NE Labs' tests.

Third, Complaint Counsel states that the ASTM D5511 test method does not allow for extension testing, *i.e.*, testing beyond the 30-day period of the test. CCB at 69 (citing Johnson, Tr. 1583). Dr. McCarthy in his report, too, opines that NE Labs conducted tests for periods well beyond the validation period of the test. CCX 891 ¶ 88. The evidence on the duration of ASTM D5511 testing, summarized above in relation to the criticisms of ERL's tests, shows this criticism is without merit.

Fourth, Complaint Counsel maintains that the protocol for extended ASTM testing was set up by Dr. Bill Ullmann and has never been independently re-evaluated. CCB at 69 (Johnson, Tr. 1560, 1583). Dr. McCarthy's report also opines that NE Labs did not have someone with the proper education or training overseeing the test. CCX 891 ¶ 88. Respondent contends that this criticism is not relevant to the reliability of NE Labs' testing. Respondent further points to evidence that Dr. Ullmann was a well-credentialed and established researcher, was the former director of the state of Connecticut's Public Health Laboratory, and held a Ph.D. in microbiology (RRB at 116-117 (citing Johnson, Tr. 1562)) and notes that he was well qualified to design NE Labs' biodegradation testing. *See* F. 1223-1225.

Fifth, Complaint Counsel asserts that NE Labs' system for gas monitoring involves using an inverted cylinder and metal paint cans and that there would be no way to identify a small leak in the system from gas generation. CCB at 69 (citing Johnson, Tr. 1584). Dr. McCarthy's report, too, opines that NE Labs used an inappropriate apparatus and that the apparatus used deteriorated over time, causing leaks and other potential problems in the system. CCX 891 ¶ 88.

Respondent argues, first, that if there were a small leak, it would not involve the ingress of external gases, but, rather, would permit the pressurized system to expel gas through other channels, meaning that, if anything, the test reading would be lower than actual gas generation due to leakage. RRB at 117. NE Labs did not have indications that its test systems were leaking. F. 1234-1238. NE Labs explained that it uses several materials, including

a silicone sealant, and that it pressure treats its containers, to ensure that the vessels remain airtight. F. 1234-1235. Mr. Johnson and Dr. Barlaz both explained that the presence of methane indicates that no leakage in the test system occurred. F. 1240 (Mr. Johnson explaining that if oxygen was "getting into the can, then you won't be producing methane"); F. 1261 (Dr. Barlaz explaining, "[y]ou either have a leak in your system or you don't have a leak in your system . . . [a]nd the fact that they were getting methane generation from their positive controls indicates to me that they have an ability to make a gas-tight system out of a metal can").

Respondent argues, second, that there is no evidence that any leakage occurred in the vessels (F. 1257), which are run in triplicate so the laboratory can determine if the data recorded is an outlier. RRB at 117; *see, e.g.*, F. 1270, 1289, 1316, 1332, 1341, 1357, 1366, 1386, 1407, 1418. Dr. Barlaz's statistical t-tests were designed to identify the standard deviations and determine statistical anomalies. F. 1012-1014. Dr. Barlaz determined that the data shows statistical significance, meaning that the fluctuations between triplicate test vessels was not extraordinary. *See* F. 1012-1014, 1280, 1284, 1299, 1303, 1325, 1375, 1380. Lastly, the ASTM D5511 test standard specifically calls for the use of inverted cylinders to measure gas totals. F. 1230.

Sixth, Complaint Counsel asserts that NE Labs waits for a paint can to rust before swapping it out for a new one, only replaces the paint cans that have been rusted, and did not consider whether the rusting test vessel affected results of biodegradation testing. CCB at 69 (citing Johnson, Tr. 1585-1586, 1592-1593). Respondent replies that there is no evidence in the record that NE Labs had that type of problem with any tests of ECM Plastics, F. 1256, and the testimony from NE Labs established that rust corrosion was a very rare anomaly. RRB at 117-118 (citing Johnson, Tr. 1566-1567 (explaining that NE Labs had never had a problem with leakage resulting from rust or otherwise)). Dr. Barlaz convincingly explained that the use of the metal canisters (*i.e.*, the cans ordinarily used for paint, but here, simply the empty cans) would not affect the validity of NE Labs' test results. F. 1259. As analyzed in Section III.E.10.a., *supra*, Respondent further states that Dr. Barlaz examined the statistical data to determine whether certain vessels had an observable variance that

would render data not statistically significant and found none. *See* F. 1011-1035, 1280, 1285, 1299, 1303, 1325, 1375, 1380.

Seventh, Complaint Counsel asserts that the methane readings produced by the infrared machine used by NE Labs have a precision of plus or minus 20%. CCB at 69 (citing Johnson, Tr. 1587). Respondent charges that Complaint Counsel mischaracterizes the factual record by suggesting that NE Labs' infrared machine had an error rate of 20%. The testimony was that the error rate may be as low as 1% or less for the higher amounts of methane, but may be as high as 20% for very low amounts of methane recorded. F. 1244-1245. Respondent states that any precision considerations would apply to all vessels tested, including the positive and negative controls, and the inoculum blank, and that variance in the readings would be factored by Dr. Barlaz's statistical t-test calculations across the triplicate test data. RRB 118-119 (citing Barlaz, Tr. 2247-2249, 2263-2264; RX 968).

Dr. Sahu reviewed NE Labs' testing protocol and credibly testified that he had no concerns with NE Labs' testing methodology. F. 1264. Dr. Barlaz convincingly testified, based on his statistical analysis of the raw data, that the NE Labs' tests were good scientific evidence showing that the test materials underwent anaerobic biodegradation. F. 1041-1042. Dr. McCarthy did not run any statistics for the ASTM D5511 studies on ECM Plastics. F. 1009. Indeed, Dr. Barlaz was surprised that Dr. McCarthy was dismissive of ECM's gas evolution testing without having even examined the data. F. 1010.

Weighing the criticisms offered by Complaint Counsel's expert, Dr. McCarthy, against the more credible and persuasive evidence offered by Respondent's experts, the greater weight of the evidence fails to show that the anaerobic gas evolution tests performed by NE Labs are so fatally flawed as to not constitute reliable and competent scientific evidence substantiating that ECM Plastics are biodegradable, or that these tests are inadequate to support ECM's "biodegrable" or "tests prove" claims.

Therefore, through its criticism of the ASTM D5511 tests performed by ERL and NE Labs, Complaint Counsel has not met

its burden of showing that Respondent's tests do not meet the standards demanded by the relevant scientific community.

ii. Complete biodegradation of ECM Plastics in landfills

Complaint Counsel next asserts that in order to support claims of biodegradation for ECM Plastics: (1) tests must be conducted for a sufficient length of time to demonstrate that the entire treated plastic, not just the biodegradable additive, will be consumed; (2) tests must also reflect the disposal conditions claimed, in this case, "landfills"; and (3) tests must show biodegradation of ECM Plastics above the "priming effect." CCB at 70-71. Complaint Counsel's assertions, Respondent's responses, and the evidence pertaining to them, are discussed below.

(a) "Complete biodegradation"

Complaint Counsel argues that the evidence fails to show that ECM Plastics biodegrade "completely." It is not apparent that the Complaint alleges, or that Complaint Counsel argues, that Respondent claimed that ECM Plastics would "completely biodegrade," except in relation to the Implied One Year Claim ("completely" decompose into elements found in nature within one year), which allegation was not proven, and also in relation to Respondent's claim that ECM Plastics would "fully biodegrade" including in a landfill, within 9 months to 5 years. Although it is unclear, Complaint Counsel appears to argue that Respondent's biodegradable claims are false or unsubstantiated because the testing fails to show biodegradation to completion.

Complaint Counsel asserts that Respondent's claim of biodegradation rests on an incorrect assumption that, once started, biodegradation will go to completion. CCB at 71. Complaint Counsel notes that Respondent's expert, Dr. Sahu, testified that he had not seen instances of taking a rate derived from a test, and then extrapolating from that, holding the rate constant, to attempt to state a time period for complete biodegradation. F. 714-715. Furthermore, the ASTM D5511 standard explicitly prohibits extrapolation of test results. RX 356 at 1 (Section 1.4)).

Thus, according to Dr. McCarthy, if a test shows 10% biodegradation in 300 days, the test cannot be used to support a claim of 100% biodegradation in 3000 days. CCB at 72. Dr. McCarthy reasons that extrapolation is prohibited because there is no evidence that biodegradation is a linear process and, according to Dr. McCarthy, the rate of biodegradation is likely to slow because of recalcitrance. CCB at 72 (citing CCX 891 (McCarthy Expert Report ¶ 69)).

Respondent asserts that there is no scientific support for requiring testing that actually shows a plastic completely biodegraded in a laboratory environment before one can claim that plastics are completely biodegradable. RRB at 121-122. Indeed, Complaint Counsel's experts have themselves claimed plastics to be biodegradable without showing complete biodegradation. Dr. McCarthy labeled a substrate biodegradable after observing just 14% biodegradation in a gas evolution test. F. 716. Also, in his '199 patent, Dr. McCarthy concluded that a substance that biodegraded by 25% in 45 days was biodegradable. F. 853. In addition, Dr. Michel testified that an article which biodegrades to 44% would be considered "fully" biodegradable in a gas evolution test. F. 685. Dr. Michel also noted that cellulose (a material that is indisputably "fully biodegradable"), could be fully biodegraded at just 74% in a test conducted for 400 days. F. 675. Thus, Complaint Counsel seeks to hold Respondent to a standard that Complaint Counsel's own experts, outside of this litigation, have not applied to or met themselves.

As analyzed in Section III.E.3., *supra*, the greater weight of the scientific evidence shows that the term biodegradation does not require complete biodegradation. Complaint Counsel's insistence that Respondent's substantiation fails because ECM's tests do not show that the plastic "completely" biodegraded ignores the scientific evidence that biodegradation is a process and not a clearly identified endpoint. F. 680-696. *E.g.,* F. 687-688 ("biodegradability" is an inherent or intrinsic characteristic of a material); F. 696 (biodegradation is not subject to a time span limitation because it is an ongoing process); F. 683 (scientific literature defining biodegradation does not require complete degradation). Accordingly, Complaint Counsel's criticism that Respondent's tests do not show complete biodegradation does not

satisfy Complaint Counsel's burden of showing that Respondent's substantiation is inadequate.

Complaint Counsel next argues that extrapolation of biodegradation test data is inappropriate. CCB at 71-72. Respondent agrees that one cannot extrapolate the rate of biodegradation easily from a lab test environment into the landfill. RB at 124 (citing Barlaz, Tr. 2282). That is because too many variables exist that might increase or decrease that rate of biodegradation over time. F. 713-714. The rate could thus vary, and it would be nearly impossible to predict with precision. F. 716.

By contrast, scientists agree that it is perfectly acceptable to extrapolate whether a material is biodegradable, including in a landfill, from accelerated lab test data. F. 717-731. Dr. Sahu convincingly explained that in accelerated testing, scientists try to mimic a slow natural process in the lab in a manner faster than would have occurred in nature so that they can get results in a reasonable period of time; accelerated testing is commonly done in fields of science where the natural phenomena of interest happens to be of a long time scale; and accelerated testing is appropriate for biodegradation studies. F. 718-720. Dr. Barlaz also explained that testing over long periods of time to show complete biodegradation would be impractical and unnecessary. F. 724. He explained that the central question was whether the material is "intrinsically biodegradable" because, if the product biodegrades, then it will do so as long as environmental conditions support biodegradation. F. 687-688. *See also* F. 729 (there is no reason that the microbes would not continue to attack those base polymers until it was completely biodegraded).

Finally, Complaint Counsel charges that Respondent's explanation of how ECM Plastics will biodegrade to completion is a "fantastical" mechanism of action and asserts that Dr. Michel and Dr. Burnette testified that the presence of a biofilm does not indicate that the microorganisms are using the plastic as a food source. CCB at 73 (citing Michel, Tr. 2865; RX 840 (e, Dep. at 41-43)). Respondent asserts that Complaint Counsel has misinterpreted the concept of causation expressed by ECM's experts concerning biofilm formation. RRB at 125. Respondent acknowledges that its experts concede that the presence of a

biofilm does not necessarily indicate that the microorganisms are using the plastic as a food source, but instead opine that the formation of biofilms is a considerable step towards the ultimate biodegradability of plastics. RRB at 125-126 (citing RX 855 at 27; Burnette, Tr. 2406-2409). As summarized in Section III.E.8.a., *supra*, Respondent's experts, Dr. Sahu and Dr. Burnette, explained the mechanism of action for the ECM Additive.

Weighing the criticisms offered by Complaint Counsel's experts against the more credible and persuasive evidence offered by Respondent's experts, the greater weight of the evidence fails to show that the scientific community demands proof of complete biodegradation in order to claim that a product is biodegradable. Thus, in this regard, Complaint Counsel has not demonstrated that Respondent's substantiation was inadequate.

(b) Biodegradation in landfills

Complaint Counsel argues that to support claims of biodegradation in landfills, tests should be run at appropriate landfill temperatures, with appropriate anaerobic bacteria, and that of the few tests purporting to show biodegradation, none mimics these conditions. CCB at 73-74. Complaint Counsel acknowledges that the primary test used to evaluate biodegradability of plastics is the ASTM D5511 test and states that this test, like other gas evolution tests, uses methane gas generation as a proxy for biodegradation. CCB at 74. Complaint Counsel contends, however, that the ASTM D5511 test is typically conducted at 52ºC and that running tests at 52ºC results in two potentially serious flaws: (1) the hot temperatures could cause non-biological degradation that would not occur at more typical landfill temperatures of 37ºC; and (2) the types of anaerobic bacteria that survive at the hotter temperatures are not the same types of anaerobic bacteria that operate at cooler landfill temperatures. CCB at 74. Accordingly, Complaint Counsel asserts, one cannot conclude that because "some" biodegradation is observed under one set of conditions, it will be observed under all conditions. *Id.*

As an initial matter, the evidence shows that temperatures in MSW landfills in the United States do average around 37ºC, and

thus, in general terms, the range of temperatures wherein landfills usually operate are in the mesophilic range. F. 577-578. However, temperatures in landfills vary greatly, sometimes even within the same landfill, and can often meet or substantially exceed the 52ºC that is used in the ASTM D5511 test. F. 547-576.[51]

Furthermore, accelerated testing, which allows laboratories to record data in an expedited manner without having to wait out the results of a field-scale timeline, is very common and widely used to measure biodegradation. F. 718-720. One way to accelerate a biodegradation test is to increase the temperature. F. 732. Dr. Tolaymat, Complaint Counsel's expert, agreed that accelerated testing to demonstrate biodegradation was proper. F. 723.

Respondent argues that Complaint Counsel has no factual basis to conclude that anaerobic bacteria that survive at the hotter temperatures are not similar to bacteria that operate at lower temperatures. RRB at 126-127. Respondent's expert, Dr. Sahu, explained that, at a fundamental level, there is no difference in the way thermophilic bacteria metabolize waste versus the way mesophilic bacteria metabolize waste. F. 739.[52] Dr. Barlaz explained that the difference between mesophilic and thermophilic conditions affects only the rate of biodegradation. F. 738. And, Dr. Burnette explained that mesophilic and thermophilic bacteria function at different temperatures and pace, but use common and universal mechanisms of action to gain access to food sources. F. 737. Dr. Burnette also testified that there are also mesophilic bacteria in landfills that would degrade plastics, and those bacteria would not be represented in the thermophilic systems, meaning that the ASTM D5511 tests may not actually capture all of the biodegradation that occurs in

[51] The ASTM D5511 test method states: "Incubate the Erlenmeyer flasks in the dark or in diffused light at 52°C (±2°C) for thermophilic conditions, or 37°C (±2°C) for mesophilic conditions for a period of normally 15-30 days." F. 781.

[52] "Mesophilic" refers to a class of microorganisms that have optimal temperature around 98.6 degrees Fahrenheit. At temperatures above 43 to 44 degrees Celsius, mesophiles are killed off or severely inhibited. "Thermophiles" have an optimal temperature closer to 60 degrees Celsius or about 130 to 140 degrees Fahrenheit. F. 733-736.

landfills. F. 740. The scientific evidence presented shows that tests run at 52ºC are relevant for assessing biodegradability of a plastic in a landfill and that the elevated temperature in the ASTM D5511 test affects only the "rate" of biodegradation, but does not affect a determination of whether the test plastic is, in fact, biodegradable in a landfill. F. 737-739, 771, 773, 775, 776.

Lastly, citing to its Proposed Finding of Fact 157, Complaint Counsel asserts that tests conducted under the appropriate temperature range showed no biodegradation at all. CCB at 74. The tests Complaint Counsel refers to, CCX 946, CCX 951, and CCX 954, were BMP tests conducted by Dr. Barlaz in his laboratory at North Carolina State University. F. 1433-1435.[53] Dr. Barlaz testified that his BMP tests were performed in a completely liquid environment and explained that his tests were not well suited to measure the biodegradability of slowly biodegrading substances. F. 1428-1431. Furthermore, Complaint Counsel omitted from its citations, CCX 952, another BMP test performed by Dr. Barlaz under the same temperature conditions, which revealed positive evidence of biodegradation of ECM Plastics. F. 1436.

Weighing the criticism offered by Complaint Counsel's experts against the more persuasive and credible evidence offered by Respondent's experts, the greater weight of the evidence fails to show that tests run at 52ºC are not competent and reliable scientific evidence for determining whether a plastic is biodegradable in a landfill. In this regard, Complaint Counsel has not met its burden of showing that the Respondent's substantiation was inadequate.

(c) Priming effect

Complaint Counsel acknowledges that some tests do purport to show minimal levels of methane gas generation beyond that from the ECM Additive. CCB at 74-75. Complaint Counsel points to the opinions of its expert witnesses, Dr. McCarthy and Dr. Michel, that the biodegradation observed in these tests is likely the result of the "priming effect." CCX 891 (McCarthy

[53] A more extensive discussion of Dr. Barlaz's BMP tests is in Section III.E.8.b., *supra*.

Expert Report ¶¶ 19, 44); CCX 895 (Michel Rebuttal Expert Report at 10) ("Many of the reports where ECM amended plastics have been observed to biodegrade greater than the negative control can be attributed to the biodegradation of the ECM additive, or to the priming effect (Shen and Bartha, 1996), and not the plastic to which it has been added."). As explained by Dr. Michel: "It is true that ECM amended plastics will biodegrade to a greater extent than unamended plastics, but only because the ECM additive itself apparently biodegrades at a much faster rate than the plastics to which it has been added." CCX 895 (Michel Rebuttal Expert Report at 13).

Dr. McCarthy defines the "priming effect" as the biodegradation of the ECM Additive (which contains organic compounds highly susceptible to biodegradation) and the organic materials of the test medium (the bacteria used for testing), rather than of the plastic. CCX 891 (McCarthy Expert Report ¶¶ 19, 44). Dr. McCarthy also testified that the priming effect occurs when you are getting degradation from the inoculum, but then recording it as biodegradation of the nonbiodegradable polymer. McCarthy, Tr. 412-413.

Complaint Counsel argues that Dr. Barlaz's calculations from tests conducted by ERL and NE Labs prove nothing because the existence of the ECM Additive both increases the total amount of material available for biodegradation (compared to the test of the inoculum by itself), and stimulates increased biodegradation of the inoculum (the priming effect). CCB at 75. Complaint Counsel further asserts that Dr. Barlaz acknowledges that the priming effect exists in anaerobic conditions, but does not explain how his calculations account for it. CCB at 75 (citing Barlaz, Tr. 2279). Complaint Counsel also contends that Dr. Barlaz tries to explain away the impact of the priming effect on these tests by asserting that the ECM Additive is not a readily degradable substance like glucose, in contradiction to Dr. Barlaz's recent testing of the ECM Additive that showed that it is almost as biodegradable as paper and other testing in the record that shows that ECM Additive alone is readily biodegradable. CCB at 75-76 (citing CCX 946 (reporting copy paper has a methane yield of 200 mL CH4/dry gram), CCX 951 (reporting 151 mL CH4/ dry gram for ECM Additive); RX 269; RX 265; RX 264; *see also* F. 159.

Respondent contends that the priming effect is a theoretical proposition never shown in the peer-reviewed literature to exist in an anaerobic environment and disproven by the record evidence. RRB at 128-132. Respondent argues that the major flaw in the priming effect theory is that it depends on the idea that the biodegradation recorded is solely attributed to the ECM Additive, or catalyzed by the ECM Additive, but the test data upon which ECM relies shows amounts of degradation far in excess of the amount of ECM Additive present in the test plastic. RB at 140. Thus, Respondent argues, if the priming effect theory is that the inoculum is triggered by the ECM Additive, then Complaint Counsel has failed to explain why the amounts of degradation continue beyond the amount fairly attributed to the additive (*e.g.*, 1% degradation). RB at 140. Respondent further argues that, even assuming a priming effect exists in these systems, there is no evidence that the effect is quantifiable, consistent, or sufficient to account for the amount of methane generated. RB at 140.

In addition, Respondent argues that if the priming effect was actually a significant element in determining biodegradability, other scientists (including Dr. McCarthy) would account for it in the test models proposed to test for biodegradation, but that none of the ASTM biodegradation test standards (*e.g.*, ASTM D5511, D5526, D6400, etc.) require that the test laboratories consider or account for a priming effect. RRFF 143 (citing CCX 84 (ASTM D5511); CCX 87 (ASTM D5526); CCX 91 (ASTM D6400)).

Although Complaint Counsel has the burden of proof on its position that any test results showing biodegradation are likely the result of the priming effect, in its proposed findings of fact, Complaint Counsel does not offer a single proposed finding on the priming effect.[54] The greater weight of the scientific evidence shows that there is no consensus in the peer-reviewed literature as to what the priming effect is, or the degree to which it could be in action during biodegradation testing of plastics. F. 862. Moreover, peer-reviewed literature concerning the priming effect of a substrate in the test environment has generally been in reference to aerobic systems and with readily degradable

[54] Furthermore, in its responses to Respondent's proposed findings, Complaint Counsel does not offer a single response to Respondent's proposed findings on evidence against Complaint Counsel's priming effect theory.

substrates. F. 863-864. Comparing a potential priming effect from a readily degradable substrate in an aerobic environment to a slowly degradable substrate in an anaerobic environment is not an appropriate scientific comparison. F. 865. Dr. Barlaz explained that, in the absence of supporting data and any peer-reviewed literature, the priming effect theory is "quite speculative as a way to shoot down a test." F. 866.

In addition, Dr. Barlaz explained that Dr. McCarthy assumed that the ECM Additive was 60% polycaprolactone ("PCL"), and that, in Dr. Barlaz's own research, the amount of degradation solely from PCL was not that significant to stimulate background methane. F. 867. Dr. Barlaz also persuasively explained that the amount of biodegradation observed in the ECM tests is much higher than any reasonable interpretation of a priming effect theory. F. 868. It is worth noting that when Dr. McCarthy relied on gas evolution testing to demonstrate that his polymer blends in the '199 patent were biodegradable, Dr. McCarthy did not account for, or even mention, any biodegradation that might result from the priming effect. F. 869.

Weighing the criticism offered by Complaint Counsel's experts against the more credible and persuasive evidence offered by Respondent's experts, the greater weight of the evidence fails to show that the priming effect theory is more than mere speculation about ECM's tests or that the priming effect accounts for the amounts of biodegradation shown in ECM's anaerobic gas evolution tests. In this regard, Complaint Counsel has not met its burden of showing the Respondent's substantiation was inadequate.

c. Summary

Based on his statistical analyses and the test data he reviewed concerning ECM Plastics and based on his review of the procedures used by the labs conducting the ASTM D5511 tests, Dr. Barlaz credibly and persuasively testified that Respondent's testing constitutes competent and reliable scientific evidence demonstrating that plastics manufactured with the ECM Additive are anaerobically biodegradable. *E.g.*, F. 1041, 1043-1044.

Having weighed the evidence, considering the totality of the expert witness testimony, and placing substantial weight on the better supported and more credible testimony of Respondent's experts, Complaint Counsel has not met its burden of proving, pursuant to the reasonable basis theory, that Respondent's substantiation is inadequate, or that the studies upon which Respondent relies do not pass muster in the view of the relevant scientific communities. In addition, Complaint Counsel has not met its burden of proving, pursuant to the falsity theory, that tests do not prove the biodegradability of ECM Plastics, or that the studies Respondent possessed do not pass muster in the view of the relevant scientific communities.

11. Conclusion

The evidence establishes that the ASTM D5511 test is a competent and reliable scientific method to prove biodegradability, including in a landfill. Respondent presented evidence of numerous ASTM D5511 tests on ECM Plastics conducted by independent laboratories. Respondent's experts provided convincing expert testimony that the ASTM D5511 tests on ECM Plastics were well-conducted and well-controlled. Dr. Barlaz persuasively and credibly testified that competent and reliable scientific evidence shows that plastics manufactured with the ECM Additive are anaerobically biodegradable.

Based on the greater weight of the more credible and persuasive evidence, Complaint Counsel did not meet its burden of demonstrating that Respondent's claims of biodegradability, including in a landfill, or that tests show the same, were false or not adequately substantiated. Complaint Counsel did, however, meet its burden of demonstrating that Respondent's 9 Months to 5 Years Claim, and tests prove its 9 Months to 5 Years Claim, are false and unsubstantiated. Accordingly, the analysis next addresses whether those claims are material.

F. Materiality

1. Introduction

It has been determined that Respondent claimed, falsely and/or without substantiation, that ECM Plastics would fully

biodegrade in a landfill within "9 months to 5 years" (the "9 Months to 5 Years Claim") and that testing proved the 9 Months to 5 Years Claim. Accordingly, the next step is to determine whether those claims are material to prospective consumers. *Kraft*, 970 F.2d at 314. It must be noted preliminarily that Complaint Counsel's argument in support of finding materiality relies, in substantial part, on evidence that the "biodegradability" of ECM Plastics is a central characteristic of ECM's marketing, and that "biodegradability" is important to ECM Customers, downstream customers, and "consumers," *i.e.*, members of the general public who would be exposed to ECM claims in the marketplace. *See* Section III.C., n.16 *supra*; CCB at 77. Indeed, there is no dispute between the parties that ECM Customers buy the ECM Additive because they want to provide "biodegradable" plastics to meet their customers' demand for such products, or that biodegradable products are "important," at least in a general sense, to consumers. Furthermore, the evidence supports these facts. F. 1503-1507.

However, Complaint Counsel has failed to prove that Respondent's generalized "biodegradable" claims, properly interpreted as a matter of both consumer perception and science, are false or misleading. The issue at this stage of the analysis is whether any false or misleading claim of ECM was material, and the only false or misleading claims found to have been made in this case are ECM's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim. Thus, the dispositive issue is whether these demonstrated deceptive claims are material, not whether Respondent's general claims of "biodegradability" are material.

"The basic question" on the issue of materiality is whether a false or misleading claim is "likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception." *Deception Statement*, 1984 FTC LEXIS 71, at *171; *see also In re Novartis Corp.*, 127 F.T.C. 580, 691, 1999 FTC LEXIS 63, at *38 (May 27, 1999) (noting that materiality is a test of the likely effect of the claim on the conduct of a consumer). In other words, information is material if it is important to a consumer's purchasing decision. *POM*, 2013 FTC LEXIS 6, at

*17-18; *Deception Statement*, 1984 FTC LEXIS 71, at *188. "Materiality turns upon whether those consumers who have drawn the claim from the advertisement and been misled by it are also likely to have their conduct affected by the misrepresentation." *Novartis Corp.*, 1999 FTC LEXIS 63, at *38.

Express claims, and claims that pertain to the central characteristics of a product, are presumed to be material. *Telebrands*, 140 F.T.C. at 292; *Thompson Medical*, 1984 FTC LEXIS 6, at *373. The presumption of materiality reflects the "general judgment that substantive claims in advertisements (in other words, claims other than 'puffery' or window-dressing) would not have been made except to affect a consumer's choice of or conduct regarding a product. Thus, the very existence of the claim ordinarily is sufficient evidence for [the Commission] to conclude it is material. However, respondent is always free to counter this evidence either with arguments pertaining to the content of the ad itself or with extrinsic evidence." *Thompson Medical*, 1984 FTC LEXIS 6, at *374 n.45.

In the instant case, Respondent argues that, notwithstanding any presumption, the preponderance of the evidence shows that Respondent's claims as to the rate of biodegradation were not, in fact, material. Respondent asserts that ECM's claims were not intended to be a performance claim, but were only a way to differentiate the ECM Additive technology from more rapidly degrading compostable products; that its Customers and downstream customers were not concerned with the rate of biodegradation, but only with whether the ECM Additive would render plastics more biodegradable than without the ECM Additive; and that ECM Customers were sophisticated purchasers, who did not rely on Respondent's representations and were not misled by them. RB at 169-170, 177-184. With respect to end-use consumers, Respondent asserts that, with few exceptions, end-use consumers saw only ECM's "generalized" biodegradable claims, such as an ECM "biodegradable" logo; and that Dr. Stewart concluded, based on his survey, that Respondent's claims were not likely to influence consumer purchasing decisions because consumers did not "understand" the claims and were skeptical of them. RB at 171-174.

In *Novartis*, the Commission explained the operation of the presumption of materiality as follows:

> Certain categories of information are presumptively material, including, but not limited to, express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product. *Deception Statement*, 103 F.T.C. at 182. Similarly, the Commission will infer materiality where the record shows that respondent intended to make an implied claim.

1999 FTC LEXIS 63, at *26-27. The opinion in *Novartis* continued:

> "To establish a 'presumption' is to say that a finding of the predicate fact," here, any of the factors listed above, "produces a required conclusion in the absence of explanation," here, materiality. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (internal quotation marks omitted). In order to rebut the presumption, respondent must come forward with sufficient evidence to support a finding that the claim at issue is not material. Respondent can present evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle. Unless the rebuttal evidence is so strong that the fact-finder could not reasonably find materiality, the fact-finder next proceeds to weigh all of the evidence presented by the parties on the issue. *See id.* at 516 (noting that after the presumption drops out, "the inquiry . . . turns from the few generalized factors that establish [the presumption] to the specific proofs and rebuttals ... the parties have introduced"). While the presumption itself is negated by sufficient rebuttal evidence, as previously noted, the predicate facts that gave rise to the presumption are not. These facts remain evidence from which materiality can be inferred. *See Boise Cascade*, 113 F.T.C. at 975 (1990). However, this

> evidence is simply part of the entire body of evidence considered. *See also* 21 *Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence* §§ 5122 *et seq.* (1977 and 1998 Supp.) (discussing the history and application of presumptions).

1999 FTC LEXIS 63, at *27-28.

Applying the principles of *Novartis* to the evidence in this case, even if a presumption arises, and even if Respondent's evidence sufficiently rebuts the presumption, as further discussed below, a "weigh[ing] of all of the evidence presented by the parties on the issue" shows that Respondent's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim, are material to the purchasing decisions of ECM Customers, and to downstream customers. *See Novartis*, 1999 FTC LEXIS 63, at *28. Because the evidence is sufficient to prove materiality in the instant case, irrespective of any legal presumption, logic dictates that this Initial Decision need not, and it does not, analyze the effect of a presumption of materiality in this case.

2. Analysis

The evidence shows that Respondent's 9 Months to 5 Years Claim was expressly made in a variety of ECM's Marketing Materials, F. 245-247, 1498, and was repeated in its communications with Customers. F. 1501. Moreover, Respondent's claim that tests prove ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, while not an express statement, was nevertheless sufficiently clear and conspicuous based on the overall net impression of the documents in which the claim appeared. F. 265, 1499. In addition, Respondent's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim, pertain to the central characteristics of plastics infused with the ECM Additive. F. 1500. It is logical to conclude from the foregoing that Respondent would not promote the ECM Additive with these claims unless it was likely to have an effect on the purchasing decisions of its Customers. Respondent's argument that it "intended" the 9 Months to 5 Years Claim only to

differentiate its technology from more rapidly degrading compostable products, which, according to Respondent, are generally expected to fully degrade in aerobic conditions in under 6 months, RB at 169, is not persuasive. The express language of the 9 Months to 5 Years Claim outweighs Respondent's purported intent, and Respondent's self-described intent does not constitute evidence that the claim was not important to ECM's Customers.

In addition, the evidence shows that ECM's Customers asked ECM questions about Respondent's claim of biodegradation within 9 months to 5 years, F. 1502, which is further proof that this claimed characteristic of ECM Plastics was an important factor to ECM's Customers in determining whether to purchase the ECM Additive. ECM provided its Customers with its Marketing Materials, including materials containing the 9 Months to 5 Years Claim and the claim that tests prove such claim, and encouraged its Customers to use these materials for its Customers' marketing of ECM Plastics to their own customers. F. 245-247, 280. This evidence supports a finding that these claims were likely to affect the purchasing decisions of customers of ECM Customers. As further evidence of the materiality of these claims, some of ECM's plastic manufacturer customers used the 9 Months to 5 Years Claim in advertising to their own customers, frequently in language mirroring that in ECM Marketing Materials. F. 286, 292-293, 1512. For example, Island Plastic Bags ("IPB"), an ECM Customer who manufactures plastic bags, stated in an advertisement for IPB's "Bio Ultra Blend" trash liners, that it was using "ECM BioFilms' technology" which will cause the liners to "completely degrade [including in a landfill] in 9 months to 5 years depending on conditions." F. 292. IPB advised, Down-to-Earth ("DTE"), a grocery store chain that bought bags from an IPB distributor, that ECM Plastics would biodegrade within 9 months to 5 years. F. 293. Ultimately, IPB manufactured ECM Plastic bags reflecting the 9 Months to 5 Years Claim for 50 to 100 different customers. In total, IPB alone manufactured approximately 10 million such bags. F. 300. The foregoing evidence amply supports the conclusion that these claims likely affected the purchasing decisions of IPB's customers. Simply put, the conduct of Respondent and its Customers in promoting ECM Plastics with the 9 Months to 5 Years Claim supports the inference that the claim was important

to the purchasing decisions of those in ECM's commercial supply chain.

Respondent's assertions that the claims at issue were not material to its Customers or downstream customers are not supported by the record and are not persuasive. Respondent points to testimony of ECM's president, Mr. Sinclair, that ECM customers are not concerned with the rate of biodegradability. Such testimony is belied by ECM's conduct, summarized above, in emphasizing the rate claims in its Marketing Materials and customer communications. Respondent also points to testimony from ECM Customers that they, and their own customers, were interested in "biodegradable" plastics. However, this is not evidence that ECM Customers and others were not also interested in the claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim. To be material, "a claim does not have to be the *only* factor or the *most* important factor likely to affect a consumer's purchase decision, it simply has to be *an* important factor." *Novartis*, 1999 FTC LEXIS 63, at *46 (emphasis in original).

Respondent further argues that its claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years and that tests prove such claim were not material because ECM's Customers were "sophisticated purchasers" who received full information from ECM over the course of a long sales cycle, and some of whom tested the ECM Additive themselves. In these circumstances, Respondent argues, it is unlikely that any Customer actually relied on Respondent's biodegradation rate and testing claims, and, therefore, such purchasers were not "misled" by Respondent's claims. Respondent's argument fails as a matter of evidence and law.

First, the evidence fails to support Respondent's assertions that ECM Customers were "sophisticated" with respect to evaluating ECM's claims and did not rely on Respondent's claims. The evidence shows that, contrary to Respondent's assertions, ECM's Customers include entities that have no expertise in biodegradability, landfills, or disposal conditions for plastics, F. 1513-1514, 1518-1520, 1522, 1525-1527, and did not consult any experts in these areas to evaluate ECM's claims. F. 1518, 1520, 1522, 1527. In addition, based on the deposition

testimony in the case, ECM's Customers include entities that do not have laboratory facilities capable of conducting biodegradability testing, and did not seek outside testing. F. 1513, 1515-1516, 1521, 1524-1525, 1528.

Second, there is direct evidence that ECM Customers believed ECM's representations to be true. For example, ANS Plastics Corporation ("ANS"), an ECM Customer, testified that it received ECM's literature and certificate, including a flyer, which included the statement "fully biodegrade in 9 months to five years . . . in a landfill," and believed that ECM Plastics would biodegrade as claimed. F. 1508. Flexible Plastics, Inc. ("Flexible"), another ECM Customer, testified that it believed that ECM Plastics would biodegrade in 9 months to 5 years. F. 1509; *see also* F. 1537 (testimony that D&W Fine Pack, an ECM Customer, believed that Respondent's 9 Months to 5 Years Claim was true). In addition, the fact that ECM Customers "passed on" Respondent's claims directly to their own customers, as noted above, also indicates that such Customers believed Respondent's claims to be true.

In addition, contrary to Respondent's argument, liability under Section 5 does not require proof that particular purchasers relied upon or were actually deceived by ECM's representations. *Cliffdale*, 1984 FTC LEXIS 71, *105 ("[U]nder Section 5 actual deception of particular consumers need not be shown."); *see also In re Travel King, Inc.*, 1975 FTC LEXIS 73, at *129 (May 17, 1974) ("[I]t need not be shown that even one consumer actually relied" on a claim.). "Advertisements having the capacity to deceive are deceptive within the meaning of the FTCA; actual deception need not be shown." *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *see also American Home Products Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("It is true that on some crucial points in the case at hand the Commission lacked direct evidence that consumers were in fact misled. But the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception."). In asserting that proof of reliance is necessary, Respondent relies on common-law fraud cases, which are inapposite. Respondent also relies on trademark and similar cases to argue that "sophisticated" customers are less likely to be "confused" by Respondent's claims. As noted above, it cannot be concluded that ECM's Customers are sophisticated in matters of

biodegradability or biodegradability testing, and the evidence fails to demonstrate that ECM Customers were "confused" about ECM's claims.

Based on the foregoing, the preponderance of the evidence shows that Respondent's claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, and that tests prove such claim, were likely to affect the purchasing decisions of ECM's Customers and downstream customers. Accordingly, Complaint Counsel has demonstrated that these claims, which have been found to have been false and unsubstantiated, violated the FTC Act.[55]

G. Means And Instrumentalities Liability

It has been determined that Respondent violated Section 5 of the FTC Act in making the false or misleading material claims in its Marketing Materials that ECM Plastics would fully biodegrade in a landfill within "9 months to 5 years" (the "9 Months to 5 Years Claim") and that testing proved the 9 Months to 5 Years Claim. Complaint Counsel argues that Respondent is also liable for these claims that were made by ECM Customers, through their own advertising, to downstream customers in the ECM supply chain, pursuant to the "means and instrumentalities" doctrine.

As noted in Section III.C., *supra*, the means and instrumentalities doctrine holds that "those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act." *Waltham Watch Co.*, 318 F.2d at 32 (quoted in *Five-Star Auto Club*, 97 F. Supp. 2d at 530). *See also Regina*, 322 F.2d at 768 ("One who places into the hands of another a means of consummating a fraud or competing unfairly in violation

[55] Because the evidence demonstrates that Respondent's false or misleading claims were material to ECM's Customers and downstream customers, it is not also necessary, in order to establish a violation of Section 5, to demonstrate that the claims were similarly material to end-use consumers. Thus, it is not necessary to address Respondent's arguments against a finding of materiality as to end-use consumers. Respondent's arguments in this regard are addressed, to the extent relevant, in the context of determining the appropriate remedy in this case in Section III.I., *infra*.

of the Federal Trade Commission Act is himself guilty of a violation of the Act."); *Litton Indus.*, 1981 FTC LEXIS 94, at *105 (stating that it is "well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for the resulting deception"). In this way, the "means and instrumentalities" doctrine ensures that "[t]he author of false, misleading and deceptive advertising may not furnish customers with the means of misleading the public and thereby insulate himself against responsibility for its deception." *Irwin*, 143 F.2d at 325.[56]

The evidence shows that Respondent put into the hands of others the means to communicate Respondent's deceptive marketing claims. Not only did Respondent provide its Customers with its Marketing Materials, but Respondent also encouraged its Customers to use these materials for its Customers' marketing of ECM Plastics to their own customers. F. 280. Further, the evidence shows that those ECM Customers did so. At least some of ECM's Customers used the 9 Months to 5 Years Claim in their advertising to their own customers, frequently in language mirroring that in ECM Marketing Materials. F. 286. Indeed, Eagle Film, an ECM Customer, would forward ECM's Marketing Materials directly to its customers. F. 287. Kappus, another ECM Customer, conveyed to its customers that it was selling a biodegradable product through a letter it submitted, on Kappus' letterhead, in which it reprinted information from ECM's materials, including the time frame of 9 months to 5 years. F. 312. Similarly, IPB, an ECM Customer, stated in an advertisement for IPB's "Bio Ultra Blend" trash liners, that it was using "ECM BioFilms' technology" that will cause the liners to "completely degrade [including in a landfill] in 9 months to 5 years depending on conditions." F. 292. IPB's customer, grocery store chain DTE, was encouraged by IPB to visit ECM's website, which DTE did. F. 293. DTE ultimately placed the claim of

[56] The record shows that, in some instances, ECM would offer to provide, and/or would provide, guidance on advertising copy of its Customers, including approval of use of the 9 Months to 5 Years Claim. F. 281-282, 297-299. Respondent is, of course, liable for this direct participation in disseminating false or misleading advertising. "Means and instrumentalities" liability seeks to impose vicarious liability for the conduct of others, and does not require a showing of direct participation in disseminating deceptive claims.

complete biodegradation within 9 months to 5 years in a landfill, on its grocery bags. F. 297.

Respondent argues that it is not responsible for representations made by its Customers to "downstream" purchasers because, under the Restatement (Second) of Torts, a supplier has no duty to warn sophisticated purchasers about the "potential dangers" of a product and is entitled to rely on these sophisticated purchasers to "warn" downstream purchasers. RB at 187-188. Respondent cites *Akin v. Ashland Chemical Company*, 156 F.3d 1030 (10th Cir. 1998), which, quoting the Restatement at Section 388, states:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) *has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition*, and (c) fails to exercise reasonable care to inform them of this dangerous condition or of the facts which make it likely to be dangerous.

Id. at 1037 n.8 (emphasis in original). As analyzed and held above, the evidence fails to demonstrate that ECM Customers are "sophisticated purchasers" in the matter of evaluating Respondent's biodegradation rate claim. Moreover, the concept of "duty to warn" in the context of tort liability for dangerous products has no application to whether Respondent can be liable, under the FTC Act, for providing to its Customers the means and instrumentalities to make false or misleading claims to downstream purchasers.

Based on the foregoing, Complaint Counsel has demonstrated that Respondent is liable for deceptive claims made by ECM's Customers by providing them with the "means and instrumentalities" to convey the deceptive marketing claims to others in the supply chain.

H. Due Process Arguments

1. Violation of Separation of Functions Doctrine

Respondent argues that these administrative proceedings violate Respondent's due process rights because the process fails to separate the Commission's adjudication function from its investigation and prosecution functions, as contemplated by Section 554(d) of the APA, 5 U.S.C. § 554(d). Specifically, Respondent argues that "[a]fter a decision is reached by the ALJ, the decision is submitted to the FTC [C]ommissioners for *de novo* review, [and] . . . [i]f the Commission does not agree with the ALJ, the Commission is free to overturn the decision and create a ruling as it so chooses. . . . The Commission brought the allegations against ECM and will be the ultimate adjudicator against ECM. Thus, the Commission necessarily has an interest in the outcome sufficient to violate the doctrine of separation of functions." RB at 212-213. Complaint Counsel responds that it is well established by case law that the Commission's combined investigative and judicial functions do not violate due process. Complaint Counsel states further that Respondent has not presented any evidence to demonstrate that the Commission or its staff has acted in bad faith and that Respondent has had a full opportunity to defend itself. CCRB at 25-26.

Congress specifically authorized the Commission, in the FTC Act, to issue a complaint, determine the facts, and, if a violation is found, to issue a cease and desist order. 15 U.S.C. § 45(b). As the court stated in *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968), "Congress has, as a general practice, vested administrative agencies with both the specified power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violation of a statutory provision and with the responsibility of ultimately determining the merits of the charges so presented. In fact, this procedure is recognized by the Administrative Procedure Act, 5 U.S.C. § 500 (Supp. II, 1965-6), *et seq*." Moreover, Section 554(d) of the APA, upon which Respondent relies, specifically excepts the "agency" or a "member or members of the body comprising the agency" from

any requirement to separate the adjudicatory and prosecutorial functions. *Cinderella*, 404 F.2d at 1315.

Section 554(d) of the APA provides in pertinent part:

> The employee who presides at the reception of evidence pursuant to section 556 of this title [5 USCS § 556] shall make the recommended decision or initial decision required by section 557 of this title [5 USCS § 557], unless he becomes unavailable to the agency. . . . An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title [5 USCS § 557], except as witness or counsel in public proceedings. *This subsection does not apply--*
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or
>
> practices of public utilities or carriers; or
>
> (C) *to the agency or a member or members of the body comprising the agency.*

5 U.S.C. § 554(d) (emphasis added).

Thus, to the extent that "the Federal Trade Commission combines the functions of investigator, prosecutor and judge and that Congress designed it in that manner," Respondent's complaint "goes to the nature of the law itself. As to this, the courts have uniformly held that this feature [of combining functions] does not make out an infringement of the due process clause . . . ." *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972). *See also Pangburn v. Civil Aeronautics Board*, 311 F.2d 349, 356 (1st Cir. 1962) ("It is well settled that a combination in investigative and judicial functions within an agency does not violate due process."); *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936) (noting that the FTC investigates charges of misconduct, files a charge, and then decides whether the proof sustains the charges it has issued). As the court stated in *Levers v. Berkshire*, 159 F.2d 689, 693 (10th Cir. 1947), "[i]t is of

course true that the charge originated in, was investigated, prosecuted, heard, and decided by the agency charged with the administration of the Act. But this adjudicatory plan is encompassed with the Congressional enactment, [and] is not repugnant to constitutional concepts . . . ."[57] Moreover, if a respondent disagrees with the final decision of the Commission, an appeal to a federal court of appeals is allowed. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

For all the foregoing reasons, Respondent's assertion that these proceedings violate due process by failing to separate investigative and prosecutorial functions from adjudicative functions is without merit and is rejected.

2. Discovery Objections

Respondent contends that Complaint Counsel engaged in "abusive discovery practices" in violation of Respondent's due process rights. RB at 213. To support this charge, Respondent first revisits discovery disputes that were raised and litigated in motion practice during the pre-hearing phase of this case. RB at 213-217. Respondent's various discovery complaints were duly considered in that context and, where meritorious, were remedied by court-ordered relief. *See, e.g.*, Order Granting in Part and Denying in Part Respondent's Motion for Sanctions, March 21, 2014; *compare* Order Denying Respondent's Motion for Sanctions for Unauthorized Dissuasion of Response to Subpoena *Duces Tecum*, April 9, 2014; Order Denying Respondent's Motion to Sanction Complaint Counsel for Violation of Discovery

[57] *Leer Electric Inc. v. Pennsylvania*, 597 F. Supp. 2d 470 (M.D. Pa. 2009), cited by Respondent, is inapposite. The federal district court in *Leer* held that the plaintiff state contractor sufficiently pled a claim for civil rights violations by the state, in part based on allegations of actual bias and intentional misconduct by the state in taking enforcement action to bar plaintiff from obtaining state contracts. Respondent makes no such assertions regarding the Commission. Moreover, *Leer* did not involve the FTC Act, or Section 554(d) of the APA, which, as analyzed above, allow the combination of functions to which Respondent objects.

Rules, April 7, 2014. The notion that these same discovery disputes amount to a denial of due process is without merit.

Respondent next contends that Complaint Counsel escalated costs in this matter by taking 20 fact witness depositions, in varying parts of the country, some of which Respondent attended only by telephone. According to Respondent, Complaint Counsel took advantage of this by asking leading questions, and then introducing those deposition transcripts, rather than live testimony at trial, thereby limiting Respondent's opportunity for cross-examination.

Respondent argues that due process requires a meaningful opportunity to cross-examine and the opportunity for the fact-finder to observe the demeanor of witnesses. Because of these circumstances, Respondent asks that no "dispositive weight" be given to the testimony of any witness who did not appear live at trial. RB at 214-217. Complaint Counsel responds, among other things, that Respondent participated in each of the depositions, including by making objections and cross-examining deponents, and that Respondent stipulated to the admissibility of the deposition transcripts. CCRB at 27-28.

Based on the foregoing and the record in this case, Respondent has failed to demonstrate that it was denied due process with respect to the number or the conduct of the fact witness depositions. The Commission's Rules permit introduction of deposition transcripts, notwithstanding their nature as hearsay, if "[r]elevant, material, and reliable . . . ." 16 C.F.R. §3.43(b). Respondent stipulated to the admissibility of the depositions. *See* JX-1A. Under these circumstances, the depositions are entitled to be, and have been, given appropriate weight.

3. Unfair Surprise

Respondent further contends that it was denied due process through "unfair surprise," based on the participation in this case of Dr. Frederick Michel as Complaint Counsel's rebuttal expert witness, and the denial of Respondent's request to call a surrebuttal expert witness, Dr. Steven Grossman.

Respondent argues that Complaint Counsel failed to timely designate Dr. Michel as a rebuttal expert witness under the Commission's Rules and that Dr. Michel's opinions included matters that were part of Complaint Counsel's case in chief. RB at 217-220. These arguments were considered and rejected by the Order issued, prior to trial, on Respondent's Combined Motion for Sanctions to Exclude Expert Witness, and for Leave, issued on July 23, 2014 ("July 23 Order"). That Order held, *inter alia*, that Complaint Counsel timely provided Dr. Michel's rebuttal expert report in accordance with the Rules and the Scheduling Order in this case; and that Dr. Michel's rebuttal opinions constituted fair rebuttal. *Id.* at 2-4. Moreover, to minimize prejudice, the July 23 Order also granted Respondent's request to modify the scheduling order to permit time for Respondent to take Dr. Michel's deposition prior to the hearing. *Id.* at 4.

Furthermore, at the evidentiary hearing, the examination of Dr. Michel was strictly limited to the opinions offered in his rebuttal expert report. Tr. 2827-2828. Accordingly, Respondent has failed to demonstrate that it was deprived of due process rights with respect to Complaint Counsel's rebuttal expert witness, Dr. Michel.

Respondent further argues that it was denied the opportunity to present a surrebuttal expert witness, Dr. Steven Grossman, who would have responded to statements made by Complaint Counsel's expert witness, Dr. McCarthy, that Respondent contends are "false and scientifically incorrect." RB at 219. However, Respondent's arguments in support of calling Dr. Grossman as a surrebuttal expert witness were also evaluated and rejected in the July 23 Order, which noted that under Rule 3.31A(a), leave to call surrebuttal experts may be considered only where it is demonstrated that "material outside the scope of fair rebuttal is presented" by a rebuttal report. 16 C.F.R. § 3.31A(a); July 23, 2014 Order, at 3. Because Respondent failed to demonstrate that matters outside the scope of fair rebuttal had been presented, there was no valid basis for allowing a surrebuttal expert witness. Thus, denying Respondent's request to call Dr. Grossman for this purpose does not constitute a denial of due process.

I. Remedy

1. Overview

Having concluded that Respondent violated the FTC Act in claiming, and providing others with the means and instrumentalities to claim, that ECM Plastics would fully biodegrade in a landfill within 9 months to 5 years, and that tests proved such claim, the FTC Act authorizes issuance of an order to cease and desist the unlawful conduct. 15 U.S.C. § 45(b) ("If upon such hearing the Commission shall be of the opinion that the . . . act or practice in question is prohibited by this Act, . . . it shall state its findings as to the facts and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using . . . such act or practice."). As an administrative body, the Commission possesses only such powers as are granted by statute and may make only such orders as the FTC Act authorizes. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587, 598 (1934). The purpose of a cease and desist order is to prevent the future repetition of the violations found to exist, including by "creating stringent monetary incentives (in the form of civil penalties) for its observance." *Litton Indus.*, 1981 FTC LEXIS 94, at *147; *accord Thompson Medical*, 1984 FTC LEXIS 6, at *405-06 (describing order as appropriate "to prohibit and prevent [the respondent] from engaging in deceptive acts or practices"). "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondent contends that remedial action in this case is not in the public interest because (1) ECM Customers were sophisticated entities who were not misled by ECM; and (2) ECM did not sell to end-use consumers. As to the first assertion, Respondent made substantially the same assertion to argue that its claims were not material to its Customers. The assertion was rejected, as stated in Section III.F., *supra*, because the evidence fails to support the conclusion that ECM Customers were "sophisticated" with respect to evaluating ECM's biodegradation rate and testing claims. Moreover, as also noted in Section III.F., *supra*, there is direct evidence that ECM Customers believed ECM's

representations to be true, and therefore were deceived by ECM. F. 1508-1509, 1537. These facts readily distinguish this case from *In re Harad*, 50 F.T.C. 300 (Sept. 24, 1953), cited by Respondent, in which it was "assumed" that the medical doctors that were targeted by an advertisement for a medical device were sufficiently knowledgeable not to be misled thereby, and from *Arnold Stone v. FTC*, 49 F.2d 1017 (5th Cir. 1931), also cited by Respondent, in which the evidence showed that the defendant's construction industry customers accurately understood "cast stone," as sold by defendant, to refer precisely to the product defendant was selling, and therefore, no misrepresentation occurred.

Furthermore, as to Respondent's second assertion, above, the fact that Respondent did not sell the ECM Additive directly to consumers is not determinative of whether the public interest is served by this action. A case affects the "public interest" where there is deception of the public. *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953). ECM Customers, and downstream customers, although not ordinary "consumers," are nonetheless members of the public, and protecting them from deception is in the public interest.

While it may not be necessary to demonstrate that end-use consumers were harmed by Respondent's deceptive claims in order for a remedial order to be in the public interest, the absence of any proof of such consumer harm in this case militates against a broad remedial order. Complaint Counsel introduced no consumer testimony. The evidence shows that ECM directly, and through its Customer, Island Plastic Bags, caused the claim that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years to be printed on millions of grocery bags sold to Island Plastic Bags' customer, Down-to-Earth ("DTE") and distributed in the state of Hawaii. F. 32, 35-36, 293, 297-301. While it is reasonable to infer that consumers were exposed to this claim, F. 302, consumers do not purchase the bags; rather, the bags are provided after consumers complete their grocery purchases. F. 297. In addition, there is no evidence that consumers would make, or did make, purchasing decisions based, in whole or in

part, on the properties of bags provided to them by stores.[58] For example, Complaint Counsel does not point to any evidence suggesting that consumers chose to shop at DTE – or any other grocery stores carrying the bags with the 9 Months to 5 Years Claim – based in whole or in part on the claim that the grocery bags would biodegrade in a landfill within 9 months to 5 years. Moreover, DTE testified that it chose to include the claim on its bags because the technology was new and DTE's customers are well-informed. F. 1510. DTE also wanted to demonstrate that DTE was doing its part to help the environment. F. 1510. The evidence fails to show that DTE included the claim on its bags in order to induce grocery sales.[59]

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[58] Indeed, Complaint Counsel did not present evidence that any end-use consumers (as opposed to commercial enterprises) purchased any ECM Plastic based, in whole or in part, on any claim made by ECM. There is also no record evidence that any such end-use consumers "purchased" the grocery bags, shopping bags, restaurant bags, disposable dinnerware, packaging materials, or shipping materials that comprise many of the products which, based on the customer deposition testimony, are manufactured using the ECM Additive. *See, e.g.*, F. 11-12, 25, 31, 49-51, 56-59, 65-66, 71-73.

[59] Complaint Counsel asserts that "ECM's 'biodegradable plastic' claims have . . . reached millions of consumers through advertising for a host of products and packages – ranging from grocery bags to shampoo bottles, Frisbees, golf tees, highlighters, storage cases, shoe soles, mailers, zippers, plastic cutlery, straws, and more." CCFF 25. The exhibits upon which this proposed finding relies consist of photographs of items with "biodegradable" symbols – some of which are not ECM's logo – and copies of promotional materials belonging to various entities, many of which have no clear connection to ECM and/or do not appear to sell to the general public. *See, e.g.*, CCX 39 (website ad for biodegradable golf tees); CCX 40 (ad for biodegradable packaging); CCX 41 (ad for biodegradable bags and film); CCX 52 (labels for "certified" biodegradable bags and cases); CCX 56 (ad for biodegradable bags and cutlery); CCX 59 (ad for biodegradable medical supply bags); CCX 61 (ad for biodegradable bottle); CCX 63 (biodegradable cold packs); CCX 64 (ad for biodegradable mailers); CCX 65 (ad for biodegradable trash bin); CCX 79 (biodegradable zipper ad); CCX 96 (biodegradable straws); CCX 103 (biodegradable Frisbee); CCX 112 (biodegradable bag); CCX 126 (biodegradable highlighter). *See also* CCX 139 (biodegradable shoe soles manufactured by Italian firm). At most, the exhibits cited in support of Complaint Counsel's Proposed Finding 25 demonstrate that ECM's logo appeared on some products that are available for purchase by consumers, or are provided to consumers in connection with the purchase of something else, such as groceries or shipped goods. However, this is not relevant because the products in the record displaying the ECM logo do not set forth the claims that ECM Plastics will fully biodegrade in a landfill within 9 months to 5 years, or

Respondent states that it has permanently discontinued the 9 Months to 5 Years Claim. The evidence shows that ECM began revising its Marketing Materials in or around October 2012, in response to the issuance of the revised Green Guides, to omit references to a biodegradation rate of "9 months to 5 years." F. 238, 251-252. The evidence further shows that ECM permanently discontinued the 9 Months to 5 Years Claim in approximately November or December 2013, when it removed all such references to this time period from its website. F. 259. The Complaint was issued in October 2013. Moreover, at least some of ECM's Customers believed that ECM Plastics would biodegrade in 9 months to 5 years, even after the change in ECM's rate language to "some period greater than a year." F. 1509. The fact that Respondent ceased making the 9 Months to 5 Years Claim in its Marketing Materials after November or December 2013, after issuance of the Complaint, does not bar a cease and desist order, where, as here, the public interest otherwise supports such an order. *See Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976) (discontinuance of claim was not "voluntary," but resulted from defendant's awareness of the Commission's investigation); *see also American Home Products Corp. v. FTC*, 695 F.2d 681, 703 n.38 (3d Cir. 1982) (holding that discontinuance of claims was not voluntary when claims ceased after proceedings were brought).

For the foregoing reasons, a cease and desist order barring the deceptive biodegradation rate and testing claims made in this case serves the public interest and is otherwise appropriate pursuant to Section 5(b) of the FTC Act. After consideration of all the arguments of the parties and the entire record of the case, the attached order, to be entered herewith ("Order"), will serve to prohibit and prevent Respondent from engaging in these deceptive trade practices in the future, is reasonably related to the unlawful acts or practices found to exist, and is sufficiently clear and precise. As more fully explained below, several portions of the proposed order submitted by Complaint Counsel ("Proposed

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that tests prove such claim, which are the only Challenged Claims that have been found in this case to have been false or misleading.

Order")[60] substantially fail to address the deceptive claims found to have been made in this case, and instead seek to restrain conduct as to which no deception has been found. Accordingly, those portions of the Proposed Order are rejected.

2. The Proposed Order

a. Part I.A. restraints on future "unqualified" biodegradable claims

Part I.A. of the Proposed Order provides as follows:

> Respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication:
>
> A. That any product or package is degradable,[61] or that any product, package, or service affects a product or package's degradability, unless
>
> i. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
>
> ii. the representation is clearly and prominently and in close proximity qualified by:
>
> a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of

[60] *See* Complaint Counsel's Annotated Proposed Order, submitted with Complaint Counsel's Post-Trial Brief.

[61] "Degradable" is defined in the Proposed Order to include, *inter alia*, "biodegradable."

decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and

b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Proposed Order Part I.A.; *see also* Definitions para. 4, defining competent and reliable scientific evidence, for "unqualified" biodegradable claims, as technical protocols demonstrating "complete decomposition within one year and replicate, ***i.e.***, simulate, the physical conditions found in landfills, ..."

i. Arguments of the parties

Complaint Counsel explains that Part I.A.i., set forth above, is designed to prohibit "unqualified" biodegradable claims (***i.e.***, representations of "biodegradable" without a qualification regarding the rate and extent of complete decomposition) unless competent and reliable scientific evidence demonstrates that the entire item will completely decompose into elements found in nature within one year after customary disposal (the "One Year Requirement"). CCB 92-93, 96. Complaint Counsel argues that such provisions are necessary to prevent Respondent "from making deceptive unqualified biodegradable claims suggesting that its additive will make plastics biodegrade within a year in landfills." CCB at 95; Proposed Order at I.A.i.n.12. Complaint Counsel notes that, under Part I.A.ii, Respondent is free to make truthful, substantiated, "qualified" biodegradable claims for

products "that will not completely biodegrade in a landfill within one year, [however] ECM must: (1) conspicuously disclose the substantiated time to complete biodegradation; or (2) conspicuously disclose, with appropriate qualifications, the rate and extent of biodegradation shown through competent and reliable scientific evidence." Proposed Order at I.A.ii.n.11; CCB at 96.

Respondent asserts that the One Year Requirement in the Proposed Order is invalid for numerous reasons. Respondent argues that its unqualified biodegradable claims are neither false, nor unsubstantiated, and that the restrictions on such speech amount to an overbroad and unjustified prior restraint in violation of the First Amendment to the Constitution. RB at 188-195. Respondent further argues that enforcing the Proposed Order is not in the public interest, because, *inter alia*, by effectively restricting the labeling of products as "biodegradable" to those that completely biodegrade in a landfill within one year, the FTC is (1) favoring rapidly degrading technologies, which Respondent asserts emit harmful amounts of methane that are worse for the environment; and (2) enforcing erroneous and unreasonable consumer "impressions" about the speed of biodegradation, over scientific facts. RB at 191, 197-198. Moreover, Respondent contends, in favoring rapidly degrading technologies, the FTC is intruding on the regulatory power of the U.S. Environmental Protection Agency ("EPA") and exceeding the powers of the FTC. RB at 205-209. In addition, Respondent asserts that the One Year Requirement in the Proposed Order is, in effect, the Commission enforcing the revised Green Guides against Respondent and giving effect to a "rule" that has not been adopted through statutorily required rulemaking processes. RB at 209-210. Further, Respondent contends that Part I.A effectively forces Respondent to state a rate and an extent for biodegradation, but the evidence fails to show that there is any test that could sufficiently demonstrate such rate and that rates are inherently variable depending on landfill environments. Thus, Respondent argues, the Proposed Order imposes requirements that are virtually impossible to meet. RB at 201-202; RRB at 182-184.

Complaint Counsel acknowledges that the One Year Requirement reflects the Commission's views as expressed in the revised Green Guides, but argues that the evidence shows that

consumers perceive "biodegradable" claims to imply complete biodegradation within one year, which makes the One Year Requirement appropriate relief. *See* Transcript of Closing Arguments, October 22, 2014, Tr. 37. Complaint Counsel further replies that regardless of whether the One Year Requirement is inconsistent with environment policy, or with science, the provisions are still "reasonable" and in the public interest because Respondent deceptively implied that its products would completely biodegrade in a landfill in one year. CCRB at 23-25.

ii. Analysis

Part I.A. of the Proposed Order is based on the Complaint Counsel's contention in this case that Respondent's "unqualified" biodegradable claims, *i.e.*, claims that ECM Plastics are "biodegradable," without stating a time period for complete biodegradation, such as the claim represented by ECM's "biodegradable" logo, F. 239, violated the FTC Act by implying, falsely or without substantiation, that ECM Plastics would completely break down into elements found in nature, in a landfill, within one year (the "Implied One Year Claim"). However, Complaint Counsel failed to prove that Respondent made the Implied One Year Claim. *See* Section III.D.4., *supra*. Moreover, the "unqualified" biodegradable claims actually made by Respondent, properly interpreted as a matter of both consumer perception and science, were not false or unsubstantiated. *See* Section III.E., *supra*. Because Complaint Counsel failed to prove its assertion that Respondent's unqualified biodegradability claims were deceptive, there is no proper basis in law, fact, or fairness, for enjoining such conduct. *See American Home Products*, 695 F.2d at 710; *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 220-21 (2d Cir. 1976). Complaint Counsel offers no alternative proposal to redress the 9 Months to 5 Years Claim or the claim that tests prove the 9 Months to 5 Years Claim, which Complaint Counsel did prove were deceptive.

In *ITT*, the Commission found that the respondent misrepresented that its product, Wonder Bread, was "an extraordinary food for producing dramatic growth in children." 532 F.2d at 221. On appeal, the court deleted provisions of the cease and desist order that prohibited the respondent from representing "[t]he nutritional properties of any [food] product in

generalized terms such as 'rich in nutrients,' vitamins or iron fortified, 'enriched,' or other similar nutritional references, [without adequate substantiation]"; "[t]he comparative nutritional efficacy or value of the product without stating the brand, product or product category to which the comparison is being made"; and "[t]he essentiality of the product as a source of a particular nutritional value if there are other food product categories which are also sources of the same or similar nutritional values, [without adequate substantiation] . . ." because the provisions were not "reasonably related" to the unlawful conduct found to exist. 532 F.2d at 220-21. Noting that "[t]he courts may narrow FTC orders, . . . by deleting those portions for which a reasonable relationship to the offending conduct is lacking, the court reasoned:

> [The Commission found] that Wonder Bread had *not* been misrepresented as nutritionally superior to other breads, or as necessary for children's healthy growth and development, the very types of representations at which paragraphs 1(b) and 1(c) are aimed. The petitioners had not been charged with representing Wonder Bread's nutritional value in "generalized terms" (the practice regulated by paragraph 1(a)); nevertheless the Commission did *exonerate* them of several accusations concerning Wonder Bread's nutritional content. Moreover, while the petitioners had advertised another group of food products, Hostess Snack Cakes, as "fortified with vitamin and iron," "vitamin fortified," and containing "good nutrition", the Commission *dismissed* all charges relating to this advertising, including charges that the claim of "good nutrition" was misleading. *It is difficult to avoid concluding that paragraphs 1(a), (b) and (c) of the cease and desist order were framed to remedy wrongs which the Commission found not to have been committed.*

532 F.2d at 221 (emphasis added). Similar to *ITT*, Part I.A. of the Proposed Order is framed to remedy the alleged Implied One Year Claim, which, it has been determined, was not made.

Complaint Counsel notes that the Commission may order "provisions that are broader than the conduct that is declared

unlawful" as a way to "fence-in" the violator. CCB at 94 n. 160. *See Telebrands*, 457 F.3d at 357 n.5. A common form of "fencing-in" relief is a "multi-product" prohibition that bars the respondent from using its deceptive trade practice to sell not only the product that was the subject of the enforcement action, but all products sold by the respondent. Such multi-product orders are justified where the respondent's deceptive practice was serious or deliberate, easily transferrable to the sale of other products, and/or where there is a history of prior violations. *See, e.g.*, *POM*, 2013 FTC LEXIS 6, at *153-57. *See also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965) (all products); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563-64 (2d Cir. 1984).

It has been held that fencing-in relief can include restraining the respondent from engaging in deceptive practices that are "like and related" to the violating practice "as a prophylactic and preventative measure." *FTC v. Mandel*, 359 U.S. 385, 393 (1959). *See also Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960) (holding that FTC orders may prohibit future use of "related and similar practices"). In the instant case, however, the unlawful practice was misrepresenting the time period in which complete biodegradation would occur. This is neither "similar" nor "related to" Respondent's non-deceptive, unqualified biodegradable claim, which did not state or imply any time period. F. 232-244. *See American Home Products*, 695 F.2d 681. In *American Home Products*, the court rejected a proposed order that the respondent cease and desist from unsubstantiated non-comparative efficacy claims. "The only non-comparative claim of effectiveness or freedom from side effects, lacking a reasonable basis, which the Commission specifically found was the advertising message that Anacin offers relief from tension." *Id.* at 703. The court dismissed the argument that the provision was justified as fencing-in relief, noting, among other things, that the provision "encompasses deceptive practices which seem to be quite dissimilar to the deceptions actually found," and that the deceptive "tension relief" claim was directly addressed by a separate – and uncontested – portion of the order. *Id.* at 710-11. The One Year Requirement in Part I.A. of the Proposed Order is even less justified in the instant case where, unlike in *American Home Products*, Complaint Counsel specifically failed to prove the claim that the proposed One Year Requirement is designed to

redress. *See* Section III.D.4., *supra*. Complaint Counsel does not point to any case upholding a Commission order that directly, or by way of fencing-in, enjoined conduct that the government contended, but specifically failed to prove, was deceptive. As a matter of fundamental fairness, fencing-in relief must not include conduct that the government charged but could not prove.

Other factors also militate against the One Year Requirement. The ECM Additive is the only product sold by Respondent, F. 158, 163, and therefore there is no issue of transferability. Complaint Counsel does not contend, nor does the evidence show, any prior violations by Respondent. Further, Complaint Counsel has failed to demonstrate that the violations in this case are so "serious" or "deliberate" that, when considered as part of the totality of the circumstances, Respondent should be fenced-in with a restraint upon "biodegradable" claims that have specifically been found not to be deceptive.[62] *See Sears*, 676 F.2d at 392 (holding that, in determining the propriety of fencing-in relief, courts look to the circumstances as a whole "and not to the presence or absence of any single factor").[63]

To be sure, those caught violating the FTC Act "must expect some fencing in" in order to prevent similar illegal practices in future advertisements. *Colgate-Palmolive*, 380 U.S. at 395. But "a court must still demand that there be some relation between the violations found and the breadth of the order. . . . An order is not entitled to enforcement if the court reviewing it finds that 'the

[62] Complaint Counsel refers to decisions of the National Advertising Division of the Better Business Bureau ("NAD") and certain European tribunals, in cases against some of ECM's Customers to which ECM was not party, as evidence that Respondent "knew" the ECM Additive "did not work." *See* CCFF 103, CCB at 26, 96. The findings in these cases, in which ECM was not a party or represented, were not offered, or accepted, for the truth of the matters asserted therein, however. Tr. 1617-1624, 1647-1650. Thus, as a matter of fairness, these cases do not constitute prior "violations" by ECM, or notice that the ECM Additive "did not work." Moreover, Respondent's failure to change its marketing practices in response to findings of the NAD or foreign tribunals does not demonstrate that the violations found in this case are "serious" and "deliberate."

[63] Respondent's cessation of the offending practice and the absence of proof that any ordinary end-use consumer purchased any ECM Plastic containing the offending claims, also militate against a broad fencing-in order.

remedy selected has no reasonable relation to the unlawful practices found to exist.' *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 613, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946)." *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964).

Part I.A. of the Proposed Order seeks to restrain unqualified biodegradable claims, which have been determined not to be deceptive or unlawful, and such claims are not sufficiently similar or related to Respondent's deceptive biodegradation rate claims to justify the provisions of Part I.A. as fencing-in relief. *See Country Tweeds*, 326 F.2d at 148-49. As the Supreme Court has stated, "[o]ne cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in." *Mandel*, 359 U.S. at 392. The judgment in the present case is that the One Year Requirement is not reasonably related to the violations found to exist and is not justified as fencing-in relief. [64] Accordingly, Part I.A. of the Proposed Order is rejected.[65]

b. Part I.B. restraints on future environmental benefit claims

Part I.B. of the Proposed Order prohibits Respondent from representing that any ECM "product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, [R]espondent possesses

[64] Complaint Counsel states that there is "wide discretion" to craft a remedy, and such discretion is subject only to two constraints: (1) that the order bear a "reasonable relation" to the unlawful practices, and (2) be sufficiently clear and precise that its requirements can be understood. CCB at 92. It is, of course, well established that Congress, through the FTC Act, has granted the Commission "wide discretion in its choice of a remedy deemed adequate to cope with . . . unlawful practices" and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel*, 327 U.S. at 611-13. However, the "reasonable relation" test is an outside limit on the permissible exercise of the FTC's discretion, rather than a standard for determining what remedy will serve the purpose of prohibiting and preventing the recurrence of deceptive trade practices.

[65] Because the One Year Requirement is not included in the Order, it is not necessary or appropriate to analyze or determine the merits of Respondent's arguments against the One Year Requirement, summarized in Section III.H.2.a.i, above.

and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation." Proposed Order, Part I.B.

The Complaint does not specifically charge, the parties did not litigate, and Complaint Counsel sought no findings as to whether or not Respondent misrepresented any "environmental benefit." Although it is unclear, Complaint Counsel appears to justify this provision as fencing-in relief. Proposed Order at 6 n.15. The facts of this case militate against a broad remedial order that would reach any "environmental benefit" claim, including that: Respondent has permanently ceased the claim found to have violated the FTC Act; there is no evidence of economic harm to ordinary consumers; Respondent has no prior violations; and there is no issue of transferability. Moreover, the term "environmental benefit" is vague, undefined by the Proposed Order, and overly broad in light of the misrepresentations found to have been made in this case. *See Country Tweeds*, 326 F.2d at 148-49 (rejecting as vague, overbroad and unjustified prohibition against "misrepresenting in any manner the quality of cashmere or other fabric in their merchandise" as fencing-in remedy for the respondent's misrepresenting the quality of their cashmere through the misuse of test results). Accordingly, Part I.B. of the Proposed Order is not included in the Order.

c. Proposed Definition of competent and reliable scientific evidence

Paragraph 4 of the Definitions section of the Proposed Order defines "competent and reliable scientific evidence" as:

> tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.

Proposed Order, Definitions para. 4.

The evidence demonstrates that competent and reliable scientific evidence is necessary to support the biodegradability claims made in this case, and the foregoing definition is consistent with that evidence. *See* F. 704-705. In addition, Commission orders requiring respondents to substantiate claims with competent and reliable scientific evidence, as defined above, are typical and have been consistently upheld by the appellate courts. *E.g.*, *In re Daniel Chapter One*, 2010 FTC LEXIS 11, *rev. denied*, 405 Fed. Appx. 505, 2010 U.S. App. LEXIS 25496 (D.C. Cir. 2010); *Telebrands*, 140 F.T.C. at 347, *aff'd*, 457 F.3d 354; *Kraft*, 1991 FTC LEXIS 38, at *59-60, *aff'd*, 970 F.2d 311 (7th Cir. 1992). Such a requirement in this case serves the purpose of preventing future violations, is reasonably related to the violation found to exist, is sufficiently clear and precise, and is amply supported by legal precedent and the facts of this case. Accordingly, the definition is incorporated into the Order.

Complaint Counsel's Proposed Order also expands upon the definition of "competent and reliable scientific evidence" by adding the following:

A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.

B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:

   i. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and

   ii. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method

> stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.
>
> For example, results from ASTM (American Society for Testing and Materials) International D5511-12, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions*, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

Proposed Order, Definitions para. 4A, 4B.

The above-quoted portions of the proposed definition of competent and reliable scientific evidence are not justified by the record in this case. As noted above, the evidence failed to prove the charge that Respondent, in representing that ECM Plastics were biodegradable, represented that ECM Plastics would completely decompose into elements found in nature, in a landfill, within one year, and Respondent will not be required to substantiate a claim that has not been made. In addition, the greater weight of the expert testimony establishes that experts in the relevant scientific fields do not require proof of complete decomposition within one year in order to substantiate that something is "biodegradable." *See* Section III.E.3., *supra*. Accordingly, to the extent that the provisions of 4A and 4B of the Proposed Order would require Respondent to prove that ECM Plastics will completely decompose into elements found in nature, in a landfill, within one year, in order to claim that ECM Plastics are "biodegradable," the definition is not justified by the findings in the case and is rejected. Those portions of 4A and 4B affecting substantiation for any future claims as to a time period for compete biodegradation are accepted with some modifications, as described *infra*.

Moreover, the proposed requirement that Respondent substantiate unqualified "biodegradable" claims with proof of complete decomposition in a landfill within one year is

unprecedented as a matter of law. Complaint Counsel cites no statute, rule, or adjudicative order that has expanded the definition of competent and reliable scientific evidence to require for "biodegradable" claims that the advertiser substantiate complete biodegradation in a landfill within one year. The Green Guides, upon which the Proposed Order is patterned, and which Complaint Counsel cites in support of the Proposed Order (Proposed Order at 2 nn.2, 3, and at 4 n.8) are not law, and expressly do not "bind the FTC or the public." 16 C.F.R. § 260.1.[66] Again, as analyzed and determined above, Complaint Counsel failed to prove that a "within one year standard" is appropriate.

Complaint Counsel's assertion that consent orders are precedent for the provisions of the Proposed Order (Proposed Order at 2 nn.2, 3) is without merit. It is well established that consent orders do not constitute legal precedent. "[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961); *see POM*, 2012 FTC LEXIS 106, at *705 (Initial Decision); *see also In re Giant Food, Inc.*, 61 F.T.C. 326, 1962 FTC LEXIS 84, at *63 (July 31, 1962) ("consent order . . . lacks the precedent value of a litigated case"); *In re Federal Employees Distributing Co.*, 56 F.T.C. 550, 1959 FTC LEXIS 301, at *58 (Nov. 23, 1959) ("consent order under agreement of parties . . . is not a precedent in other cases for any purpose."). Indeed, as confirmed by the express terms of the consent orders cited by Complaint Counsel, a consent order "is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated." *See, e.g.*, *In re Gorell Enters.*, No. C-4360, 2012 FTC LEXIS 96, at *1 (May 16, 2012); *In re Down to Earth Designs, Inc.*, No. C-4443, 2014 FTC LEXIS 46, Consent Order at *1 (Mar. 18, 2014). For these reasons as

[66] Furthermore, the Green Guides acknowledge that "[i]n any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act." 16 C.F.R. § 260.1 In the instant case, such enforcement action has failed to demonstrate that Respondent's unqualified biodegradable claims were deceptive in violation of the FTC Act, or to demonstrate that Respondent represented that ECM Plastics would completely biodegrade in a landfill within one year.

well, the proposed requirement that Respondent substantiate unqualified biodegradable claims with proof of complete decomposition in a landfill within one year, is rejected.

3. The Order

In order to prohibit and prevent the deceptive claims found to have been made in this case, the Order includes this provision: "[R]espondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication, that any product or package will completely biodegrade within any time period, or that tests prove such representation, unless such representation is true, not misleading, and, at the time it is made, [R]espondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation." Order, Part I. Although this provision will encompass all false or unsubstantiated biodegradation rate claims, and not just the 9 Months to 5 Years Claim, Respondent has maintained throughout this proceeding, and it has been found as a matter of fact, that there is presently no single test that can substantiate the precise rate of biodegradation of plastics in a landfill. F. 712-715. Accordingly, based upon the scientific record in this case, it is appropriate to prohibit false or unsubstantiated biodegradation rate claims, as provided in the Order, in order to prevent deceptive claims in the future. Moreover, barring all biodegradation rate claims, unless and until such rate can be properly substantiated as provided in the Order, will give clear guidance to Respondent, as well as other similarly situated entities, as to how ECM Plastics may be marketed.

As noted above, the Order defines competent and reliable scientific evidence as "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of

relevant and reliable scientific evidence, to substantiate that a representation is true." In addition, in accordance with the findings in this case, the definition set forth in the Order further requires that:

> for any representation that complete biodegradation will occur within any time period, or that tests prove such representation, any scientific technical protocol (or combination of protocols) substantiating such representations must both:
>
> i. substantiate that the entire product will completely decompose within the time period stated in the representation; and
>
> ii. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

Order, Definitions Paragraph 2. The foregoing definition of competent and reliable scientific evidence incorporates portions of the definition proposed by Complaint Counsel, in paragraphs 4A and 4B of the Proposed Order that specify the type of substantiation required for future biodegradation rate claims and is consistent with the evidence and findings in this case. However, the Order does not include Complaint Counsel's proposal that "results from ASTM (American Society for Testing and Materials) International D5511-12, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions*, or any prior version thereof, are not competent and reliable scientific evidence . . . ." The Order makes clear what substantiation is required in the future. Therefore, it is unnecessary to also specify a test that may not constitute adequate substantiation.

Part II of the Order, which is based upon Part II of the Proposed Order with modifications, prohibits Respondent from providing "others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false,

unsubstantiated, or otherwise misleading representation that any product or package will completely biodegrade within any particular time period, or that tests prove such representation." Order, Part II. These provisions are consistent with the evidence and findings and will prevent future violations by Respondent.

Parts III-VII of the Order incorporate the corresponding parts of the Proposed Order. These provisions impose certain record-keeping, notification, and reporting requirements, and set forth the duration of the order. Such provisions properly serve to facilitate administration of the Order, and therefore have been included in the Order.

4. Conclusion

The Order entered herewith will serve to prevent Respondent from engaging in deceptive practices in the future, is reasonably related to the unlawful acts or practices found to exist, and is sufficiently clear and precise.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.

2. Respondent is a corporation within the meaning of Sections 4 and 5 of the Federal Trade Commission Act ("FTC Act"). 15 U.S.C. §§ 44, 45.

3. Respondent's sales of "MasterBatch Pellets" (the "ECM Additive"), as alleged in the Complaint, are and have been "in or affecting commerce," as required by the FTC Act, 15 U.S.C. § 45(a)(1).

4. The FTC has jurisdiction over the conduct challenged in the Complaint, pursuant to Sections 4 and 5 of the FTC Act.

5. An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision.

6. An advertisement is deemed to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.

7. Whether an advertisement communicated a claim to reasonable consumers is a question of fact. This question of fact may be resolved by the terms of the advertisement itself or by evidence of what consumers interpreted the advertisement to convey.

8. The primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself.

9. Complaint Counsel has proven that Respondent claimed that ECM Plastics are biodegradable, including in a landfill; that ECM Plastics would completely biodegrade in a landfill in a time period ranging from 9 months to 5 years; and that tests proved such claims.

10. Complaint Counsel failed to prove its contention that Respondent's claims of (1) "biodegradable" or (2) "biodegradable" in "some period greater than a year" impliedly claimed that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year (the "Implied One Year Claim"). Rather, to find such an implied claim would be to "inject novel meanings into ads," which is improper.

11. To prove its Implied One Year Claim, Complaint Counsel bears the burden of proving that a significant minority of reasonable consumers would interpret ECM's claims of (1) "biodegradable" or (2) "biodegradable" in "some period greater than a year" to be conveying the message that ECM Plastics will completely biodegrade into elements found in nature, in a landfill, within one year.

12. The plain language used in Respondent's Marketing Materials and logo does not state that ECM Plastics will completely breakdown into elements found in nature, in a landfill, within one year. Moreover, there are no additional elements of

the materials at issue, such as the juxtaposition of phrasing or associated images, that support a finding that the language (1) "biodegradable" or (2) "biodegradable" in "some period greater than a year" is reasonably interpreted to be conveying the Implied One Year Claim.

13. Based on a facial analysis alone, Respondent's (1) "biodegradable" and (2) "biodegradable" in "some period greater than a year" claims do not, in fact, convey the message that ECM Plastics completely biodegrade into elements found in nature, including in a landfill, within one year.

14. It is appropriate to infer that consumers interpret words to mean what they say.

15. As the primary evidence of the meaning of Respondent's representations, the fact that the advertisements themselves do not support the Implied One Year Claim is given substantial weight.

16. When extrinsic evidence has been introduced, that evidence must be considered in reaching a conclusion about the meaning of the advertisement.

17. Extrinsic evidence includes, but is not limited to, evidence of the common usage of terms, and reliable results from methodologically sound consumer surveys.

18. The common meanings of "biodegradable," based on the dictionary definitions, are: "capable of being slowly destroyed and broken down into very small parts by natural processes, bacteria, etc." or "capable of being broken down especially into innocuous products by the action of living things (as microorganisms)." *Merriam-Webster.com*, *supra*. *Thompson Medical*, 1984 FTC LEXIS 6, at *359. Nothing in the foregoing definitions supports a conclusion that a significant minority of reasonable consumers would interpret "biodegradable," to mean completely breakdown into elements found in nature, in a landfill, within one year.

19. Complaint Counsel has failed to prove that the Google survey, procured for this litigation by Complaint Counsel's expert witness, Dr. Shane Frederick, drew valid samples from the appropriate population, asked appropriate questions in ways that

minimized bias, and analyzed results correctly, or that the Google survey should be given any meaningful weight on the issue of whether a significant minority of reasonable consumers would interpret Respondent's biodegradable claims to be communicating a message that ECM Plastics will completely break down into elements found in nature, in a landfill, within one year.

20. Complaint Counsel's Google survey fails to comport with generally accepted standards for survey research, as well as the legal standards used by the Commission, and is insufficiently reliable or valid to draw any material conclusions.

21. Complaint Counsel's Google survey is not of sufficient methodological quality to constitute probative evidence in litigation, under the Commission's standards or the standards applicable to federal courts in general. For purposes of this adjudication, the Google survey is weak, at best.

22. The 2006 survey by the American Plastics Council ("APCO" survey) and 2010 survey performed by Synovate ("Synovate" survey), upon which Complaint Counsel relies to support the Implied One Year Claim, are both so seriously flawed that, for the purpose of determining the message conveyed by Respondent's biodegradable claims, the surveys are either invalid or, at best, entitled to little weight.

23. Dr. Frederick's theory of "convergent validity" of the Google, APCO, and Synovate surveys is inapplicable to bolster the probative value of these three flawed surveys. For purposes of the weight to be given to the Google, APCO, and Synovate surveys on the issue of whether Respondent made the alleged Implied One Year Claim, the whole is no greater than the sum of its parts.

24. Results from survey questions designed and implemented for this litigation by Respondent's expert, Dr. David Stewart, weigh against the conclusion that Respondent's "biodegradable" representation implied complete biodegradation in a landfill within one year. Based on Dr. Stewart's survey, consumers interpret the term "biodegradable" to mean the process by which a product breaks down or decays; and consumers understand that the time for this process varies depending on the materials

involved and that the process of biodegradability is not always, or even often, a rapid process.

25. Two approaches have been used to prove that an advertisement is deceptive: (1) the "falsity" theory, or (2) the "reasonable basis" or "substantiation" theory.

26. Respondent must possess and rely on "competent and reliable scientific evidence" in support of its claims.

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

28. The scientific evidence in this case establishes that the term "biodegradable" refers to the biological process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source and that scientific literature defining biodegradation does not require completion or impose a time restraint.

29. Complaint Counsel failed to prove that, for purposes of evaluating whether Respondent's claims are false or unsubstantiated, the term "biodegradable" means that an item must completely break down and decompose into elements found in nature within one year after customary disposal.

30. Complaint Counsel failed to prove that, in order to claim that a product is biodegradable, the relevant scientific community demands competent and reliable scientific evidence that assures complete decomposition within one year in a landfill environment.

31. ASTM D5511 tests can provide competent and reliable scientific evidence of biodegradability of plastics in a landfill environment.

32. The expert testimony convincingly establishes that ECM Plastics are not fully biodegradable in a period of 9 months to 5 years in a landfill, and that tests do not prove such claims.

33. Complaint Counsel has met its burden of proving that the claims that ECM Plastics would completely biodegrade, including in a landfill, in a time period ranging from 9 months to 5 years, and that tests proved such claim, are both false and unsubstantiated.

34. Respondent has met its burden of producing the scientific evidence upon which it relies, including numerous ASTM D5511 tests conducted by independent laboratories, to substantiate its representations.

35. Complaint Counsel has not met its burden of showing that the ASTM D5511 tests upon which Respondent relies do not meet the standards demanded by the relevant scientific community or are so fatally flawed as to not constitute reliable and competent scientific evidence.

36. The tests upon which Respondent relies constitute competent and reliable scientific evidence demonstrating that plastics manufactured with the ECM Additive are biodegradable, including in a landfill.

37. Complaint Counsel has not met its burden of proving, pursuant to the falsity theory, that tests do not prove the biodegradability of ECM Plastics, or that the studies Respondent possessed do not pass muster in the view of the relevant scientific communities.

38. Complaint Counsel has not met its burden of proving, pursuant to the reasonable basis theory, that Respondent's substantiation for its claims that ECM Plastics are "biodegradable," including in a landfill, is inadequate, or that the studies upon which Respondent relies do not pass muster in the view of the relevant scientific communities.

39. Complaint Counsel has not met its burden of proving that the claims that ECM Plastics are biodegradable, including in a

landfill, and that tests proved such claims, are false or unsubstantiated.

40. Complaint Counsel has proven that Respondent's false and unsubstantiated claims that ECM Plastics will fully biodegrade in a landfill in 9 months to 5 years, and that tests prove such claim, are likely to affect the purchasing decisions of ECM Customers, and downstream customers, and that therefore these claims constitute material misrepresentations.

41. Because Complaint Counsel has demonstrated Respondent made material false and unsubstantiated claims that ECM Plastics will fully biodegrade in a landfill in 9 months to 5 years, and that tests prove such claim, Complaint Counsel has met its burden of proving the charge that Respondent committed a deceptive trade practice in violation of Section 5 of the FTC Act.

42. Complaint Counsel has proven that Respondent provided its Customers with marketing materials that included false and unsubstantiated claims that ECM Plastics will fully biodegrade in a landfill in 9 months to 5 years, and that tests prove such claim, and encouraged its Customers to use these materials for its Customers' marketing of ECM Plastics to their own customers. Accordingly, Complaint Counsel has met its burden of proving the charge that Respondent provided the means and instrumentalities for deceptive marketing claims to be conveyed to others in the ECM supply chain.

43. Respondent has failed to prove that its due process rights have been violated in this case.

44. Having concluded that Respondent violated the FTC Act, that Act authorizes an order requiring Respondent to cease and desist from such violating acts or practices.

45. Although Respondent ceased making the 9 Months to 5 Years Claim as of late 2013, after issuance of the Complaint, this fact does not bar a cease and desist order, where, as here, the public interest otherwise supports such an order.

46. Because Complaint Counsel failed to prove its assertion that Respondent impliedly claimed that ECM Plastics would

completely biodegrade in a landfill within one year, or that Respondent's "unqualified" biodegradability claims were otherwise deceptive, Complaint Counsel is not entitled to its proposed order barring Respondent from making unqualified biodegradable claims unless Respondent can substantiate that "the entire item will completely decompose into elements found in nature within one year after customary disposal."

47. The facts of this case militate against a broad remedial order, including that: Respondent has permanently ceased the claim found to have violated the FTC Act; there is no evidence of economic harm to ordinary consumers; Respondent has no prior violations; and there is no issue of transferability.

The Order entered herewith will serve to prevent Respondent from engaging in deceptive practices in the future, is reasonably related to the unlawful acts or practices found to exist, and is sufficiently clear and precise.

ORDER

DEFINITIONS

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

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

2. "Commission" shall mean the Federal Trade Commission.

3. "Competent and reliable scientific evidence" shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and

that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically, for any representation that complete biodegradation will occur within any time period, or that tests prove such representation, any scientific technical protocol (or combination of protocols) substantiating such representations must both:

i. substantiate that the entire product will completely decompose within the time period represented; and

ii. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

4. "Landfill" means a municipal solid waste landfill that receives household waste. "Landfill" does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.

5. "Means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product, package, or service, in or affecting commerce.

6. Unless otherwise specified, "respondent" shall mean ECM BioFilms, Inc., a corporation, and its successors and assigns.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in

connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication, that any product or package will completely biodegrade within any time period, or that tests prove such representation, unless such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation that any product or package will completely biodegrade within any particular time period, or that tests prove such representation.

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. All advertisements, labeling, packaging and promotional materials containing the representations specified in Parts I and II;

B. All materials that were relied upon in disseminating the representations specified in Parts I and II;

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the

representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. All acknowledgments of receipt of this Order obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this Order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this Order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondent shall deliver this Order to current personnel within thirty (30) days after the effective date 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 that may affect compliance obligations arising under this Order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be

emailed to Debrief@ftc.gov 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: "ECM BioFilms, Inc., Docket 9358."

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the effective date of this Order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov 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: "ECM BioFilms, Inc., Docket No. 9358."

VII.

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

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

B. This Order's application to any respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

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

COMPLAINT

The Federal Trade Commission, having reason to believe that ECM BioFilms, Inc., also d/b/a Enviroplastics International ("respondent") has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent ECM BioFilms, Inc., is an Ohio corporation with its principal office or place of business at Victoria Place, Suite 225, 100 South Park Place, Painesville, OH 44077.

2. Respondent manufactures, advertises, offers for sale, sells, and distributes additives for plastics, including "MasterBatch Pellets" (hereinafter referred to collectively as "ECM Additives"). Respondent advertises ECM Additives through the Internet site www.ecmbiofilms.com. Respondent distributes ECM Additives to independent distributors and to plastic products manufacturers located throughout the United States who, in turn, treat plastics with respondent's additives (hereinafter referred to as "ECM Plastics") and sell ECM Plastics to customers and consumers in various plastic products advertised as biodegradable.

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

4. To induce sales of its ECM Additives, respondent has disseminated, or has caused the dissemination of, advertising and promotional materials, including printed advertisements, website advertisements, certifications, and other promotional materials to distributors, customers, and end-use consumers. See, e.g., Exhibits 1-4. Respondent's distributors and customers have disseminated, or have caused the dissemination of, the advertising claims in these promotional materials to end-use consumers.

5. In its advertising and promotional materials, including, but not limited to, those shown in Exhibits 1-4, respondent has made the following statements and depictions:

A. Respondent's Website (Exhibit 1A, disseminated until approximately October 2012):

i. Website Banner Tagline:

(Ex. 1A at 1-12).

ii. Home Page:

"Transform any Plastic into Biodegradable Plastic! . . . The revolutionary additive technology, when combined as a one-percent load to the most widely-used plastic resins, renders the finished plastic products biodegradable while maintaining their other desired characteristics. The potential uses of this technology are limited only by the imagination." (Id. at 1).

iii. Product Overview Page:

"MasterBatch Pellets™ is a revolutionary additive, which when combined as a one-percent load to the most widely used plastic resins, renders the finished plastic products biodegradable while maintaining their other desired characteristics. . . ." (Id. at 5).

"Plastic products made with ECM additives:

· Fully biodegrade in 9 months to 5 years

· Fully biodegrade when disposed of in a biodegrading environment, either anaerobically or aerobically:

· in landfills" (Id.).

iv. Comparison to Alternative Products Page:

Comparison of Products Produced with ECM MasterBatch Pellets™ to Alternative Products

	ECM MasterBatch™	Oxo-Degrader*	Bioplastics+
For Biodegradation			
100% Biodegradable (on land, in land, in water)	**True**	False	False
100% Biodegradable in landfill, as litter or backyard compost	**True**	False	False

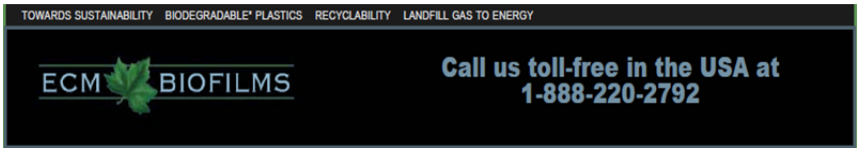
(Ex. 1A at 8).

v. Technology Page:

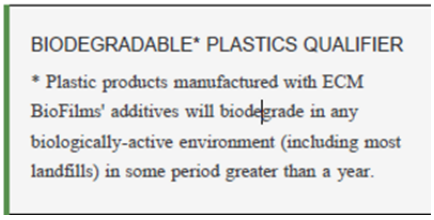
> "The plastic products made with our additives will break down in approximately 9 months to 5 years in nearly all landfills or wherever else they may end up." (Id. at 10).
>
> "Material treated with ECM has been tested and proved as biodegradable and safe for the environment by using the following: . . . ASTM 5511 [sic] 'Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions'." (Id.).

B. Respondent's Website (Exhibit 1B, disseminated on or around October 2012 to present):

i. Website Banner Tagline:



(E.g., Ex. 1B at 1, 3, 5).



(E.g., Id. at 2, 4, 9).

ii. Home Page:

> "Cutting-edge additives for manufacturing biodegradable* plastics . . . Unlike other degradable plastic technologies which require very specific conditions, plastic products manufactured with ECM MasterBatch Pellets will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year. This revolutionary additive technology, when combined as a 1% load to the most widely-used plastic resins, renders the resulting plastic products biodegradable* while maintaining their other desired characteristics. The potential uses of this technology are limited only by the imagination." (Id. at 1).
>
> "BIODEGRADABLE* PLASTICS QUALIFIER
> * Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." (Id.).

iii. MasterBatch Pellets, Additives for Manufacturing Biodegradable* Plastics Page:

> "ECM MasterBatch Pellets™ are a revolutionary additive technology for manufacturing biodegradable* plastics . . . When combined as a 1% load with the most widely-used plastic resins, they render the resulting plastic products biodegradable*." (Id. at 10).

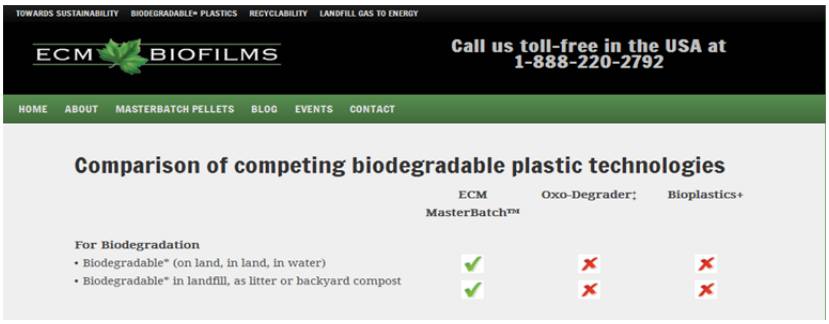
"Plastic products made with ECM BioFilms' additives: . . .

- Biodegrade* in any biologically-active environment in some period greater than a year
- Biodegrade* when disposed of in a biodegrading environment, either anaerobically or aerobically:
- in landfills
- in compost (backyard compost or commercial facilities)
- if buried or littered in the ground
- in agricultural and erosion-control settings" (Id. at 10-11).

"BIODEGRADABLE* PLASTICS QUALIFIER

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." (Id. at 11).

iv. Comparison to Alternative Products Page:



(Id. at 12).

v. MasterBatch Pellets, ECM Technology Page:

"The plastic products made with our additives will break down in more than one year but less than a hundred plus years in nearly all landfills or wherever else they may end up . . . ." (Id. at 14).

"Material treated with ECM has been tested and proved as biodegradable* and safe for the environment by using the following: . . . ASTM 5511 [sic] 'Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions'." (Id.).

vi. MasterBatch Pellets, Mechanism Page:

"We have determined, through years of testing both internally and through independent laboratories, that plastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets will biodegrade once they are placed in conditions wherein they are in constant contact with other biodegrading materials." (Id. at 16).

vii. MasterBatch Pellets, Life Expectancy Page

"Concerning the life expectancy of the plastic products manufactured with our additives once they are placed in constant contact with other biodegrading materials, we certify the full biodegradation of most all plastic products manufactured with at least a one percent load of our additives. We can certify this situation due to the internal and external studies that have cost us hundreds of thousands of dollars." (Id. at 19).

"Plastics manufactured with our additives will fully biodegrade in home compost heaps, commercial composting operations (both high heat and low heat, or even in vermiculture, processes), buried in the ground, buried in landfills, tilled into the soil, having been littered, etc. Most importantly, our process is by far the least expensive, most widely applicable, proven technology for the biodegradation of plastics in the world." (Id.).

"Again, we certify the biodegradation* of polyolefins (any of the polyethylenes and polypropylenes), EVAs, PVCs, PETs, PSs, PUs and any combination of these resins, manufactured with at least a 1% load of our additives. We base this certification on more than ten years of testing worldwide by us, by universities, by customers, by prospects and by competitors." (Id.).

"BIODEGRADABLE* PLASTICS QUALIFIER
* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." (Id.).

C. Respondent's Print Materials:

i. Flyer (Exhibit 2):

[redacted]

ii. Brochure (Exhibit 3):

[redacted]

iii. Certificate of Biodegradability of Plastic Products (Exhibit 4):

"This is to certify that numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test methods . . . . The results of these tests and the related biodegradation and ecological impact experiments are contained in the Ecological Assessment of ECM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable . . . . This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been

> *conducted since the publication of the Ecological Assessment . . . may be used by [the certificate holder] to validate[i] ts claims to the biodegradability and environmental safety of plastic products that it manufactures . . . .*" (Ex. 4 at 1).

6. Approximately 92 percent of total municipal solid waste in the United States is disposed of either in landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow ECM Plastics to completely break down and decompose into elements found in nature within a reasonably short period of time.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

8. The Ecological Assessment of ECM Plastic, American Society for Testing and Materials ("ASTM") International D5511, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions ("ASTM D5511"), and other scientific tests relied on by respondent do not assure complete decomposition of ECM Plastics in a reasonably short period of time or in respondent's stated timeframes, *e.g.*, nine months to five years, and do not replicate, *i.e.*, simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

FALSE OR MISLEADING REPRESENTATIONS

9. Through the means described in Paragraphs 2, 4, and 5, respondent has represented, expressly or by implication, that:

A. ECM Plastics are biodegradable, i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

B. ECM Plastics are biodegradable in a landfill;

C. ECM Plastics are biodegradable in a stated qualified timeframe; and

D. ECM Plastics have been shown to be biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe under various scientific tests including, but not limited to, ASTM D5511.

10. In truth and in fact:

A. ECM Plastics will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

B. ECM Plastics will not completely break down and decompose into elements found in nature within a reasonably short period of time after disposal in a landfill;

C. ECM Plastics will not completely break down and decompose into elements found in nature within respondent's stated qualified timeframes after customary disposal; and

D. ECM Plastics have not been shown to completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe, under various scientific tests, including, but not limited to, ASTM D5511.

11. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

UNSUBSTANTIATED REPRESENTATIONS

12. Through the means described in Paragraphs 2, 4, and 5, in numerous instances respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

13. In truth and in fact, at the time respondent made the representations referred to in Paragraph 9, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 12 is false or misleading.

MEANS AND INSTRUMENTALITIES

14. Respondent has distributed the promotional materials described in Paragraphs 4 and 5 to its customers and independent distributors. In so doing, respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

15. Respondent's practices, as alleged in this complaint, therefore constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to the respondent that the eighteenth day of June, 2014, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532-H, Washington, D.C. 20580, as the place when and where a 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 to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Federal Trade 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 of fact and conclusions of law under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and 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 not later than ten (10) days after the answer is filed by the respondent. 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-H, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five (5) days after the answer is filed by the respondent. Rule 3.31(b) obligates counsel for each party,

within five (5) days of receiving respondent's answer, to make certain disclosures without awaiting a formal discovery request.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to ECM BioFilms, Inc., also d/b/a Enviroplastics International might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate, including corrective advertising or other affirmative disclosure.

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

ORDER

DEFINITIONS

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

1. "Clearly and Prominently" shall mean as follows:

   A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;

B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.

2 "Close proximity" means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.

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

4 "Competent and reliable scientific evidence" shall mean tests, analyses, research, or studies that have

been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically:

A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, i.e., simulate, the physical conditions found in landfills, where most trash is disposed.

B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:

   i. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and

   ii. replicate, i.e., simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

5 "Customary disposal" means any disposal method whereby respondent's products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.

6 "Degradable" includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.

7 "Landfill" means a municipal solid waste landfill that receives household waste. "Landfill" does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.

8 "Means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product, package, or service, in or affecting commerce.

9 Unless otherwise specified, "respondent" shall mean ECM BioFilms, Inc., a corporation, and its successors and assigns.

I.

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

A. That any product or package is degradable, or that any product, package, or service affects a product or package's degradability, unless

1. the entire item will completely decompose into elements found in nature within one year after customary disposal; or

2. the representation is clearly and prominently and in close proximity qualified by:

   a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and

   b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold

   and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

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

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other

device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact regarding any environmental benefit.

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. All advertisements, labeling, packaging and promotional materials containing the representations specified in Parts I and II;

B. All materials that were relied upon in disseminating the representations specified in Parts I and II;

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

D. All acknowledgments of receipt of this order obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall secure from each such person a signed and dated

statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service 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 that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: "ECM BioFilms, Inc., Docket No. 9358, File No. 122 3118."

VI.

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

directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: "ECM BioFilms, Inc., Docket No. 9358, File No. 122 3118."

VII.

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

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN WITNESS WHEREOF, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eighteenth day of October, 2013.

By the Commission.

Complaint

EXHIBIT 1A

Complaint

EXHIBIT 1A

Complaint

EXHIBIT 1A

EXHIBIT 1A

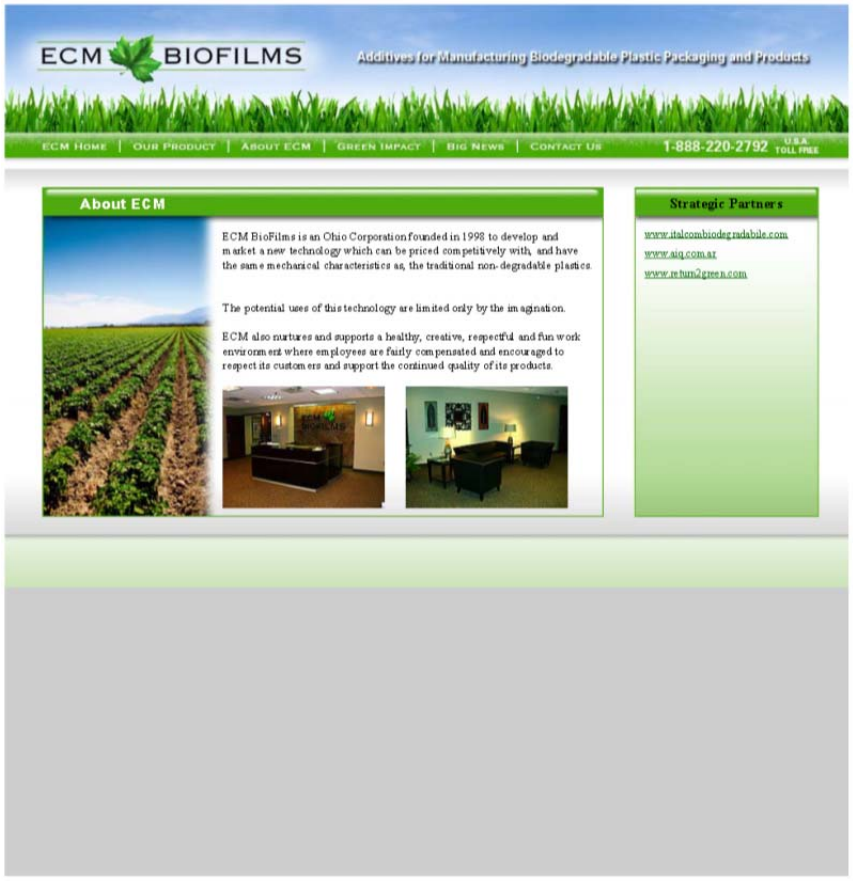

ECM BIOFILMS
Additives for Manufacturing Biodegradable Plastic Packaging and Products
ECM Home | Our Product | About ECM | Green Impact | Big News | Contact Us
1-888-220-2792
Big News
ECM LAUNCHES NEW WEBSITE
ECM Biofilms, Inc. is proud to announce the launch of our completely redesigned website. With a totally fresh appearance, the new website contains important information about ECM and our exclusive MasterBatch Pellets™. The clean graphics paired with our cutting edge additive technology provides an informative and visually appealing site for prospective customers.
www.ECMbiofilms.com
READ MORE...
CLEAN AIR COUNCIL
Our waste, from paper and soda cans to old refrigerators and television. . .
read more
ECO-PLASTIC
Every year US landfills receive tens of millions of tons of plastic. . .
read more
BIODEGRADABLE CLOSE-UP
ECM is a relatively new firm that tailors a range of biodegradable. . .
read more
DOWN TO EARTH SWITCHES
The biodegradable bags from Down to Earth are made using. . .
read more

Complaint

EXHIBIT 1A

Complaint

EXHIBIT 1A



Complaint

EXHIBIT 1A

Complaint

EXHIBIT 1A

Comparison of Products Produced with ECM MasterBatch Pellets™ to Alternative Products

	ECM MasterBatch™	Oxo-Degrader*	Bioplastics+
For Biodegradation			
100% Biodegradable (on land, in land, in water)	**True**	False	False
100% Biodegradable in landfill, as litter or backyard compost	**True**	False	False
For Recycling			
100% Recyclable at any time	**True**	False	False
Compatible with the recycle stream	**True**	False	False
For Properties			
No special storage conditions required	**True**	False	False
Shelf life is indefinite	**True**	False	False
Not degraded by exposure to heat, light or external strasses during storage, shipping, handling or use	**True**	False	False
Does not fragment during degradation	**True**	False	True
Degradation begins at the time of disposal - not before	**True**	False	False
For Performance			
When compared to the original material in the application, physical properties are unchanged and no redesign of end product needed	**True**	False	False
UV or anti-oxidant additives are needed, inhibiting product performance	**False**	True	False
Performance not negatively affected by over loading	**True**	False	n/a
For Processing			
Can be processed with conventional equipment	**True**	True	False
No changes to the process settings required	**True**	False	False
Biodegradable with 1% loading in PE, PP, PVC, PS and PET	**True**	False	n/a
For the Environment			
No heavy metals, ecologically safe	**True**	False	True
Degraded product returns to the environment not as small particles, but as biomass and humus	**True**	False	True°
For the Bottom Line			
Cost effective	**True**	False	False

* EPI Environmental Products Inc., Willow Ridge Plastics, Inc., Symphony Environmental, Inc., etc.
\+ PLA, Mater-Bi®, PHB and combinations (NatureWorks LLC., Novamont S.p.A., et al.)
° Only in industrial/municipal composting facilities

ECM BioFilms, Inc.
Victoria Place - Suite 225, 100 South Park Place, Painesville, Ohio 44077 U.S.A.
Phone: 440.350.1400 · Toll Free in U.S.A.: 800.220.2792 · Fax: 440.350.1444
Email: biodeg@ecmbiofilms.com · Website: ecmbiofilms.com

EXHIBIT 1A

Mechanism for the Biodegradation of Products Manufactured with ECM MasterBatch Pellets™

We have determined, through years of testing both internally and through independent laboratories, that plastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets will fully biodegrade once they are placed in conditions wherein they are in constant contact with other biodegrading materials.

Originally it was not known precisely what the threshold amount of our material was necessary to initiate and sustain the process. Much of the early testing was done with plastics manufactured with five percent (5%) or higher loads of the additives but it has been determined that all that is required is a minimum of a one percent (1%) load. This amount will initiate the process and any significant amount less than this amount will not permit the process to begin or be sustained.

People often wonder whether significantly greater quantities of our additive will reduce the biodegradation times. The answer is yes, but so very marginally that it is rarely worth the potential issues concerning other physical properties in the finished plastic products and cost. To explain this more fully, it will be helpful to understand the basics of the mechanism.

The presence of at least one percent of our additives in a plastic product, which is in contact with other biodegrading organic materials, structures communities of such organisms as are there present on the surfaces of the plastic in such a way that their interaction produces the ability to break down the long hydrocarbon chains of the "non-biodegradable" petrochemical plastics. As most people are aware, an example of a biofilm would be the scum that can form on the surface of a pond or on teeth, for that matter. In the cases of most pond biofilms, the surface layers with chlorophyllic, aerobic organisms can support layers of anaerobic organisms in the deeper layers and the interaction of all of the organisms makes for an ecosystem that in some cases produce byproducts that would not be formed without the interaction. The same can be said of the biofilms formed by the interaction of our additive materials and the naturally existing biota. Importantly, this structuring of communities of microorganism proceeds in anaerobic as well as aerobic conditions.

Once there are the structured communities of microorganisms interacting to produce schisms in the long hydrocarbon chains of the polymers the process continues until all the hydrocarbons are eventually transformed into the carbon dioxide and water (aerobic biodegradation) or carbon dioxide, methane and water (anaerobic biodegradation).

This leads us back to the reason why greater quantities of our additives do not significantly speed up the time for biodegradation. If you have four otherwise identical 100 kilograms of PE products, one with no ECM (100% PE), one with a half a percent of ECM (99.5% PE), one with one percent ECM (99% PE) and one with seven percent ECM (93% PE) disposed of under the same conditions you will see why this is.

The one with no ECM does not form the necessary biofilm and thereby 100-kg of PE sits in the ground in that form for hundreds or thousands of years or more. The one with a half a percent of ECM does not form the biofilm with sufficient sustainability to initiate and continue the biodegradation process so only the very surface amounts of the ECM biodegrades and you will have remaining all of the 99.5-kg of PE and most of the 0.5-kg of ECM for hundreds or thousands of years in that form. The product that has the one percent of ECM will form and sustain the biofilm that will continue to break apart the long chains of the 99-kg of PE until the entire quantity of PE is biodegraded. The sample that has 7 percent ECM will do the same thing; the only difference is that there will be only 93-kg of the difficult-to-biodegrade PE to degrade rather than 99-kg. The difference in biodegradation time is not terribly dramatic but it is less.

As a method of concluding, I think that it may be helpful to illustrate how the mechanism employed by this unique biodegradation technology is an important reason as to why the technology will continue the path it is on to become one of the world's leading technologies for the production of plastic products.

The fact that the mechanism is not based on photodegradation or thermal degradation means that the shelf life and usable life of the plastic products will be the same as they were without the ECM additives. The fact that there is a threshold quantity necessary for the initiation and sustainability of the biofilms responsible for the biodegradation means that the plastics with the ECM additive do not have to be segregated out of the plastics that might be recycled into plastic products that are not meant to biodegrade. And finally, the fact that the threshold quantity is so low (one percent by weight) means that the manufacturer is able to immediately make plastic products with all the same other properties they had when they were not biodegradable and at nearly the same cost.

ECM BioFilms, Inc.
Victoria Place - Suite 225, 100 South Park Place, Painesville, Ohio 44077 U.S.A.
Phone: 440.350.1400 · Toll Free in U.S.A.: 800.220.2792 · Fax: 440.350.1444
Email: biodeg@ecmbiofilms.com · Website: ecmbiofilms.com

Complaint

EXHIBIT 1A

Our Technology for the Biodegradation of Plastic Products

The technology is an additive which, when combined in small quantities with any of the popular plastic resins, renders the end products biodegradable while maintaining their other desired characteristics. It is sold as ECM MasterBatch Pellets and our Company has developed the technology to the point where most plastic products manufacturers can use the additive without having to modify their existing methods of production any more than if they were changing the product's color. The resulting plastic products exhibit the same desired mechanical properties, have effectively similar shelf-lives, and yet, when disposed of, are able to be metabolized into biomass by the communities of microorganisms commonly found almost everywhere on this planet.

This biodegradation process can take place aerobically and anaerobically. It can take place with or without the presence of light. These factors allow for biodegradation even in landfill conditions which are normally inconducive to any degradation of other technologies. Our technology differs significantly from other "degradable plastics" emerging in the market today because it does not attempt to replace the currently popular plastic resin formulizations but instead enhances them by rendering them biodegradable

Recognizing the environmental concerns related to plastics and the market potential, the corporate and scientific communities have long sought to develop degradable plastics. However, the Company believes that degradable plastics introduced to date possess several weaknesses that have prevented wide-spread acceptance in the marketplace. Photo-degradable products, for example, do not degrade in landfills due to the lack of sunlight (they are typically covered with another layer of trash before the degradation can occur). At the same time these photo-degradable products present difficult circumstances for storage before use due to their reactivity to light. Similarly, plastic products manufactured with PLA and such "renewable" replacement resins fail to biodegrade as litter or in a landfill, are very expensive to manufacture, and often do not achieve the requisite physical properties.

ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment. Our process utilizes several proprietary compounds that are combined into a masterbatch pellet that is easily added to plastic resins using existing technology.

ECM engaged several renowned testing laboratories to independently establish the biodegradability of plastic products made with ECM's additives. The tests concluded that the products were fully biodegradable under both aerobic and anaerobic conditions. In addition, the tests concluded that their biodegradation did not produce any toxic residue harmful to living organisms in land or water.

Technology Explanation

The plastic products made with our additives will break down in approximately 9 month to 5 years in nearly all landfills or wherever else they may end up. All sorts of factors determine the amount of microbes available in the soil and the soil conditions determine the rate of degradation. The plastic products made with ECM technology basically rely on the microbes in the soil to react with the additives and form communities, biofilms, which create the enzymes and acids that can attack the long-chain hydrocarbon molecules and break them down to the point that the microbes' natural acids and enzymes are then effective and the microbes can metabolize the simple hydrocarbons with CO_2 and water or methane being the waste products. This process continues until all the plastic product is full biodegraded.

Material treated with ECM has been tested and proved as biodegradable and safe for the environment by using the following:

- ASTM D5209 "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge";
- ISO 14855 / ASTM D5338 "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions"; and
- ASTM 5511 "Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions".

Where will it biodegrade?

- Home composting
- Commercial composting
- Landfills
- Buried in, or in contact with the soil
- Erosion / Agricultural netting & film
- Litter

Where won't it degrade?

- Warehouses
- Store shelves
- Offices & Home

ECM BioFilms, Inc.
Victoria Place - Suite 225, 100 South Park Place, Painesville, Ohio 44077 U.S.A.
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Email: biodeg@ecmbiofilms.com · Website: ecmbiofilms.com

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EXHIBIT 1A

Life Expectancy of Products Manufactured with ECM MasterBatch Pellets™ Page 1

The life expectancy of plastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets can be explained through two types of life expectancies. The first type of life expectancy is the life expectancy of the plastic when it is on the warehouse or store shelf, in regular usage as packaging or other normal plastic usage. The second type of life expectancy has to do with the situation when the same plastic has been put in conditions wherein it has constant contact with other materials that are biodegrading.

Plastic products manufactured with ECM MasterBatch Pellets will have the same life expectancy as the same plastic product manufactured without our additives under all but the conditions mentioned above wherein they are placed in constant contact with other materials that are biodegrading (i.e. on or buried in the ground). This is a major reason why our technology for having biodegradable plastic products is so successful.

The principles concerned with the degradation of plastics that make use of our additive technology are truly involved with "bio"-degradation. Our technology does not rely on the use of photosensitivity or thermal sensitivity to photodegrade or thermally break down the plastics. For this reason, a blow-molded HDPE shampoo bottle or motor oil bottle manufactured with one of our additives will last in the warehouse and on the store shelf as long as it would without our additives. There is a considerable amount of interest in our additives for the plastics for the automotive and aviation industries for this reason.

There is the real concern for the technologies that make use of thermal or photodegradation that they are simply leaving smaller particles of plastic in the soil rather than having the material truly become the organic components of soil. This is especially of concern in the agricultural industry and for those needing erosion control products. Agricultural films, erosion control nettings, and other such products manufactured with our additives will last long enough to get the required use but will completely biodegrade into the soil; such plastic products completely biodegrade in a period of from 9 months to 5 years or less. It is not a "poof, it's gone" system but simply makes the plastic product biodegrade as if it were a stick or a branch off a tree rather than "sticking around" for hundreds of years.

To summarize the concept, the key to our technology is that the right conditions for biodegradation are not those found when the plastic product is in use, is on the store shelves or is being warehoused somewhere. Just like a wood bowl or a piece of wood furniture, which can be used for a lifetime or more, a plastic product with our additives can be used for essentially the same period of time as the same plastic product without our additives could be used.

Concerning the life expectancy of the plastic products manufactured with our additives once they are placed in constant contact with other biodegrading materials, we certify the full biodegradation of most all plastic products manufactured with at least a one percent load of our additives. We can certify this situation due to the internal and external studies that have cost us hundreds of thousands of dollars. Our additives have been tested in all of the types of polyolefins, EVAs, PVCs, PETs, PSs, PUs and combinations thereof, with much of the testing having been performed using the various world-standardized tests in independent laboratories by independent scientists. We have had the various test data analyzed by independent scientists and their conclusions and some of the data have been sent to you in the presentation package and are what we base our certification on.

The basic concept is that biodegradation is a natural process that occurs around the world but at various speeds due to various conditions. Plastics with our additives behave like sticks, branches or trunks of trees. Due to this fact, we do not guarantee any particular time because the time depends on the same factors that the biodegradation of woods and most other organic materials on earth depend - ambient biota and other environmental conditions - but the time frame of between nine months to five years will give a good general idea for most conditions. Under specific composting conditions with additional accelerants sprayed on them, some customers have reported biodegradation in as little as a couple of months. Under the more usual, commercial composting conditions using high heat processes, a time frame of around one year is a reasonable expectation.

Petrochemical plastics would normally take hundreds or thousands of years or even longer to "biodegrade"; with our additives, these same plastic formulas biodegrade in a hundredth of that time or less.

Do not be confused by the claims of some companies that say that their resins fully biodegrade in 2 months or 3 months. They are speaking of biodegradation under very specific conditions. This has lead to some confusion when the plastic products are in the end-consumers' hands, such as in the Kassel project in Germany when the bags and other plastic products marked with a "compostable" label were found not to be compostable by the town's citizens in their backyard compost heaps (they were only "compostable" under the very specific commercial

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EXHIBIT 1A

Life Expectancy of Products Manufactured with ECM MasterBatch Pellets™ Page 2

composting standards where there is high heat, oxygenation, moisture control and high levels of microorganisms). When I spoke at the Biodegradable Plastics Conference in Frankfurt, Germany a few years ago, I argued with the companies involved in that project that they should be careful in not trying to confiscate generic terms for too specific conditions (i.e. they should label items as "Commercially Compostable" rather than simply "Compostable" when such conditions are required). As the use of our technology continues to grow to become the world's leading technology for the production of biodegradable plastics, our viewpoint will continue to gain more and more adherents.

Plastics manufactured with our additives will fully biodegrade in home compost heaps, commercial composting operations (both high heat and low heat, or even in vermiculture, processes), buried in the ground, buried in landfills, tilled into the soil, having been littered, etc. Most importantly, our process is by far the least expensive, most widely applicable, proven technology for the biodegradation of plastics in the world.

Again, we certify the biodegradation of polyolefins (any of the polyethylenes and polypropylenes), EVAs, PVCs, PETs, PSs, PUs and any combination of these resins, manufactured with at least a 1% load of our additives. We base this certification on more than ten years of testing worldwide by us, by universities, by customers, by prospects and by competitors.

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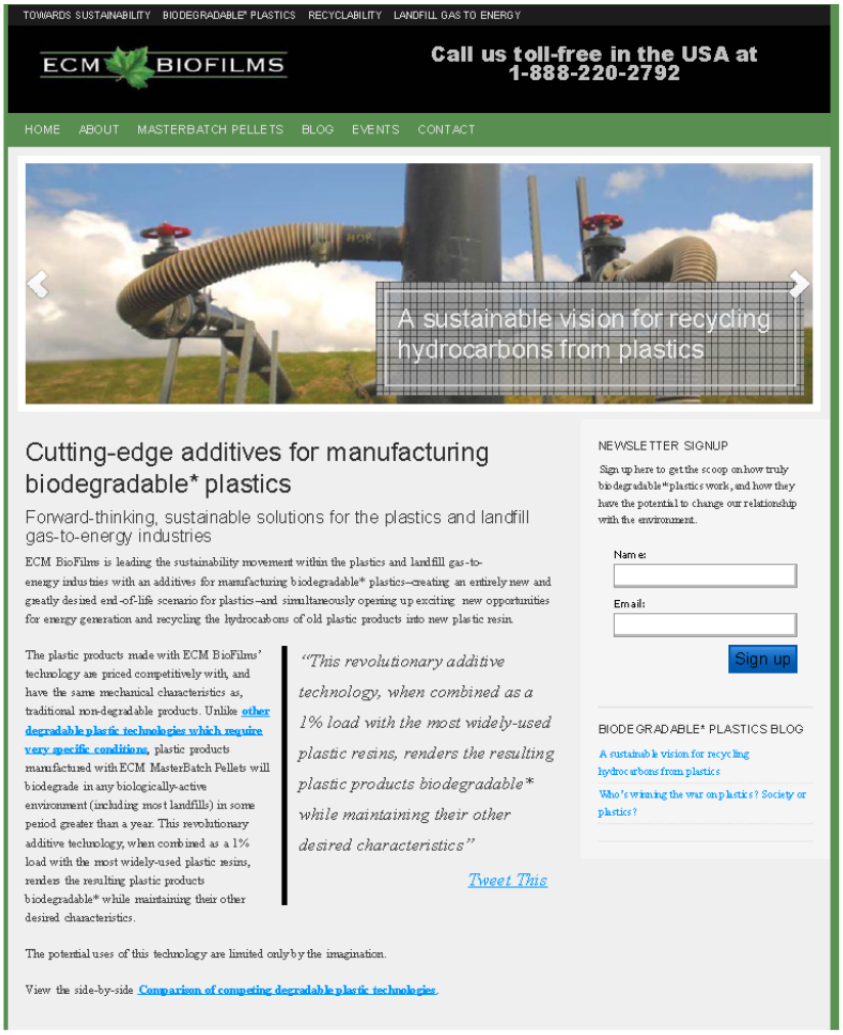

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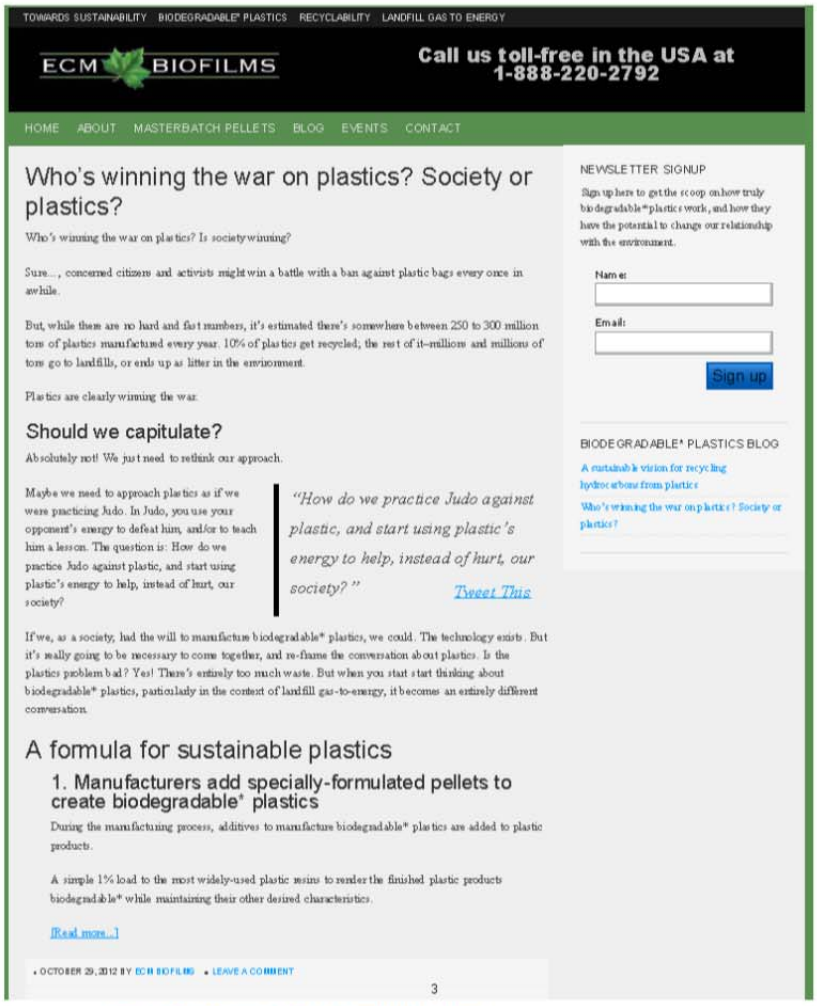

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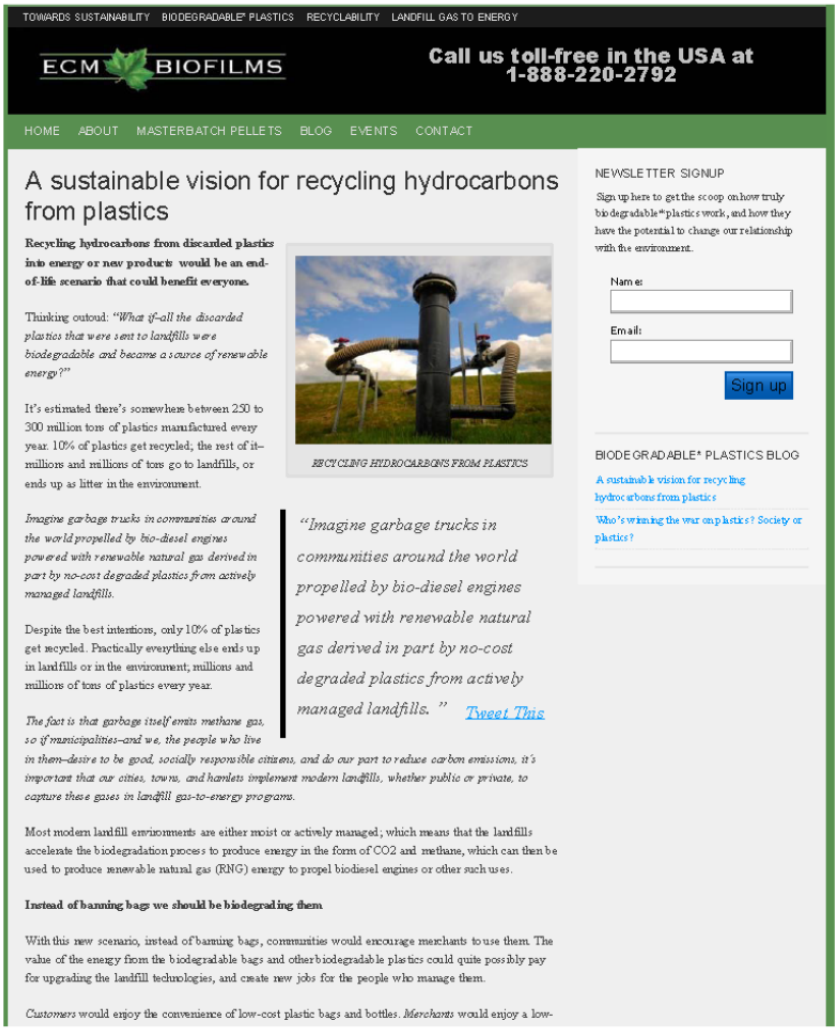

TOWARDS SUSTAINABILITY BIODEGRADABLE* PLASTICS RECYCLABILITY LANDFILL GAS TO ENERGY

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HOME ABOUT MASTERBATCH PELLETS BLOG EVENTS CONTACT

A sustainable vision for recycling hydrocarbons from plastics

Recycling hydrocarbons from discarded plastics into energy or new products would be an end-of-life scenario that could benefit everyone.

Thinking outoud: *"What if–all the discarded plastics that were sent to landfills were biodegradable and became a source of renewable energy?"*

It's estimated there's somewhere between 250 to 300 million tons of plastics manufactured every year. 10% of plastics get recycled; the rest of it– millions and millions of tons go to landfills, or ends up as litter in the environment.

RECYCLING HYDROCARBONS FROM PLASTICS

Imagine garbage trucks in communities around the world propelled by bio-diesel engines powered with renewable natural gas derived in part by no-cost degraded plastics from actively managed landfills.

Despite the best intentions, only 10% of plastics get recycled. Practically everything else ends up in landfills or in the environment; millions and millions of tons of plastics every year.

"Imagine garbage trucks in communities around the world propelled by bio-diesel engines powered with renewable natural gas derived in part by no-cost degraded plastics from actively managed landfills." Tweet This

The fact is that garbage itself emits methane gas, so if municipalities–and we, the people who live in them–desire to be good, socially responsible citizens, and do our part to reduce carbon emissions, it's important that our cities, towns, and hamlets implement modern landfills, whether public or private, to capture these gases in landfill gas-to-energy programs.

Most modern landfill environments are either moist or actively managed; which means that the landfills accelerate the biodegradation process to produce energy in the form of CO2 and methane, which can then be used to produce renewable natural gas (RNG) energy to propel biodiesel engines or other such uses.

Instead of banning bags we should be biodegrading them

With this new scenario, instead of banning bags, communities would encourage merchants to use them. The value of the energy from the biodegradable bags and other biodegradable plastics could quite possibly pay for upgrading the landfill technologies, and create new jobs for the people who manage them.

Customers would enjoy the convenience of low-cost plastic bags and bottles. *Merchants* would enjoy a low-

NEWSLETTER SIGNUP

Sign up here to get the scoop on how truly biodegradable* plastics work, and how they have the potential to change our relationship with the environment.

Name:

Email:

Sign up

BIODEGRADABLE* PLASTICS BLOG

A sustainable vision for recycling hydrocarbons from plastics

Who's winning the war on plastics? Society or plastics?

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EXHIBIT 1B

cost service that is eco-friendly and sustainable. *The plastics industry* would continue to operate with a minimally disruptive technology and *municipalities* would expand a free source of renewable energy.

Why the world needs

Biodegradable* Plastics

Turn off your mind for a moment, and just

Imagine

Garbage trucks in communities around the world propelled by **bio-diesel engines** powered with **renewable natural gas** derived in part by **no-cost degraded* plastics** from **actively managed landfills**. If this were the case...

"Instead of banning bags and bottles, we would <u>biodegrade</u>* them!"

...the C02 and methane gases could be recycled or upcycled into new products.

300 to 350 million tons of plastics produced annually.

10% gets recycled.

That's 225 to 270 millions of tons of plastics that could be converted into energy in landfills, or....

The other 90% goes to landfills. where it could biodegrade*.

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Recycle, biodegrade*, and energy capture with truly biodegradable plastics and landfill gas-to-energy

#1 Win-win-win-win (1) *Customers* would enjoy the convenience of low-cost truly biodegradable plastics (2) *Merchants* and manfucturers benefit by offering a low-cost service that is eco-friendly and sustainable (3) *The Plastics Industry* would continue to operate with a minimally disruptive technology, and (4) *Municipalities* would expand **a free source of renewable energy.**

"Waste is Food"

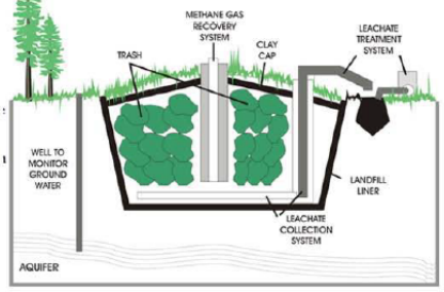
When it comes to truly biodegradable* plastics, it is not either/or. Biodegradable* plastics are both a technical nutrient and a biological nutrient that can be made useful or harmless under any scenario; whether recycled, landfilled, or litter.

End-of-life scenarios of types of Biodegradable* plastics in the context of "Cradle to Cradle"

Nutrient cycle	ECM MasterBatch™	Oxo-Degrader	‡Bioplastics+
If recycled => technical nutrient	✓	✗	✗
If landfill => bionutrient	✓	✗	✗
If litter => bionutrient	✓	✗	✗

‡ EPI Environmental Products Inc., Symphony Environmental, Inc., etc.
+ PLA, Mater-Bi®, PHB and combinations (NatureWorks LLC., Novamont S.p.A., et al.)

RENEWABLE ENERGY
MODERN LANDFILL



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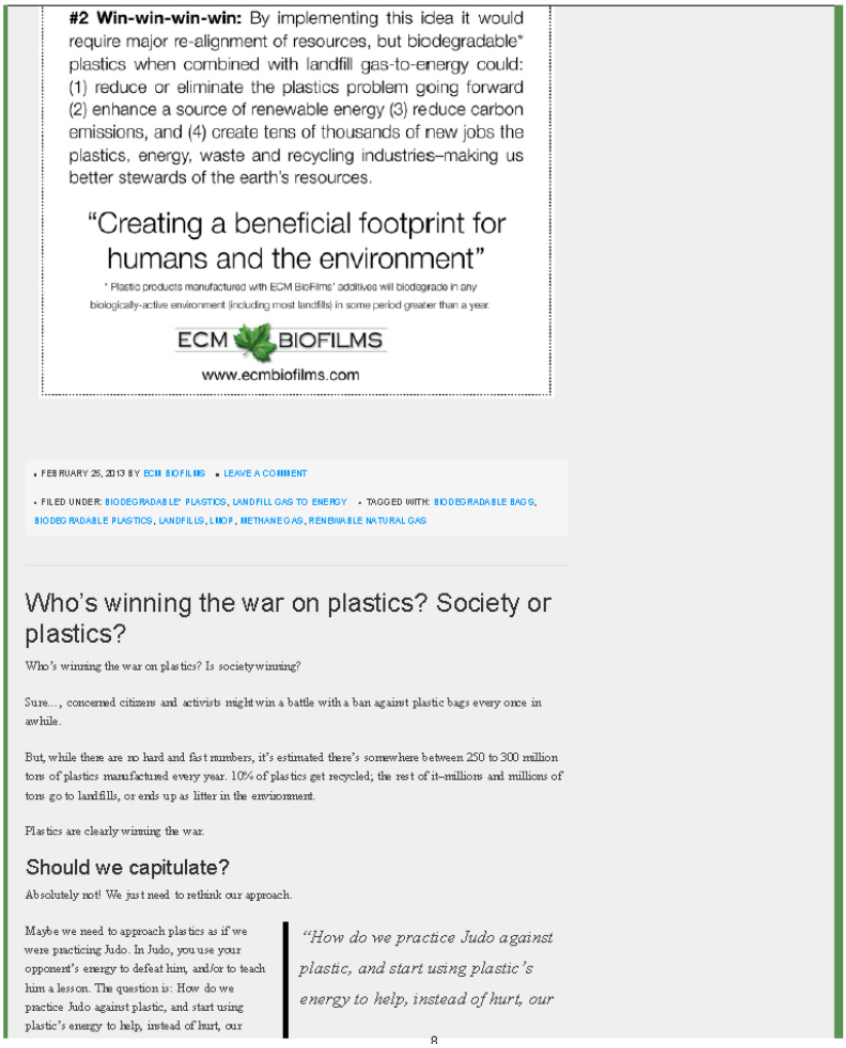

#2 Win-win-win-win: By implementing this idea it would require major re-alignment of resources, but biodegradable* plastics when combined with landfill gas-to-energy could: (1) reduce or eliminate the plastics problem going forward (2) enhance a source of renewable energy (3) reduce carbon emissions, and (4) create tens of thousands of new jobs the plastics, energy, waste and recycling industries–making us better stewards of the earth's resources.

"Creating a beneficial footprint for humans and the environment"

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

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• FEBRUARY 25, 2013 BY ECM BIOFILMS • LEAVE A COMMENT

• FILED UNDER: BIODEGRADABLE* PLASTICS, LANDFILL GAS TO ENERGY • TAGGED WITH: BIODEGRADABLE BAGS, BIODEGRADABLE PLASTICS, LANDFILLS, LMOP, METHANE GAS, RENEWABLE NATURAL GAS

Who's winning the war on plastics? Society or plastics?

Who's winning the war on plastics? Is society winning?

Sure..., concerned citizens and activists might win a battle with a ban against plastic bags every once in awhile.

But, while there are no hard and fast numbers, it's estimated there's somewhere between 250 to 300 million tons of plastics manufactured every year. 10% of plastics get recycled; the rest of it–millions and millions of tons go to landfills, or ends up as litter in the environment.

Plastics are clearly winning the war.

Should we capitulate?

Absolutely not! We just need to rethink our approach.

Maybe we need to approach plastics as if we were practicing Judo. In Judo, you use your opponent's energy to defeat him, and/or to teach him a lesson. The question is: How do we practice Judo against plastic, and start using plastic's energy to help, instead of hurt, our

> *"How do we practice Judo against plastic, and start using plastic's energy to help, instead of hurt, our*

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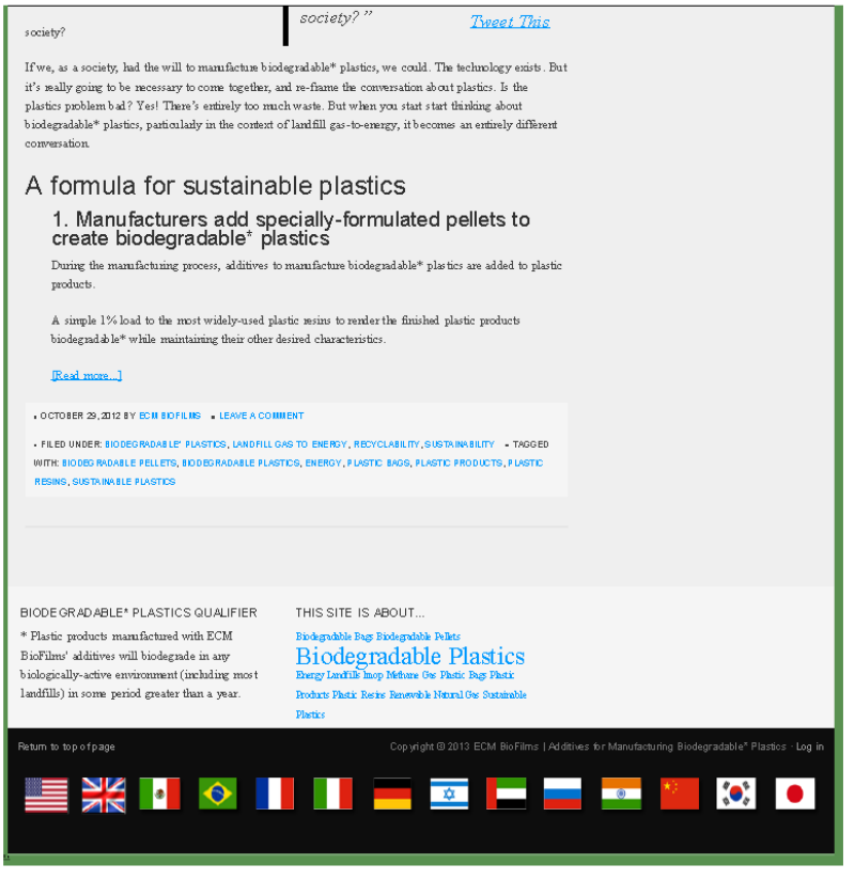

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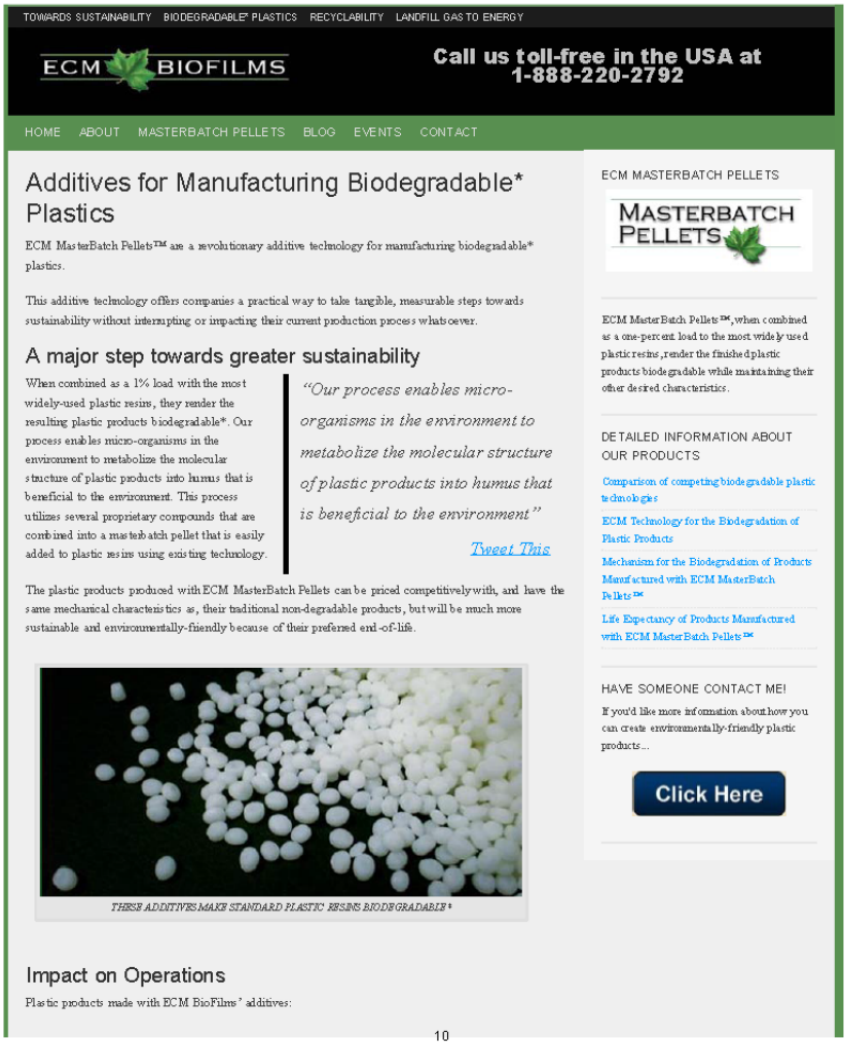

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Additives for Manufacturing Biodegradable* Plastics

ECM MasterBatch Pellets™ are a revolutionary additive technology for manufacturing biodegradable* plastics.

This additive technology offers companies a practical way to take tangible, measurable steps towards sustainability without interrupting or impacting their current production process whatsoever.

A major step towards greater sustainability

When combined as a 1% load with the most widely-used plastic resins, they render the resulting plastic products biodegradable*. Our process enables micro-organisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment. This process utilizes several proprietary compounds that are combined into a masterbatch pellet that is easily added to plastic resins using existing technology.

"Our process enables micro-organisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment"

Tweet This

The plastic products produced with ECM MasterBatch Pellets can be priced competitively with, and have the same mechanical characteristics as, their traditional non-degradable products, but will be much more sustainable and environmentally-friendly because of their preferred end-of-life.

THESE ADDITIVES MAKE STANDARD PLASTIC RESINS BIODEGRADABLE*

Impact on Operations

Plastic products made with ECM BioFilms' additives:

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ECM MASTERBATCH PELLETS

MASTERBATCH PELLETS

ECM MasterBatch Pellets™, when combined as a one-percent load to the most widely-used plastic resins, render the finished plastic products biodegradable while maintaining their other desired characteristics.

DETAILED INFORMATION ABOUT OUR PRODUCTS

Comparison of competing biodegradable plastic technologies

ECM Technology for the Biodegradation of Plastic Products

Mechanism for the Biodegradation of Products Manufactured with ECM MasterBatch Pellets™

Life Expectancy of Products Manufactured with ECM MasterBatch Pellets™

HAVE SOMEONE CONTACT ME!

If you'd like more information about how you can create environmentally-friendly plastic products...

Click Here

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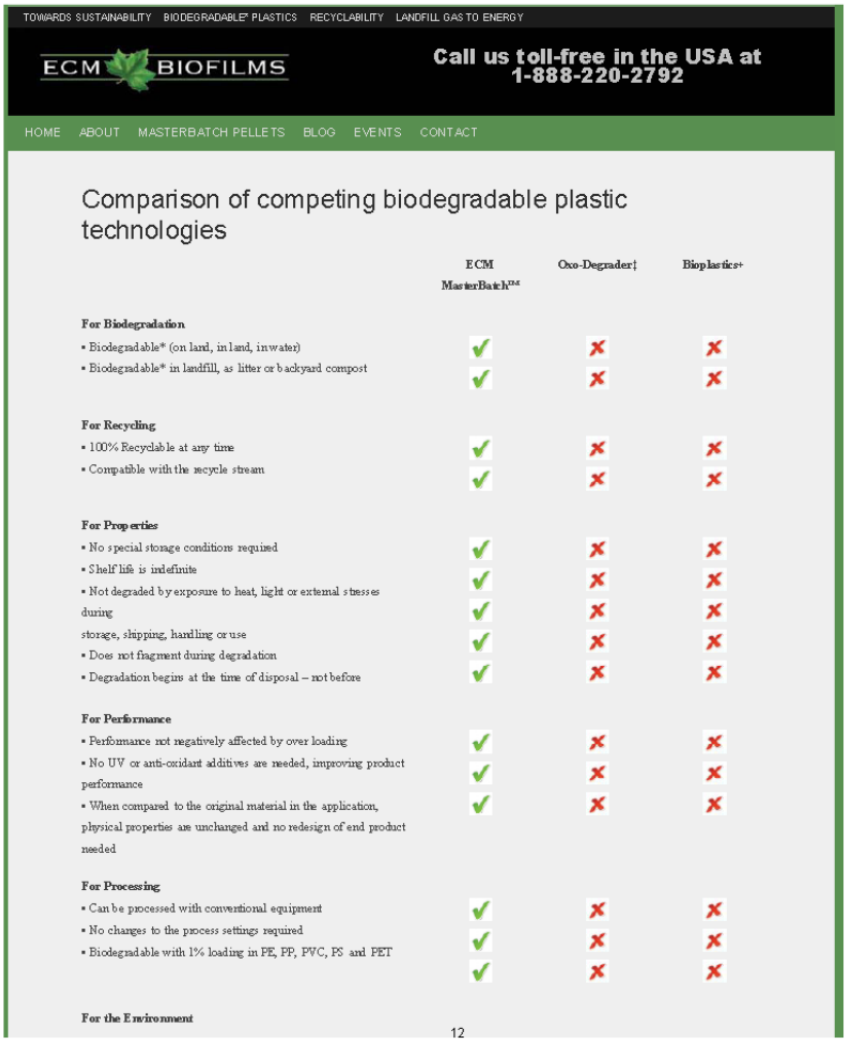

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HOME ABOUT MASTERBATCH PELLETS BLOG EVENTS CONTACT

Comparison of competing biodegradable plastic technologies

	ECM MasterBatch℠	Oxo-Degrader‡	Bioplastics+
For Biodegradation			
• Biodegradable* (on land, in land, in water)	✓	✗	✗
• Biodegradable* in landfill, as litter or backyard compost	✓	✗	✗
For Recycling			
• 100% Recyclable at any time	✓	✗	✗
• Compatible with the recycle stream	✓	✗	✗
For Properties			
• No special storage conditions required	✓	✗	✗
• Shelf life is indefinite	✓	✗	✗
• Not degraded by exposure to heat, light or external stresses during storage, shipping, handling or use	✓	✗	✗
• Does not fragment during degradation	✓	✗	✗
• Degradation begins at the time of disposal – not before	✓	✗	✗
For Performance			
• Performance not negatively affected by over loading	✓	✗	✗
• No UV or anti-oxidant additives are needed, improving product performance	✓	✗	✗
• When compared to the original material in the application, physical properties are unchanged and no redesign of end product needed	✓	✗	✗
For Processing			
• Can be processed with conventional equipment	✓	✗	✗
• No changes to the process settings required	✓	✗	✗
• Biodegradable with 1% loading in PE, PP, PVC, PS and PET	✓	✗	✗
For the Environment			

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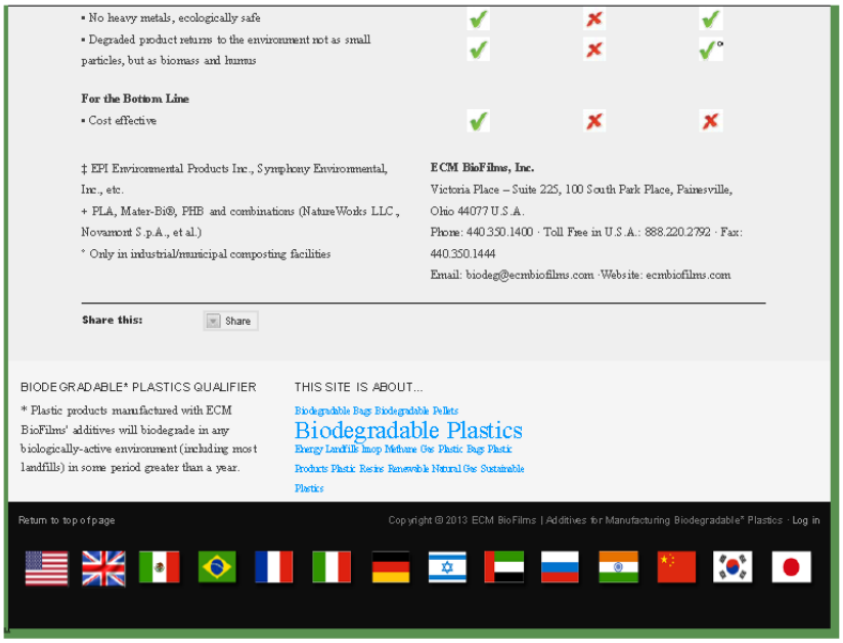

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HOME ABOUT MASTERBATCH PELLETS BLOG EVENTS CONTACT

ECM Technology for the Biodegradation of Plastic Products

The technology is an additive which, when combined in small quantities with any of the popular plastic resins, renders the end products biodegradable* while maintaining their other desired characteristics. It is sold as ECM MasterBatch Pellets and our Company has developed the technology to the point where most plastic products manufacturers can use the additive without having to modify their existing methods of production any more than if they were changing the product's color. The resulting plastic products exhibit the same desired mechanical properties, have effectively similar shelf-lives, and yet, when disposed of, are able to be metabolized into biomass by the communities of microorganisms commonly found almost everywhere on this planet.This biodegradation process can take place aerobically and anaerobically. It can take place with or without the presence of light. These factors allow for biodegradation even in landfill conditions which are normally inconducive to any degradation of other technologies. Our technology differs significantly from other "degradable plastics" emerging in the market today because it does not attempt to replace the currently popular plastic resin formulizations but instead enhances them by rendering them biodegradable* Recognizing the environmental concerns related to plastics and the market potential, the corporate and scientific communities have long sought to develop degradable plastics. However, the Company believes that degradable plastics introduced to date possess several weaknesses that have prevented wide-spread acceptance in the marketplace. Photo-degradable products, for example, do not degrade in landfills due to the lack of sunlight (they are typically covered with another layer of trash before the degradation can occur). At the same time these photo-degradable products present difficult circumstances for storage before use due to their reactivity to light. Similarly, plastic products manufactured with PLA and such "renewable" replacement resins fail to biodegrade as litter or in a landfill, are very expensive to manufacture, and often do not achieve the requisite physical properties.ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment. Our process utilizes several proprietary compounds that are combined into a masterbatch pellet that is easily added to plastic resins using existing technology.

ECM engaged several renowned testing laboratories to independently establish the biodegradability of plastic products made with ECM's additives. The tests concluded that the products were biodegradable* under both aerobic and anaerobic conditions. In addition, the tests concluded that their biodegradation did not produce any toxic residue harmful to living organisms in land or water.

Technology Explanation

The plastic products made with our additives will break down in more than one year but less than a hundred plus years in nearly all landfills or wherever else they may end up. All sorts of factors determine the amount of microbes available in the soil and the soil conditions determine the rate of degradation. The plastic products made with ECM technology basically rely on the microbes in the soil to react with the additives and form communities, biofilms, which create the enzymes and acids that can attack the longchain hydrocarbon molecules and break them down to the point that the microbes' natural acids and enzymes are then effective and the microbes can metabolize the simple hydrocarbons with CO2 and water or methane being the waste products. This process continues until all the plastic product is fully biodegraded.

Material treated with ECM has been tested and proved as biodegradable* and safe for the environment by using the following:

- ASTM D5209 "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge",
- ISO 14855 / ASTM D5338 "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions", and
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Where will it biodegrade*?

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- Litter

Where won't it degrade?

- Warehouses
- Store shelves
- Offices & Home

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BIODEGRADABLE* PLASTICS QUALIFIER

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

THIS SITE IS ABOUT...

Biodegradable Bags Biodegradable Pellets

Biodegradable Plastics

Energy Landfill Snop Methane Ow Plastic Bags Plastic Products Plastic Resins Renewable Natural Ow Sustainable Plastics

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Mechanism for the Biodegradation of Products Manufactured with ECM MasterBatch Pellets™

We have determined, through years of testing both internally and through independent laboratories, that plastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets will biodegrade once they are placed in conditions wherein they are in constant contact with other biodegrading materials. Originally it was not known precisely what the threshold amount of our material was necessary to initiate and sustain the process. Much of the early testing was done with plastics manufactured with five percent (5%) or higher loads of the additives but it has been determined that all that is required is a minimum of a one percent (1%) load. This amount will initiate the process and any significant amount less than this amount will not permit the process to begin or be sustained.People often wonder whether significantly greater quantities of our additive will reduce the biodegradation times. The answer is yes, but so very marginally that it is rarely worth the potential issues concerning other physical properties in the finished plastic products and cost. To explain this more fully, it will be helpful to understand the basics of the mechanism.The presence of at least one percent of our additives in a plastic product, which is in contact with other biodegrading organic materials, structures communities of such organisms as are then present on the surfaces of the plastic in such a way that their interaction produces the ability to break down the long hydrocarbon chains of the "non-biodegradable" petrochemical plastics. As most people are aware, an example of a biofilm would be the scum that can form on the surface of a pond or on teeth, for that matter. In the cases of most pond biofilms, the surface layers with chlorophyllic, aerobic organisms can support layers of anaerobic organisms in the deeper layers and the interaction of all of the organisms makes for an ecosystem that in some cases produce byproducts that would not be formed without the interaction. The same can be said of the biofilms formed by the interaction of our additive materials and the naturally existing biota. Importantly, this structuring of communities of microorganism proceeds in anaerobic as well as aerobic conditions.

This leads us back to the reason why greater quantities of our additives do not significantly speed up the time for biodegradation. If you have four otherwise identical 100 kilograms of PE products, one with no ECM (100% PE), one with a half a percent of ECM (99.5% PE), one with one percent ECM (99% PE) and one with seven percent ECM (93% PE) disposed of under the same conditions you will see why this is.The one with no ECM does not form the necessary biofilm and thereby 100-kg of PE sits in the ground in that form for hundreds or thousands of years or more. The one with a half a percent of ECM does not form the biofilm with sufficient sustainability to initiate and continue the biodegradation process so only the very surface amounts of the ECM biodegrades and you will have remaining all of the 99.5-kg of PE and most of the 0.5-kg of ECM for hundreds or thousands of years in that form. The product that has the one percent of ECM will form and sustain the biofilm that will continue to break apart the long chains of the 99-kg of PE until the entire quantity of PE is biodegraded. The sample that has 7 percent ECM will do the same thing; the only difference is that there will be only 93-kg of the difficult-to-biodegrade PE to degrade rather than 99-kg. The difference in biodegradation time is not terribly dramatic but it is less.As a method of concluding, I think that it may be helpful to illustrate how the mechanism employed by this unique biodegradation technology is an important reason as to why the technology will continue the path it is on to become one of the world's leading technologies for the production of plastic products.The fact that the mechanism is not based on photodegradation or thermal degradation means that the shelf life and usable life of the plastic products will be the same as they were without the ECM additives. The fact that there is a threshold quantity necessary for the initiation and sustainability of the biofilms responsible for the biodegradation means that the plastics with the ECM additive do not have to be segregated out of the plastics that might be recycled into plastic products that are not meant to biodegrade. And finally, the fact that the threshold quantity is so low (one percent by weight) means that the

1 2

Once there are the structured communities of microorganisms interacting to produce scissions in the long hydrocarbon chains of the polymers the process continues until all the hydrocarbons are eventually transformed into the carbon dioxide and water (aerobic biodegradation) or carbon dioxide, methane and water (anaerobic biodegradation).

manufacturer is able to immediately make plastic products with all the same other properties they had when they were not biodegradable and at nearly the same cost.

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BIODEGRADABLE* PLASTICS QUALIFIER

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

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Biodegradable Plastics

Energy Landfill Bags Methane Gas Plastic Bags Plastic Products Plastic Resins Renewable Natural Gas Sustainable Plastics

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EXHIBIT 1B

TOWARDS SUSTAINABILITY BIODEGRADABLE* PLASTICS RECYCLABILITY LANDFILL GAS TO ENERGY

ECM BIOFILMS

Call us toll-free in the USA at 1-888-220-2792

HOME ABOUT MASTERBATCH PELLETS BLOG EVENTS CONTACT

Life Expectancy of Products Manufactured with ECM MasterBatch Pellets™

The life expectancy of plastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets can be explained through two types of life expectancies. The first type of life expectancy is the life expectancy of the plastic when it is on the warehouse or store shelf, in regular usage as packaging or other normal plastic usage. The second type of life expectancy has to do with the situation when the same plastic has been put in conditions wherein it has constant contact with other materials that are biodegrading.

Plastic products manufactured with ECM MasterBatch Pellets will have the same life expectancy as the same plastic product manufactured without our additives under all but the conditions mentioned above wherein they are placed in constant contact with other materials that are biodegrading (i.e. on or buried in the ground). This is a major reason why our technology for having biodegradable* plastic products is so successful.

The principles concerned with the degradation* of plastics that make use of our additive technology are truly involved with "bio"-degradation*. Our technology does not rely on the use of photosensitivity or thermal sensitivity to photodegrade or thermally break down the plastics. For this reason, a blow-molded HDPE shampoo bottle or motor oil bottle manufactured with one of our additives will last in the warehouse and on the store shelf as long as it would without our additives. There is a considerable amount of interest in our additives for the plastics for the automotive and aviation industries for this reason.

There is the real concern for the technologies that make use of thermal or photodegradation that they are simply leaving smaller particles of plastic in the soil rather than having the material truly become the organic components of soil. This is especially of concern in the agricultural industry and for those needing erosion control products. Agricultural films, erosion control nettings, and other such products manufactured with our additives will last long enough to get the required use but will completely biodegrade into the soil; such plastic products completely biodegrade in a period of from 9 months to 5 years or less. It is not a "poof, it's gone" system but simply makes the plastic product biodegrade as if it were a stick or a branch off a tree rather than "sticking around" independent laboratories by independent scientists. We have had the various test data analyzed by independent scientists and their conclusions and some of the data have been sent to you in the presentation package and are what we base our certification on.

The basic concept is that biodegradation is a natural process that occurs around the world but at various speeds due to various conditions. Plastics with our additives behave like sticks, branches or trunks of trees. Due to this fact, we do not guarantee any particular time because the time depends on the same factors that the biodegradation of woods and most other organic materials on earth depend – ambient biota and other environmental conditions – but the time frame of between nine months to five years will give a good general idea for most conditions. Under specific composting conditions with additional accelerants sprayed on them, some customers have reported biodegradation in as little as a couple of months. Under the more usual, commercial composting conditions using high heat processes, a time frame of around one year is a reasonable expectation.

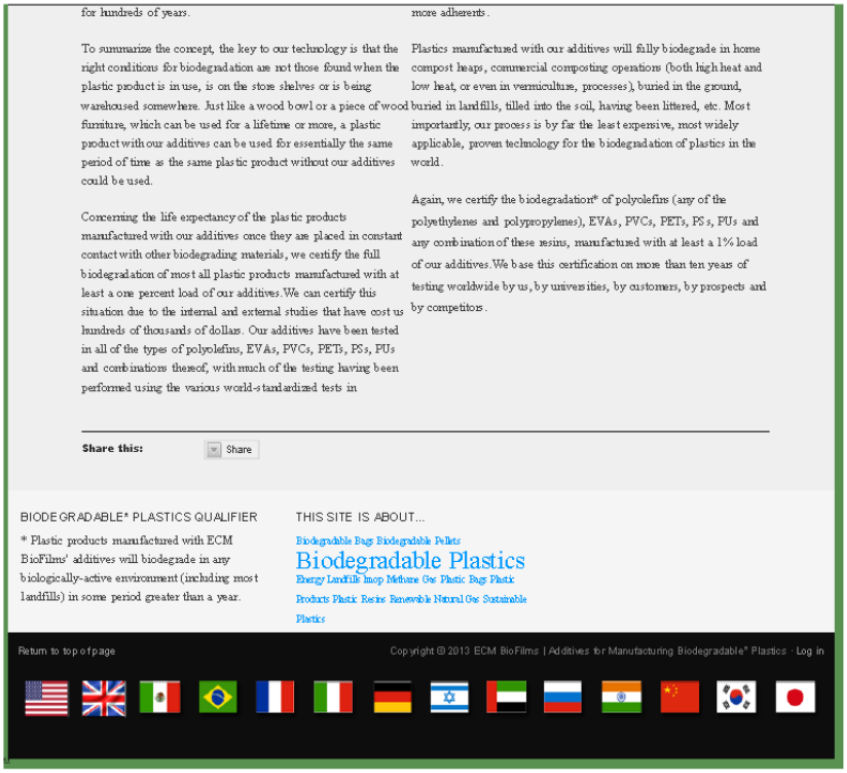
Petrochemical plastics would normally take hundreds or thousands of years or even longer to "biodegrade"; with our additives, these same plastic formulas biodegrade in a hundredth of that time or less.

Do not be confused by the claims of some companies that say that their resins fully biodegrade in 2 months or 3 months. They are speaking of biodegradation under very specific conditions. This has lead to some confusion when the plastic products are in the end-consumers' hands, such as in the Kassel project in Germany when the bags and other plastic products marked with a "compostable" label were found not to be compostable by the town's citizens in their backyard compost heaps (they were only "compostable" under the very specific commercial composting standards where there is high heat, oxygenation, moisture control and high levels of microorganisms). When I spoke at the Biodegradable Plastics Conference in Frankfurt, Germany a few years ago, I argued with the companies involved in that project that they should be careful in not trying to confiscate generic terms for too specific conditions (i.e. they should label items as "Commercially Compostable" rather than simply "Compostable" when such conditions are required). As the use of our technology continues to grow to become the world's leading technology for the production of biodegradable* plastics, our viewpoint will continue to gain more and

18

Complaint

EXHIBIT 1B



for hundreds of years.

To summarize the concept, the key to our technology is that the right conditions for biodegradation are not those found when the plastic product is in use, is on the store shelves or is being warehoused somewhere. Just like a wood bowl or a piece of wood furniture, which can be used for a lifetime or more, a plastic product with our additives can be used for essentially the same period of time as the same plastic product without our additives could be used.

Concerning the life expectancy of the plastic products manufactured with our additives once they are placed in constant contact with other biodegrading materials, we certify the full biodegradation of most all plastic products manufactured with at least a one percent load of our additives. We can certify this situation due to the internal and external studies that have cost us hundreds of thousands of dollars. Our additives have been tested in all of the types of polyolefins, EVAs, PVCs, PETs, PSs, PUs and combinations thereof, with much of the testing having been performed using the various world-standardized tests in

more adherents.

Plastics manufactured with our additives will fully biodegrade in home compost heaps, commercial composting operations (both high heat and low heat, or even in vermiculture, processes), buried in the ground, buried in landfills, tilled into the soil, having been littered, etc. Most importantly, our process is by far the least expensive, most widely applicable, proven technology for the biodegradation of plastics in the world.

Again, we certify the biodegradation* of polyolefins (any of the polyethylenes and polypropylenes), EVAs, PVCs, PETs, PSs, PUs and any combination of these resins, manufactured with at least a 1% load of our additives. We base this certification on more than ten years of testing worldwide by us, by universities, by customers, by prospects and by competitors.

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BIODEGRADABLE* PLASTICS QUALIFIER

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

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Biodegradable Plastics

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EXHIBIT 2

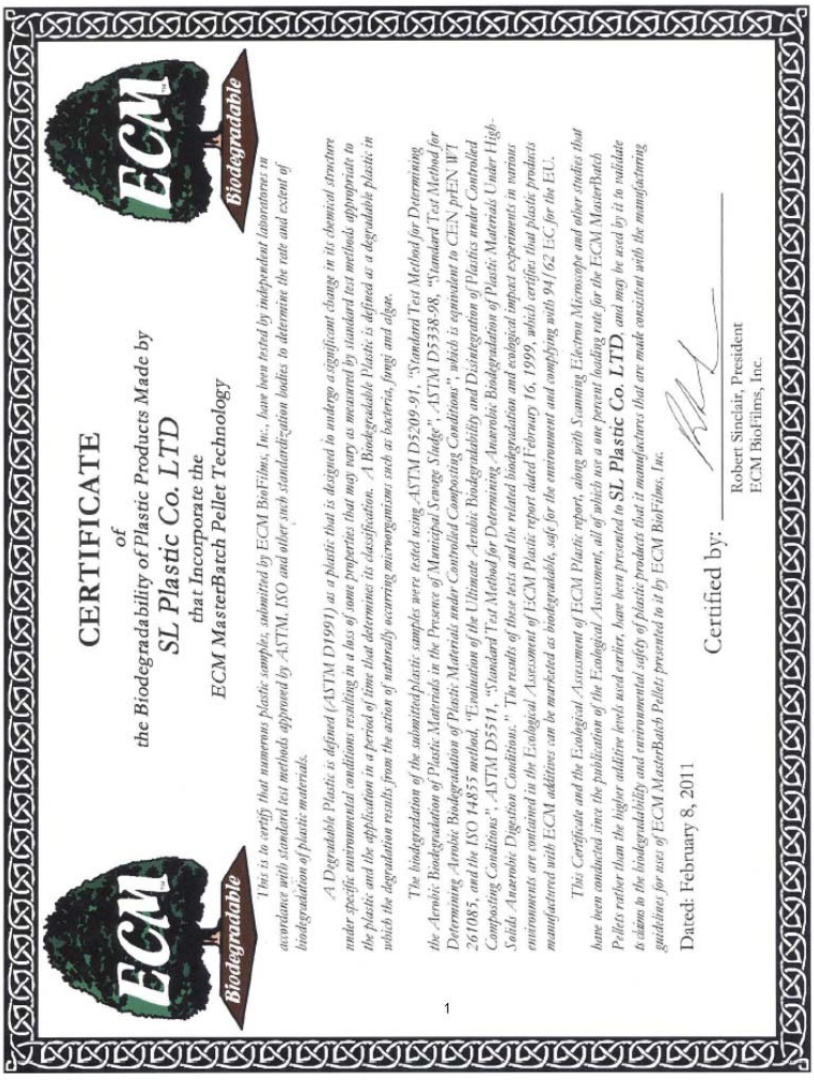
[Redacted from the Public Record but Incorporated by Reference]

EXHIBIT 3

[Redacted from the Public Record but Incorporated by Reference]

Complaint

EXHIBIT 4



CERTIFICATE

of

the Biodegradability of Plastic Products Made by

SL Plastic Co. LTD

that Incorporate the

ECM MasterBatch Pellet Technology

This is to certify that numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic materials.

A Degradable Plastic is defined (ASTM D1991) as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.

The biodegradation of the submitted plastic samples were tested using ASTM D5209-91, "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge", ASTM D5338-98, "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions", which is equivalent to CEN prEN WT 26108S, and the ISO 14855 method, "Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions", ASTM D5511, "Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions." The results of these tests and the related biodegradation and ecological impact experiments in various environments are contained in the Ecological Assessment of ECM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable, safe for the environment and complying with 94/62 EC for the EU.

This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been conducted since the publication of the Ecological Assessment, all of which use a one percent loading rate for the ECM MasterBatch Pellets rather than the higher additive levels used earlier, have been presented to **SL Plastic Co. LTD** and may be used by it to validate its claims to the biodegradability and environmental safety of plastic products that it manufactures that are made consistent with the manufacturing guidelines for uses of ECM MasterBatch Pellets presented to it by ECM BioFilms, Inc.

Dated: February 8, 2011

Certified by: _____

Robert Sinclair, President
ECM BioFilms, Inc.

1

Complaint

IN THE MATTER OF

TXVT LIMITED PARTNERSHIP, D/B/A TROPHY NISSAN

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, REGULATION M OF THE CONSUMER LEASING ACT, AND REGULATION Z OF THE TRUTH IN LENDING ACT

Docket No. C-4508; File No. 142 3117
Complaint, February 12, 2015 – Decision, February 12, 2015

This consent order concerns TXVT Limited Partnership's ("Trophy") advertising of the purchase, financing, and leasing of its motor vehicles. The respondent is a motor vehicle dealer. According to the complaint, Trophy advertised that when a consumer trades in a used vehicle in order to purchase a new vehicle and pays $1.00, Trophy will pay off the balance of any loan or lease agreement on the trade-in vehicle and the consumer will have no remaining obligation for any amount of that loan or lease. Instead, Trophy included the negative equity from the trade-in vehicle within the total loan amount for the newly purchased vehicle. The complaint alleges that Trophy's representation is false or misleading in violation of Section 5 of the FTC Act. The order prohibits Trophy from misrepresenting in any advertisement the material terms of any promotion or other incentive, including that it will pay off a consumer's trade-in or the cost of leasing or purchasing a vehicle. Trophy is also prohibited from failing to clearly and conspicuously disclose material terms of its promotions or other incentives and must comply with the Consumer Leasing Act and Regulation M and the Truth in Lending Act and Regulation Z.

Participants

For the *Commission: Ambar Chavez* and *Luis Gallegos.*

For the *Respondent: Deanya K. Cocanougher, Cantey Hanger LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that TXVT Limited Partnership, a Texas Limited Partnership, doing business as Trophy Nissan ("Respondent") has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA") and its implementing Regulation M, and the Truth in Lending Act ("TILA") and its implementing Regulation

Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Texas Limited Partnership with its principal place of business at 5031 North Galloway Avenue, Mesquite, Texas 75150. Respondent offers automobiles for sale or lease to consumers.

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 February 2014, Respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

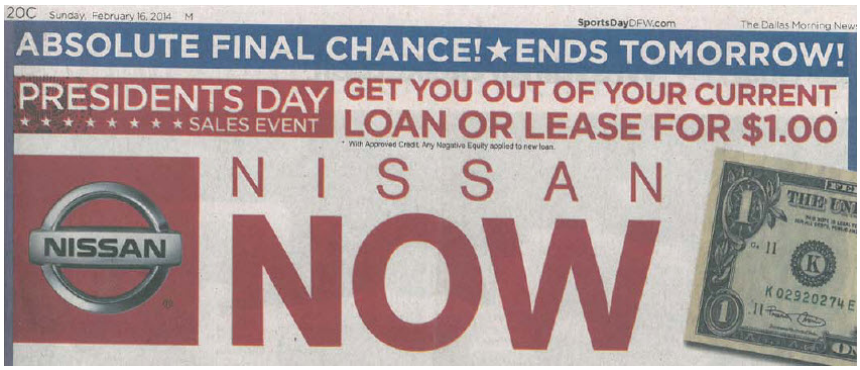
6. Such advertisements have been placed in local Dallas newspapers, including The Dallas Morning News and the Spanish-language newspaper Al Dia; on local television networks; on Respondent's website, www.trophynissan.com, and on social media websites, including Facebook and Twitter.

"NISSAN NOW" SALES EVENT

7. Respondent ran an advertising campaign entitled the "Nissan Now" sales event. This campaign included advertisements in Dallas Morning News, attached as Exhibit A; video commercials placed on local television stations and on

Respondent's website, attached as Exhibit B, with screen captures attached as Exhibit C; and advertisements placed on Respondent's Facebook and Twitter pages, attached as Exhibit D. The advertisements all contained similar statements and depictions.

8. For example, the following statement and depiction appeared in the advertisement in The Dallas Morning News:



The prominent offer to "GET YOU OUT OF YOUR LOAN OR LEASE FOR $1.00" was followed by small, fine print that stated "With Approved Credit. Any Negative Equity applied to the new loan." (Exhibit A).

9. A similar offer was made in a video commercial for Respondent. In the video, a narrator stood between two vehicles waving a $1.00 bill and stated:

> "Stuck with a high car payment? Owe more on your vehicle than it's worth? Trophy Nissan can set you free for a buck! During our Nissan Now event, you can get out of your current loan or lease for just $1.00."

While the above statement was made, small text that was difficult to distinguish from the background was displayed on the screen for approximately two seconds. The text stated the following:

> "With Approved Credit. Any Negative Equity applied to new loan. Offer ends [unreadable] See dealer for details." (Exhibits B-C).

10. On Respondent's Facebook and Twitter social media sites, Respondent claimed:

> "$1 GETS YOU OUT OF YOUR CURRENT LOAN OR LEASE!"

This ad did not contain any other text describing the sales offer. (Exhibit D).

11. Contrary to the claims made in the advertisements, consumers who had outstanding loan balances on trade-in vehicles could not get out of their loan for $1.00. In addition to $1.00, they would have to pay the amount of the outstanding loan balance. Further, consumers with leases could not get of their leases for $1.00. In addition to $1.00, they would have to pay other amounts, such as lease termination fees.

12. Respondent's Nissan Now advertisement attached as Exhibit A also promoted automobiles for lease or sale.

The prominent offers of "$18,888 or $179 Per Month Lease" were followed by small, fine print that stated:

> With approved credit. Lease for 39 mo. $3,779 down. $0 Security deposit, based on 12k miles per year. An extra charge may be imposed at end of lease. Residual 48%.
>
> With approved credit. Lease for 39 mo. $3,059 down. $0 Security deposit, based on 12k miles per year. An extra charge may be imposed at end of lease. Residual 48%.

Thus, despite the prominent claim that consumers could lease a car for only $179 a month, the total amount due at lease signing was unclear because any costs and fees in addition to the down payment required at lease signing were not disclosed.

13. Respondent's advertisement attached as Exhibit A also promoted the availability of closed-end credit for motor vehicle transactions.

The prominent offer of "$19 DOWN DELIVERS" was followed by small, fine print at the bottom of the advertisement that stated:

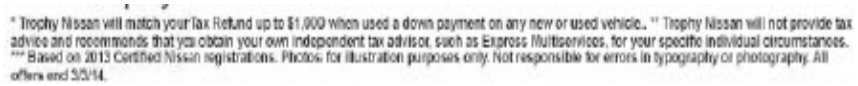
> Not Responsible For Errors In Photography Or Typography. † Based on 2013 Certified Nissan Registrations. 1) $19 cash down with approved above average credit, See Dealer for Details. Example: $19 down, for 60 months at 6.9% APR financing. Based on STK#AC125197 All Prices plus tax, title, license and $150 doc fee. All Leases with Approved Above Average Credit Must Finance Thru Nissan Motor Acceptance Corporation.All vehicles subject to prior sale. All offers end of business 2/18/14.

Thus, only in fine print did the Respondent include the financing term, APR, and other required terms.

"MAX YOUR TAX" SALES EVENT

14. Respondent ran an advertising campaign entitled the "Max Your Tax" sales event. One of the "Max Your Tax" advertisements that was placed on Respondent's website, www.trophynissan.com, attached as Exhibit E, contained the following statement:

A statement was included at the bottom of the advertisement, in small, fine print that said Respondent would only match tax refunds up to $1,000 and would not provide tax advice:


* Trophy Nissan will match your Tax Refund up to $1,000 when used a down payment on any new or used vehicle.. ** Trophy Nissan will not provide tax advice and recommends that you obtain your own independent tax advisor, such as Express Multiservices, for your specific individual circumstances. *** Based on 2013 Certified Nissan registrations. Photos for illustration purposes only. Not responsible for errors in typography or photography. All offers end 3/3/14.

15. Respondent's advertisement attached as Exhibit E also promoted the availability of closed-end credit for motor vehicle transactions.

The prominent offer of "$19 DOWN DELIVERS OR PAY JUST $269 PER MONTH" was followed by small, fine print that stated:

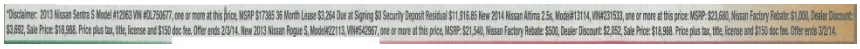
> 1) $19 cash down with approved above average credit. See Dealer for Details. Example: $19 down, for 60 months at 6.9% APR financing. Based on STK#CL940924. Offer ends 3/3/14. 2) 2013 Nissan Altima, STX#DN551599, payments of $269/mo for 72 months, 10% down, plus tax, title, license, equity and $150 doc fee. With approved credit. Offer ends 3/3/14.

Thus, only in fine print did the Respondent include the financing term, APR, and other required terms.

SPANISH LANGUAGE ADVERTISEMENT

16. Respondent placed an advertisement in the Spanish-language newspaper Al Dia, attached as Exhibit F, that depicted numerous automobiles offered for sale or lease.

The advertisement included a prominent offer to lease a Nissan Sentra S for $100. At the bottom, the advertisement included the following small, fine print in English:


*Disclaimer: 2013 Nissan Sentra S Model #12063 VIN #DL750677, one or more at this price, MSRP $17385 36 Month Lease $3,264 Due at Signing $0 Security Deposit Residual $11,916.85 New 2014 Nissan Altima 2.5s, Model#13114, VIN#231533, one or more at this price: MSRP: $23,680, Nissan Factory Rebate: $1,000, Dealer Discount: $3,692, Sale Price: $18,988. Price plus tax, title, license and $150 doc fee. Offer ends 2/2/14. New 2013 Nissan Rogue S, Model#22113, VIN#542967, one or more at this price, MSRP: $21,540, Nissan Factory Rebate: $500, Dealer Discount: $2,052, Sale Price: $18,988. Price plus tax, title, license and $150 doc fee. Offer ends 3/2/14.

The fine print language reads in English:

> Disclaimer: 2013 Nissan Sentra S Model #12063 VIN #DL750677, one or more at this price, MSRP $17,385 36 Month Lease $3,264 Due at Signing $0 Security Deposit Residual $11,916.85 New 2014 Nissan Altima 2.5s, Model #13114, VIN#231533, one or more at this price, MSRP: $23,680, Nissan Factory Rebate $1,000 Dealer Discount: $3,692, Sales Price $18,568, Price plus tax, title, license and $150 doc fee. New 2013 Nissan Rogue S, Model #22113, VIN#542967, one or more at this price, MSRP $21,540, Nissan Factory Rebate: $500, Dealer Discount $2,052, Sales Price: $18,988, Price plus tax, title, license and $150 doc fee. Offer ends 3/2/14. (Exhibit F).

Thus, despite the prominent claim in Spanish that consumers could lease a car for only $100 a month, a consumer would actually have to pay thousands of dollars up-front to lease the car.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I
MISREPRESENTATION THAT $1.00 GETS YOU OUT OF YOUR CURRENT LOAN OR LEASE

17. In advertisements, including but not necessarily limited to those described in Paragraphs 7 through 11, Respondent represented, expressly or by implication, that consumers could end their current loan or lease with a payment of only $1.00.

18. In truth and in fact, in numerous instances, consumers could not end their current loan or lease for only $1.00. Instead, the balance of any loan or lease obligation after trading in the vehicle was added to the consumer's new loan. Accordingly, Respondent's representation as alleged in Paragraph 17 was, and is, false and misleading.

19. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
FAILURE TO DISCLOSE ADEQUATELY THAT TROPHY WOULD MATCH YOUR INCOME TAX REFUND ONLY UP TO $1,000

20. In advertisements, including but not necessarily limited to those described in Paragraph 14, Respondent represented, expressly or by implication, that Respondent would match consumers' income tax refund for use as a down payment on an automobile. These advertisements did not disclose adequately additional terms pertaining to the offer, such as that Respondent would match only up to $1,000 of consumers' income tax refund. The existence of these additional terms was material to consumers in deciding whether to purchase a vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

21. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III
FAILURE TO DISCLOSE OR DISCLOSE ADEQUATELY IN LEASE ADVERTISING

22. In lease advertisements, including but not necessarily limited to those described in Paragraphs 12 and 16, Respondent represented, expressly or by implication, that consumers could lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

23. These advertisements did not disclose or disclose adequately additional terms pertaining to the lease offer, such as the total amount of any payments due at lease inception. The existence of these additional terms was material to consumers in deciding whether to lease a vehicle. The failure to disclose or disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

24. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

25. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("additional terms") if they state any of the several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

26. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 12 and 16, are subject to the requirements of the CLA and Regulation M.

COUNT IV
FAILURE TO DISCLOSE OR TO DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED LEASE INFORMATION

27. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 12 and 16, included CLA triggering terms, but failed to disclose or to disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

28. Therefore, the practices set forth in Paragraph 27 of this Complaint violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

VIOLATION OF THE TRUTH IN LENDING ACT AND REGULATION Z

29. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

30. Respondent's advertisements promoting closed-end credit, including but not limited to those described in Paragraphs 13 and 15, are subject to the requirements of the TILA and Regulation Z.

COUNT V
FAILURE TO DISCLOSE OR TO DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED CREDIT INFORMATION

31. Respondent's advertisements promoting closed-end credit, including but not limited to, those described in Paragraphs 13 and 15, included TILA triggering terms, but failed to disclose, or to disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment.

b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

32. Therefore, the practices set forth in Paragraph 31 of this Complaint violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this twelfth day of February, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A

Complaint

EXHIBIT B

Video Advertisement Available at
https://www.ftc.gov/system/files/documents/cases/trophy_nissan_exhibit_b_-_nissan_now_commercial.avi

Complaint

EXHIBIT C

Complaint

EXHIBIT D

Complaint

EXHIBIT D

Complaint

EXHIBIT E

Complaint

EXHIBIT F

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Consumer Leasing Act ("CLA"); and

Respondent, Respondent's counsel, and counsel for the Commission having thereafter executed an agreement containing consent order ("consent agreement"), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the consent agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent TXVT Limited Partnership, is a Texas limited partnership, doing business as Trophy Nissan, with its principal place of business at 5031 North Galloway Avenue, Mesquite, Texas 75150.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondent" shall mean TXVT Limited Partnership, doing business as Trophy Nissan, and its successors and assigns.

2. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

3. "Clearly and conspicuously" shall mean as follows:

   a. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

   b. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

   c. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

d. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

e. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

4. "Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

5. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

6. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

7. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

8. "Motor vehicle" or "vehicle" shall mean:

a. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

b. Recreational boats and marine equipment;

c. Motorcycles;

d. Motor homes, recreational vehicle trailers, and slide-in campers; and

e. 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 any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent that Respondent will pay any particular amount of the remaining loan or lease obligation on a used motor vehicle that a consumer trades in ("trade-in vehicle") to purchase, finance, or lease another motor vehicle, including by representing that the Respondent will pay the entire remaining obligation on the trade-in vehicle when the consumer will actually be responsible for paying that amount;

B. Misrepresent the material terms of any promotion or other incentive, and the nature, value, or amount of a promotion or other incentive, including, but not limited to, that Respondent will match a consumer's tax refund for use as the down payment on the purchase of a vehicle;

C. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

D. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication, make any representation about any promotion or other incentive including, but not limited to, that Respondent will match a consumer's tax refund for use as the down payment on the purchase of a vehicle, without disclosing clearly and conspicuously, the terms and limitations of such promotion or other incentive.

III.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

IV.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed;

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

V.

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

A. All advertisements and promotion materials containing the representation;

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.

VI.

IT IS FURTHER ORDERED that Respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having marketing or advertising responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent

shall deliver this order to current personnel with thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after such person assumes such position or responsibilities.

VII.

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 FTC v. TXVT Limited Partnership, d/b/a Trophy Nissan.

VIII.

IT IS FURTHER ORDERED that Respondent, with sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

IX.

This order will terminate on February 12, 2035, 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 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;

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from TXVT Limited Partnership, d/b/a Trophy Nissan. 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 motor vehicle dealer. The matter involves its advertising of the purchase, financing, and leasing of its motor vehicles. According to the FTC complaint, Respondent has advertised that when a consumer trades in a used vehicle in order to purchase a new vehicle and pays $1.00, Respondent will pay off the balance of any loan or lease agreement on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan or lease. The complaint alleges that in fact, when a consumer trades in a used vehicle with negative equity (i.e., the loan or lease balance on the vehicle exceeds the vehicle's value), pays $1.00, and purchases another vehicle, Respondent does not pay off the balance of the loan or lease agreement on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan or lease agreement. Instead, the Respondent includes the negative equity from the trade-in in the loan for the newly purchased vehicle. The complaint alleges therefore that the representation is false or misleading in violation of Section 5 of the FTC Act.

The complaint also alleges that Respondent has advertised that Respondent would match consumers' income tax refund for use as a down payment on an automobile. The complaint alleges that Respondent's advertisement did not disclose adequately additional terms pertaining to the offer, such as that Respondent would match only up to $1,000 of consumers' income tax refund. The complaint alleges therefore that the failure to disclose adequately the additional terms is deceptive in violation of Section 5 of the FTC Act.

Analysis to Aid Public Comment

The complaint further alleges that Respondent advertised that consumers could lease advertised vehicles at terms prominently stated in the advertisements, including, but not necessarily limited to, the monthly payment amount. The complaint alleges that Respondent's advertisements did not disclose or disclose adequately additional terms pertaining to the lease offer, such as the total amount of any payments due at lease inception. The complaint alleges that these additional terms were material to consumers in deciding whether to lease a vehicle. The complaint alleges therefore that the failure to disclose or disclose adequately the additional terms is deceptive in violation of Section 5 of the FTC Act.

In addition, the complaint alleges violations of the Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising leases. Finally, the complaint alleges violations of the Truth in Lending Act ("TILA") and Regulation Z for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit.

The proposed order is designed to prevent the Respondent from engaging in similar deceptive practices in the future. Part I.A of the proposed order prohibits the Respondent from misrepresenting that it will pay any particular amount of the remaining loan or lease obligation on a consumer's trade-in vehicle used to purchase, finance, or lease another motor vehicle, including representing that the Respondent will pay the entire remaining obligation on the trade-in vehicle when the consumer will actually be responsible for paying that amount. Part I.B of the proposed order prohibits Respondent from misrepresenting the material terms of any promotion or other incentive, and the nature, value, or amount of a promotion or other incentive, including, but not limited to, that Respondent will match a consumer's tax refund for use as the down payment on the purchase of a vehicle. Part I.C prohibits the Respondent from misrepresenting the cost of: (1) leasing a vehicle, including, but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2)

purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.D prohibits the Respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order prohibits Respondent from making any representation about any promotion or other incentive including, but not limited to, that Respondent will match a consumer's tax refund for use as the down payment on the purchase of a vehicle, without disclosing clearly and conspicuously, the terms and limitations of such promotion or other incentive.

Part III of the proposed order requires Respondent to clearly and conspicuously make all of the disclosures required by CLA and Regulation M if they state relevant trigger terms, including the monthly lease payment or the amount of any payment or that any or no initial payment is required at lease inception. In addition, Part III prohibits any other violation of CLA or Regulation M.

Part IV of the proposed order requires that the Respondent clearly and conspicuously make all of the disclosures required by TILA and Regulation Z if they state the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge. In addition, Part IV prohibits the Respondent from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term. Part IV also prohibits any other violation of TILA and Regulation Z.

Part V of the proposed order requires Respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part VI requires that Respondent provide copies of the order to certain of their personnel. Part VII requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VIII requires the Respondent to file compliance

Analysis to Aid Public Comment

reports with the Commission. Finally, Part IX is a provision "sunsetting" 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

PROFESSIONAL SKATERS ASSOCIATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, REGULATION M OF THE CONSUMER LEASING ACT, AND REGULATION Z OF THE TRUTH IN LENDING ACT

Docket No. C-4509; File No. 131 0168
Complaint, February 13, 2015 – Decision, February 13, 2015

This consent order addresses the provisions in the Professional Skaters Association ("PSA") code of ethics that limit competition among its members. PSA is a non-profit trade association whose members include approximately 6,400 ice skating coaches who teach, train, and coach skaters at all levels – from beginners to elite skaters. Many of PSA's members teach and coach skaters for a fee. The Complaint alleges that PSA violated Section 5 of the FTC Act by restraining competition among coaches of ice skating through adoption and enforcement of the no-solicitation provision of PSA's Code of Ethics. This is in effect an agreement among competitors not to compete. The consent order requires PSA to stop restraining its members from soliciting work and competing on the basis of price. It also requires the group to change its code of ethics, publicize its settlement with the FTC, and implement an antitrust compliance program.

Participants

For the *Commission: Karen A. Mills.*

For the *Respondent: Jennifer Burt* and *David Shulman, Davis Law Office*; and *Gregory Merz, Gray Plant Mooty.*

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 Professional Skaters Association ("Respondent" or "PSA"), 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. RESPONDENT

1. Respondent Professional Skaters Association is a non-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 3006 Allegro Park SW, Rochester, MN 55902.

2. Respondent is a professional association for coaches of ice skating. Respondent's members teach, train, and coach skaters from beginning skill levels to elite levels of competition. Respondent's membership includes approximately 6400 coaches worldwide, as well as judges, skaters, families, patrons, and fans of the sport.

3. Many of Respondent's members provide ice skating teaching, training, and coaching 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 coaches of ice skating.

II. JURISDICTION

4. Respondent conducts business for the pecuniary benefit of its members and is therefore a "corporation," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

5. Respondent confers pecuniary benefits on its members, including:

a. PSA membership is required by the U.S. Figure Skating Association ("USFSA") for coaches of skaters participating in: (i) USFSA qualifying competitions, and (ii) international ice skating competitions as part of Team USA. Because of this requirement, PSA membership is required in order to coach competitive skaters.

b. Coaches require access to ice skating rink facilities in order to engage in teaching. Some ice skating rink facilities require that coaches have PSA membership.

c. PSA offers insurance to its members, including general liability coverage and participant accident coverage.

d. PSA provides to members in good standing certain accreditations, ratings, and rankings that enable such members to charge fees for, and that affects the amount that can be charged for, coaching services.

6. The acts and practices of Respondent, including the acts and practices alleged herein, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. PSA'S CONDUCT IN RESTRAINT OF TRADE

A. PSA RESTRICTIONS ON SOLICITATION

7. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting the ability of its members to solicit the customers of competing teachers and coaches of skating. Specifically, Respondent's Code of Ethics contains a provision that reads:

> "No member shall in any case solicit pupils of another member, directly or indirectly, or through third parties."

Further, Respondent's Code of Ethics requires that, "Prior to acting as a coach, the member shall determine the nature and extent of any earlier teaching relationship with that skater and other members."

8. Respondent requires its members to agree to abide by 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 through a grievance process (described below).

B. PSA EXHORTS ITS MEMBERS TO FORGO SOLICITATION

9. Respondent has adopted and publicized a broad definition of solicitation that restricts many types of competition among members.

10. Respondent created an Ethics Committee to develop educational materials and programs in the area of ethics, and to educate its members about the types of conduct that it considers prohibited solicitation. Education occurs through required continuing education programs, publications, web postings, and the fielding of questions by Respondent's staff, including Respondent's Executive Director and General Counsel.

11. Respondent disseminates publicly and to its members a variety of documents that interpret and apply the Code of Ethics, including Proper Procedures for Changing Coaches, Ethics Issues When Changing Coaches, and Tenets of Professionalism.

12. Respondent defines the following statements as solicitation prohibited by the Code of Ethics:

- "I am a much more qualified coach than _____ is."
- "Join our program. That other program isn't very good."
- "We'll give your child free lessons, ice time, equipment, etc."

13. Respondent published in its magazine, Professional Skater, articles stating that handing to a student a business card that reads, "one free lesson" is prohibited solicitation.

14. Respondent created and disseminated supplemental guidelines to the Code of Ethics that discourage solicitation of ice skating teaching work in situations specific to team teaching (primary coaches, secondary coaches, specialty coaches), pairs and dance, synchronized skating, and social media. In these guidelines, Respondent gives the following instructions regarding the Code of Ethics no-solicitation provision:

- "Targeting a skater already established with a coach and suggesting they change to you is SOLICITATION."
- "Telling a skater already involved in a coaching relationship they will have better results with you is SOLICITATION."
- "(Solicitation) A coach approaches a skater (or skater's parent) who is already taking lessons and has a primary coach."
- "(Solicitation) A team travels to an established training center for a seminar with a nationally/internationally recognized coach. After the seminar, the program director/coach/presenter suggests they stay for a few days of training to work with them or someone else."
- "(Solicitation) Contacting, either directly or through another means, a skater or parent by sending recruiting material (resume, etc.) directly to a skater or parent is 'targeting' a skater."
- "A coach or team manager should not approach (target) a skater who is a member of another team or taking private lessons."
- "Sending recruiting material directly to a skater on another team is 'targeting' a skater."

15. Respondent published Ethics Guidelines for Social Media instructing:

- "Social media solicitation remains solicitation and is unethical."
- "[I]t is solicitous to recruit skaters using any form of social media."
- "It is a violation of the PSA Code of Ethics for any coach, U.S. Figure Skating official, or U.S. Figure Skating official who is also a coach, to use any form of communication or engage in any acts which reasonably could give the appearance of the intent to solicit a business or personal relationship with any skater or a parent (or legal guardian) of a skater, who is not the current student of that coach or with a skater who is competing in a competition in which the U.S. Figure Skating official is officiating."

C. PSA'S ENFORCEMENT REGIME

16. In furtherance of the combination alleged above, Respondent has established and administered a grievance and enforcement regime for receiving complaints about and resolving alleged violations of the PSA Code of Ethics, including the no-solicitation provision.

17. Respondent's Bylaws provide that any complaint concerning a breach of the Code of Ethics shall be resolved by the PSA Committee on Professional Standards ("COPS"). The PSA COPS may discipline a member who it deems to have breached the Code of Ethics.

18. Respondent's members have filed grievances for alleged violation of the PSA Code of Ethics no-solicitation provision to restrain other PSA members from soliciting skaters who study with the complaining member.

19. Since 2006, PSA has sanctioned at least eight coaches for soliciting pupils of other members in violation of the Code of Ethics no-solicitation provision. PSA sanctions have included public admonition, private admonition, probation, suspension, and termination of membership.

20. Since 2006, Respondent has suspended at least one coach for violation of the Code of Ethics no-solicitation provision. The suspension was for six months. The suspension rendered the coach ineligible to attend or accompany skaters to USFSA qualifying competitions, or to work with skaters on Team USA. The suspension also resulted in the coach's losing insurance coverage. Respondent publicized notice of the suspension in Respondent's magazine, Professional Skater.

21. Since 2006, Respondent has publicly admonished at least one coach for violation of the Code of Ethics no-solicitation provision.

22. Since 2006, Respondent has privately admonished at least six additional coaches for violation of the Code of Ethics no-solicitation provision. COPS panel members have voted for private admonitions even in situations where they believed a

coach's alleged solicitation was "mild," was via a third party, was probably inadvertent, was not intentional, was not premeditated, and was probably harmless.

23. Members of Respondent's COPS panels have acknowledged that even private sanctions may be sufficient to sensitize sanctioned coaches to the prohibition on solicitation, and to deter coaches from future violations of the no-solicitation provision of the Code of Ethics.

24. Member coaches being investigated for violation of the no-solicitation provision of the Code of Ethics have in some cases specifically pledged not to violate the no-solicitation provision in the future.

25. Respondent has sanctioned member coaches when skaters switched to or spent more time with a coach who was alleged to have engaged in the following practices, among others:

a. Offering skating workshops to students of other coaches;

b. Offering free admission or scholarships to workshops to students of other coaches;

c. Offering housing, costumes, or other support to students of other coaches.

26. Respondent has sanctioned member coaches for soliciting students of other members even over the objection of skating students and their parents who wanted to switch coaches and submitted affidavits or letters explaining their decisions to the PSA COPS panel. Respondent has sanctioned members for soliciting students of other members even when parents presented to the PSA COPS independent reasons for wanting to switch coaches, such as geographic convenience, carpooling arrangements, time preferences, preference for a different type of coach, judgment that a skater needed a coach with different expertise or approach, concerns about a coach's availability or personal comportment or cost, or some combination of these and other factors.

27. Sanctions for violations of the no-solicitation rule can harm the commercial prospects of PSA member coaches by damaging their reputation, jeopardizing their access to ice skating facilities, voiding their liability insurance, and terminating their eligibility to participate with their students in USFSA tests and competitions.

D. VIOLATION CHARGED

28. The purpose, effect, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs X through Y has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among ice skating teachers and coaches, and by depriving consumers of the benefits of free and open competition among teachers and coaches of ice skating.

29. The combination, agreement, acts and practices alleged in Paragraphs X through Y 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 thirteenth day of February, 2015, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, ("Commission"), having initiated an investigation of certain acts and practices of the Professional Skaters Association, Inc. ("Respondent" or "PSA") 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 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 Act, 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 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 described in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order ("Order"):

1. Respondent Professional Skaters Association, Inc., is a non-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 3006 Allegro Park SW, Rochester, Minnesota 55902.

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 "PSA" means Professional Skaters Association, Inc., its directors, boards, officers, employees, agents, representatives, councils, committees, foundations, divisions, 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 Federal court or in the highest court of any State or Territory 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. "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.

F. "FTC Settlement Statement" means the statement attached to this Order as Appendix A.

G. "Member" means a member of PSA, including any full, associate, family, patron, basic, and intern member.

H. "Organization Documents" means any documents relating to the governance, management, or direction of the relevant organization, including, but not limited to, bylaws, rules, regulations, Codes of Ethics, policy statements, interpretations, commentaries, guidelines, or educational materials.

I. "Performing" means skating or preparing to skate at an arena in a test, competition, or exhibition, and includes meetings with coaches, locker room time, practice skating, and warmup skating.

J. "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.

K. "Skating Organizations" means (1) Ice Skating Institute, 6000 Custer Rd., Bldg. 9, Plano, Texas 75023 and (2) U. S. Figure Skating Association, 20 First Street, Colorado Springs, Colorado 80906.

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. Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against:

1. Solicitation of coaching work by any Member, through any legal means, directly or indirectly, including but not limited to adoption or maintenance of any Code of Ethics or practice that restricts any coach from:

   a. Making statements about the comparative desirability of offered coaching services or claiming or implying unusual, unique, or one-of-a-kind coaching abilities;

   b. Engaging in any solicitation of business from actual or prospective students or the parents of such students or offering coaching services to a student or parent of a student receiving services from another coach;

   c. Providing coaching services without first determining the nature and extent of any earlier teaching relationship with the skater and other coaches or contacting the current coach; and

   d. Contacting a student or parent of a student receiving services from another coach to offer coaching services.

   Provided, however, that nothing in this Paragraph II.A. shall prohibit Respondent from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of its Members with respect to (i) representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, (ii) prevention of sexual and physical abuse of children, or (iii) in-person solicitation of a skater actively engaged in a lesson or Performing.

2. Price competition by any Member, including, but not limited to, restraining any person from offering free lessons when soliciting business.

B. Adopting or maintaining any Code of Ethics or practice that restricts or attempts to restrict any non-Member from talking to, convincing, or requiring students or parents of such students to switch from one coach to another.

C. With respect to any other organization:

1. Encouraging or assisting such organization to adopt or maintain any Code of Ethics or practice that would violate Paragraph II.A. or B. of this Order if adopted by Respondent, and

2. Enforcing or investigating on behalf of such organization a violation of a Code of Ethics that would violate Paragraph II.A. or B. of this Order if enforced or investigated by Respondent on its own behalf.

III.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days from the date this Order is issued, Respondent shall:

1. Post and maintain for five (5) years on the Ethics page of PSA's website the following items:

a. An announcement that states "PSA agreed to change its Code of Ethics and will not adopt, encourage its members to follow, or enforce any Code of Ethics provision relating to solicitation of coaching work that does not comply with the FTC Consent 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 board of governors, officers, employees, and Members.

3. Notify the Skating Organizations that Respondent agreed to change its Code of Ethics and will not enforce or investigate on behalf of the Skating Organizations a violation of any Code of Ethics or practice that does not comply with the FTC Consent Order, and provide a copy of this Order to each organization.

B. No later than sixty (60) days from the date this Order is issued Respondent shall:

1. Remove from PSA's Organization Documents and website any statement that is inconsistent with Paragraph II. of this Order, and

2. Publish on PSA's website any revisions of PSA's Organization Documents.

C. Respondent shall publish:

1. In the font that is customarily used for feature articles:

a. Any revisions of PSA's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement in the next available editions of the "Professional Skater Magazine" and "In The Loop" publications; and

b. The FTC Settlement Statement, on or as close as possible to the first and second anniversary dates of the first publication of the FTC Settlement Statement, in the "Professional Skater Magazine" and "In The Loop" publications, or any successor publication.

2. For a period of three (3) years, a statement in all ethics related continuing education courses and materials for Members and all education materials directed toward non-Members (including parents of students) that restrictions on solicitation no longer apply.

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 Member no later than thirty (30) days after the date of commencement of the membership; and

2. Member who receives a membership renewal notice, at the time the Member receives such notice.

E. 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 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 received from any person relating to Respondent's compliance 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 one year from the date this Order is issued, the Antitrust Compliance Officer shall be Loren Hansen, after which a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a member of the board of governors, or employee of Respondent.

C. For a period of five (5) years from the date this Order is issued, Respondent shall:

1. Provide in-person annual training to its board of governors, officers, 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; and

2. Conduct a presentation at (i) each of its annual conferences and (ii) at least one meeting of the board of governors every twelve (12) months, that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws.

D. No later than sixty (60) days after the date this Order is issued, Respondent shall implement policies and procedures to:

1. Enable persons (including, but not limited to, its board of governors, officers, employees, Members, and agents) 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 its board of governors, officers, employees, Members, and agents for failure to comply fully with this Order.

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, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 13, 2035.

By the Commission.

APPENDIX A

[Letterhead of PSA]

Dear Member:

As you may know, the Federal Trade Commission ("FTC") conducted an investigation concerning the provision in PSA's Code of Ethics that stated:

> No member shall in any case solicit pupils of another member, directly or indirectly, or through third parties.

The FTC alleges that this provision in the Code of Ethics violates the Federal Trade Commission Act because it unnecessarily restricts members of PSA from competing for pupils, thereby depriving pupils of the benefits of competition among skating coaches. The FTC also alleges that PSA guidelines state it is unethical for members to give free lessons is an illegal restriction on price competition.

To end the investigation expeditiously and to avoid disruption to its core functions, PSA voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission. As a result, PSA will eliminate the above provision from its Code of Ethics and other organizational documents and implement an antitrust compliance program.

In general, the FTC has prohibited PSA from maintaining bylaws, code of ethics, operational policies, or membership requirements that restrict members from soliciting students and engaging in price competition. The Decision and Order also prohibits PSA from (1) encouraging other organizations to adopt policies or practices that would violate the Decision and Order if PSA adopted such policies and (2) enforcing or investigating violations of the code of ethics of other organizations that would violate the Decision and Order if enforced or investigated by PSA on its behalf.

PSA is also prohibited from adopting policies or practices that restrict or attempts to restrict non-members from talking to,

convincing, or requiring students or parents of such students to switch from one coach to another.

The Decision and Order does not prohibit PSA from adopting and enforcing Codes of Ethics or similar documents that govern the conduct of members with respect to (1) representations that PSA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, (2) prevention of sexual and physical abuse of children, or (3) in-person solicitation of a skater actively engaged in a lesson or Performing.

A copy of the Decision and Order is enclosed. It is also available on the Federal Trade Commission website at www.FTC.gov, and through the PSA web site.

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 Professional Skaters Association, Inc. (hereinafter "PSA"). The Commission's complaint ("Complaint") alleges that PSA, 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 a provision in its Code of Ethics that restrains coaches from soliciting teaching work.

Under the terms of the proposed Consent Agreement, PSA is required to cease and desist from restricting competition among its members, or working with other ice skating organizations to restrict competition, including by restricting solicitation, advertising, or price--related competition.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed order, subject to final approval, contained in the Consent Agreement. 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").

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way to modify their terms.

The Consent Agreement is for settlement purposes only and does not constitute an admission by PSA 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

PSA is a non-profit trade association whose members include approximately 6400 coaches of ice skating who teach, train, and coach skaters at all levels -- from beginners to elite skaters. Many PSAs members teach and coach skaters for a fee. Some PSA members are employed at schools, universities, ice skating clubs, and ice skating rinks. PSA membership provides financial benefits to its members.

PSA membership and continuing education is required by the U.S. Figure Skating Association ("USFSA") for coaches of skaters participating in: (i) USFSA qualifying competitions, and (ii) international ice skating competitions as part of Team USA. Because of this requirement, PSA membership is required in order to coach competitive skaters.

Coaches require access to ice skating rink facilities. Some ice skating rink facilities require that coaches have PSA membership.

PSA maintains a Code of Ethics applicable to the commercial activities of its members. The PSA Code of Ethics states that, "No member shall in any case solicit pupils of another member, directly or indirectly, or through third parties." The PSA Code of Ethics also requires that, "Prior to acting as a coach, the member shall determine the nature and extent of any earlier teaching relationship with that skater and other members."

B. The Anticompetitive Conduct

The Complaint alleges that PSA violated Section 5 of the Federal Trade Commission Act by restraining competition among coaches of ice skating through adoption and enforcement of the no-solicitation provision of PSA's Code of Ethics. This is in effect an agreement among competitors not to compete. PSA

Analysis to Aid Public Comment

interprets the no-solicitation rule broadly, prohibiting direct, indirect, third-party, and social media solicitation of teaching work. PSA has instructed its members and others that the Code of Ethics no solicitation rule prohibits coaches from many types of direct or indirect communication with skaters and parents, including:

- Suggesting a skater change coaches
- Suggesting a skater would have better results by changing coaches
- Suggesting a skater who attends a seminar stay for a few days of additional training
- Sending recruiting material to a skater or parent
- Claiming one coach is a more qualified coach than another
- Claiming one ice skating program is better than another
- Offering free lessons, ice time, or equipment

PSA requires its members to agree to abide by the Code of Ethics, educates members about the Code of Ethics, exhorts its members to follow the Code of Ethics and polices members' behavior. It also enforces the Code of Ethics through a grievance process administered by PSA's Committee on Professional Standards (the "COPS"). PSA has enforced the Code of Ethics no-solicitation provision against at least nine member coaches since 2006, with penalties including private admonition, public admonition, suspended membership, and probation.

PSA has sanctioned member coaches for soliciting students of other members even when the students and their parents wanted to switch coaches for a variety of compelling reasons. PSA has enlisted parents and skaters in the effort to enforce the Code of Ethics no-solicitation provision. The Complaint alleges that the purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of PSA has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among ice skating teachers and coaches.

Analysis to Aid Public Comment

II. The Proposed Order

The Proposed Order has the following substantive provisions:

Paragraph I contains definitions for terms used in the Order.

Paragraph II requires PSA to cease and desist from restraining or declaring unethical, interfering with, or advising against the solicitation of teaching work. It also requires that PSA not prohibit or advise against coaches' solicitation of students. Paragraph II requires PSA to cease and desist from encouraging or assisting any other organization to adopt, maintain, or enforce any Code of Ethics or other restriction on solicitation. Finally, Paragraph II requires PSA to cease and desist from restraining price competition, including offering free lessons.

The Proposed Order does not prohibit PSA from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of its Members with respect to (i) representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; (ii) prevention of sexual and physical abuse of children; or (iii) in-person solicitation of a skater actively engaged in (a) a skating lesson, or (b) skating or preparing to skate at an arena in a test, competition, or exhibition. The Order defines skating or preparing to skate as including meetings with coaches, locker room time, practice skating, and warm-up skating.

Paragraph III of the Proposed Order requires PSA to remove from its organization documents and website any statement inconsistent with the Proposed Order PSA must publicize to its members, new members, leaders, employees, and the public the changes PSA must make to the Code of Ethics, and a statement describing the Consent Agreement. Finally, PSA must notify the Ice Skating Institute ("ISI") and United States Figure Skating Association that PSA (i) agreed to change its Code of Ethics and (ii) will not enforce or investigate on behalf of Skating Organizations violation of any Code of Ethics or practice that does not comply with the FTC's Order against PSA. Further, the Order requires PSA to notify USFSA and ISI that the Order will prevent PSA from doing on behalf of USFSA or ISI anything that, if done by PSA, would be inconsistent with the Order against

PSA. This is necessary because PSA provides various education services on ethics to both USFA and ISI coaches.

Paragraph IV of the Proposed Order requires PSA to design, maintain, and operate an antitrust compliance program. PSA must have an Antitrust Compliance Officer for the duration of the Proposed Order. For a period of five years, PSA must provide guidance to its staff, employees, members, and leaders concerning the antitrust laws and PSA obligations under the Proposed Order. PSA also must implement policies and procedures to enable persons to ask questions about, and report violations of, the Proposed Order and the antitrust laws confidentially and without fear of retaliation, and to discipline its leaders, employees and agents for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed Order require certain standard compliance reporting, cooperation, and access.

The Proposed Order will expire in the 20 years.

Complaint

IN THE MATTER OF

ELI LILLY AND NOVARTIS AG

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

Docket No. C-4500; File No. 141 0142
Complaint, February 20, 2015 – Decision, February 20, 2015

This consent order addresses the $5.4 billion acquisition by Eli Lilly and Company of Novartis' Animal Health business from Novartis AG. Both parties sell canine heartworm parasiticide products in the United States. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act, by eliminating the close competition between Eli Lilly and Novartis Animal Health and lessening competition in the U.S. market for canine heartworm parasiticides. Additionally, any other company seeking to enter the canine heartworm parasiticide market would face high barriers, because developing new animal health pharmaceutical products – including those that treat heartworm in dogs – is difficult and time-consuming. Under the terms of the order, Eli Lilly is required to divest all of the rights and assets related to its canine heartworm products, Sentinel Spectrum and Sentinel Flavor Tabs, to the French pharmaceutical company, Virbac S.A.

Participants

For the *Commission: Michael R. Barnett, Steven C. Lavender,* and *David Von Nirschl.*

For the *Respondents: Andrew J. Forman* and *Charles F. Rule, Cadwalader, Wickersham & Taft LLP*; and *Mary Lehner, Craig Minerva,* and *Paul Yde, Freshfields Bruckhaus Deringer US 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 Novartis AG ("Novartis"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire oncology assets from Respondent GlaxoSmithKline, PLC ("GSK"), 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 ("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 Novartis is a corporation organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters located at Lichtstrasse 35, Basel, Switzerland CH 4056 and the address of its U.S. subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, NY 10169.

2. Respondent GSK is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters located at 980 Great West Road, Brentford Middlesex, TW8 9GS, England. GSK's U.S. headquarters are located at Philadelphia Navy Yard, 5 Crescent Drive, Philadelphia, PA, 19112.

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 TRANSACTION

4. Pursuant to an agreement executed on April 22, 2014 (the "Agreement"), Novartis intends to acquire GSK's marketed oncology products and two pipeline products for approximately $16 billion (the "Transaction"). The Transaction 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 Transaction are:

a. the development and sale of BRAF inhibitors used to treat cancer ("BRAF inhibitors"); and

b. development and sale of MEK inhibitors used to treat cancer ("MEK inhibitors").

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

IV. THE STRUCTURE OF THE MARKETS

7. There are currently only two BRAF-inhibitors approved by the U.S. Food and Drug Administration ("FDA") and sold in the United States: (1) Zelboraf®, sold by F. Hoffman-La Roche Ltd. ("Roche"); and (2) Tafinlar®, sold by GSK. Novartis is the only other firm likely to begin competing with a BRAF inhibitor in the near future.

8. GSK currently sells the only FDA-approved MEK inhibitor, Mekinist®. Roche and Novartis are two of only a small number of companies with MEK inhibitors in late-stage clinical development.

9. The near-term application of BRAF and MEK inhibitors is primarily as a combination product to treat melanoma. GSK sells the only FDA-approved BRAF/MEK combination, which consists of Tafinlar and Mekinist. Roche and Novartis have BRAF/MEK combinations in clinical development and likely will be the only other firms to compete against GSK's combination in the near future.

V. ENTRY CONDITIONS

10. Entry into the relevant lines of commerce described in Paragraphs 5 and 6 would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Transaction. Development of a BRAF inhibitor and MEK-inhibitor by a new entrant would be difficult, expensive, and time-consuming, in large part because new oncology medicines must complete clinical trials and receive FDA approval before they can be sold in

the United States. No firms have products in development which are likely to enter the relevant markets and prevent the competitive harm from the transaction.

VI. EFFECTS OF THE TRANSACTION

11. The effects of the Transaction, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant lines of commerce, 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. Eliminating substantial future competition between GSK and Novartis in the development and sale of BRAF-inhibitors; and

b. Eliminating substantial future competition between GSK and Novartis in the development and sale of MEK-inhibitors.

VII. VIOLATIONS CHARGED

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

13. The Transaction 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 twentieth day of February, 2015, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Eli Lilly and Company ("Eli Lilly") of certain assets comprising the animal health division of Respondent Novartis AG ("Novartis"), collectively "Respondents", and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having 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 described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Eli Lilly is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its headquarters address located at Lilly Corporate Center, Indianapolis, Indiana 46285.

2. Respondent Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.

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

ORDER

I.

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

A. "Eli Lilly" means, the following: Eli Lilly and Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Eli Lilly and Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Eli Lilly shall include the Novartis Animal Health Group.

B. "Novartis" means, the following: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG, and the respective directors, officers, employees, agents, representatives,

successors, and assigns of each. Novartis shall not include the OTC Joint Venture.

C. "Novartis Animal Health Group" means:

1. the following entities acquired or to be acquired by Eli Lilly from Novartis pursuant to the Acquisition Agreement: Novartis Animal Health Australasia Pty (Commonwealth of Australia); Novartis Saúde Animal Ltda. (Federative Republic of Brazil); Novartis Animal Health Canada Inc. (Canada); Shanghai Novartis Animal Health Co., Ltd. (People's Republic of China); Novartis Santé Animale S.A.S. (French Republic); Novartis Tiergesundheit GmbH (Federal Republic of Germany); Novartis Animal Health S.p.A. (Italian Republic); Novartis Animal Health K.K. (Japan); Novartis Salud Animal, S.A. de C.V. (United Mexican States); Novartis Veterina d.o.o. (Republic of Slovenia); Novartis Sanidad Animal S.L. (Kingdom of Spain); Novartis Centre de Recherche Santé Animal SA (Swiss Confederation); Novartis Tiergesundheit AG (Swiss Confederation); Novartis Animal Health UK Limited (United Kingdom of Great Britain and Northern Ireland); Novartis Animal Vaccines Limited (United Kingdom of Great Britain and Northern Ireland); Vericore Limited (United Kingdom of Great Britain and Northern Ireland); Novartis Animal Health US, Inc. (United States of America);

2. the respective directors, officers, employees, agents, representatives, successors, and assigns of each of the foregoing entities;

3. the assets acquired or to be acquired by Eli Lilly from Novartis pursuant to the Acquisition Agreement and referred to as Transferred Assets in Section 2.01(b) of the Acquisition Agreement; and

4. the Businesses related to all of the foregoing entities and assets.

D. "Respondents" means Eli Lilly and Novartis, individually and collectively; *provided, however,* that from the later to occur of (i) the OTC Joint Venture Date, or (ii) the Closing Date, "Respondents" shall mean Eli Lilly.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

G. "Acquisition" means Respondent Eli Lilly's acquisition of the Novartis Animal Health Group from Novartis pursuant to the Acquisition Agreement.

H. "Acquisition Agreement" means the Stock and Asset Purchase Agreement between Novartis AG and Eli Lilly and Company dated as of April 22, 2014, that was submitted by Eli Lilly to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix II.

I. "Acquisition Date" means the earlier of the following dates: (i) the date on which Respondent Eli Lilly acquires fifty percent (50%) or more of the voting securities of any of the entities listed in the definition

of Novartis Animal Health Group; or, (ii) the date on which Respondent Eli Lilly acquires any of the assets related to such entities.

J. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

K. "Animal Study(ies)" means a controlled study in animals of the safety and/or efficacy of a Product, and includes, without limitation, such animal studies 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 a Product.

L. "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, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

M. "Biological Manufacturing and Testing Materials" means:

1. Reagents;

2. assays (including, without limitation, potency and microorganism cell protein assays);

3. Master Cells;

4. Master Seeds;

5. hybridomas;

6. antibodies;

7. cell culture media and similar materials;

8. nutrient feed for cells and microorganisms;

9. challenge materials; and

10. references;

to the extent any of the foregoing are being used, have been used, or are being planned to be used for the manufacture, use, Development, or commercialization of Milbemycin.

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

O. "Canine Health Product(s)" means:

1. all Products in Development, manufactured, marketed, or sold, pursuant to the following Applications, and any supplements, amendments, or revisions to such Applications:

   a. NADA #141-084 (a.k.a., Sentinel® Flavor Tabs®);

   b. NADA #141-204; and,

c. NADA #141-333 (a.k.a., Sentinel® Spectrum®); and,

2. the following active pharmaceutical ingredients:

a. Milbemycin;

b. Lufenuron; and,

c. Praziquantel.

P. "Canine Health Product Assets" means all assets and rights of Novartis related to the Business of the Canine Health Products, wherever located throughout the world, as such assets and rights are in existence as of the date the Respondents sign the Agreement Containing Consent Orders in this matter (and as such rights and assets shall be maintained by the Respondents in accordance with the Asset Maintenance Order until the Closing Date), including, the following:

1. all rights to all of the following Applications:

a. NADA #141-084;

b. NADA #141-204;

c. NADA #141-333;

d. INAD #010-416;

e. INAD #011-044;

f. INAD #009-165; and,

all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the

Respondent and the FDA related to the foregoing Applications;

2. Biological Manufacturing and Testing Materials related to Milbemycin, *provided, however,* that Respondent Eli Lilly may retain certain rights to the Biological Manufacturing and Testing Materials (to the extent such retention of rights by Respondent Eli Lilly is approved by the Commission in a Remedial Agreement);

3. all Animal Studies related to the Canine Health Products including, without limitation, all such Animal Studies for which Novartis has filed a protocol prior to the date Novartis signed the Agreement Containing Consent Orders and such protocol has been approved by the FDA, whether or not such Animal Study(ies) has been completed, *provided, however,* that for those Animal Studies solely related to expanded product labeling in order to add the indications of (i) Microfilaricide, and/or (ii) the Dipylidium caninum, Respondent Eli Lilly may receive a license from the Acquirer to the raw data for use in connection with any Retained Product;

4. all rights to the Veterinary Master File #005-225;

5. all rights to the Drug Master File #13999 (Praziquantel) to the full scope and extent licensed to Novartis from the holder and/or owner of such DMF;

6. all Product Intellectual Property related to each of the Canine Health Products, including, without limitation:

    a. the Sentinel Patents;

    b. the Sentinel® trademark (U.S. registration #2193259);

c. Sentinel Spectrum® trademark (U.S. registration #3713732);

d. Spectrum® trademark (U.S. registration #3508817); and,

e. Flavor Tabs® trademark (U.S. registration #2810751), *provided, however,* that Eli Lilly may obtain a license to use the Flavor Tabs® trademark for a limited transitional period (as such transitional period is approved by the Commission in a Remedial Agreement) for use in connection with the sale or marketing of Products that use the Interceptor® , Program® or Capstar® trademarks;

7. all Product Approvals related to each of the Canine Health Products, to the extent such Products Approvals are permitted to be transferred by applicable Law;

8. all Product Manufacturing Technology, related to each of the Canine Health Products to the extent that such Product Manufacturing Technology is not: (i) Product Licensed Intellectual Property; (ii) Easy Chew Patents and Technology; (iii) the Flavor Tabs Patents and Technology; or (iv) the Flavorings;

9. all Product Marketing Materials related to each of the Canine Health Products;

10. all Product Scientific and Regulatory Materials related to each of the Canine Health Products;

11. all Process Analytical Documents related to Milbemycin;

12. all Website(s) related exclusively to each of the Canine Health Products;

13. the content related exclusively to each of the Canine Health Products that is displayed on any Website that is not dedicated exclusively to such Canine Health Product;

14. a list of all of the NDC Numbers related to each of the Canine Health Products, and rights, to the extent permitted by applicable Law:

    a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of each of the Canine Health Products except for existing inventory, returns, rebates, allowances, and adjustments for such Canine Health Product sold prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

    b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) except for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and except as may be required by applicable Law;

    c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from Respondent Eli Lilly of any such cross-referencing that is discovered by Respondent Eli Lilly);

    d. to seek cross-referencing from a customer of Novartis's NDC Numbers related to such Canine Health Product with the Acquirer's NDC Numbers related to such Canine Health Product;

e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of each of the Canine Health Products except for returns, rebates, allowances, and adjustments for such Canine Health Product sold prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and

f. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondents prior to such notification(s) being disseminated to the customer(s);

15. all Product Development Reports related to each of the Canine Health Products;

16. at the option of the Acquirer, all Product Contracts related to each of the Canine Health Products;

17. for each Canine Health Product that has been marketed or sold at any time during the year immediately preceding the Closing Date:

    a. a list of all customers and targeted customers for that Canine Health Product;

    b. a profile of each customer, by customer type (e.g., product distributor, retail store chains, individual veterinarian clinics, veterinarian clinic chains) including to the extent available: contact information, order history, credit levels;

    c. all customer visit reports that have been inputted into any customer relations management database;

    d. a listing of the net sales (in units and in dollars) of such Canine Health Product to such

customers on a 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) of each High Volume Account that is or has been responsible for the purchase of such Canine Health Product on behalf of the High Volume Account and his or her business contact information;

18. For each Canine Health Product Core Employee that accepts an offer of employment from the Acquirer, at the Acquirer's option and to the extent transferrable, the employee's work cell phone number, cell phone, and related service provider contract;

19. for each Contract Manufacture Product:

    a. a list of the inventory levels (weeks of supply) for each customer (i.e., retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and

    b. anticipated reorder dates for each customer as of the Closing Date;

20. at the option of the Acquirer, 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 related to each of the Canine Health Products;

21. copies of all unfilled customer purchase orders for each of the Canine Health Products as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date;

22. at the option of the Acquirer, all unfilled customer purchase orders for each of the Canine Health Products;

23. at the option of the Acquirer, copies of any adverse event reports, adverse experience information, and descriptions of material events concerning safety or lack of efficacy related to any Product marketed or sold prior to April 22, 2014, by Novartis that contains Lufenuron, Milbemycin, and/or Praziquantel; and

24. all of the books, records, and files directly related to the foregoing;

provided, however, that the term "Canine Health Product Assets" excludes: (i) documents related to any Respondents' general business strategies or practices relating to the conduct of its Business of Products for the health of animals, where such documents do not discuss with particularity any of the Canine Health Products; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of any of the Canine Health Products by the Interim Monitor or the Acquirer; (iv) rights that are exclusively related to a Retained Product; (v) any real estate and the buildings and other permanent structures located on such real estate; (vi) all Product Licensed Intellectual Property; (vii) rights that are exclusively related to Products distributed, marketed, or sold outside the Geographic Territory; (viii) rights that are exclusively related to Products in Development that contain either Lufenuron, Milbemycin, or Praziquantel in combination with active pharmaceutical ingredients other than Lufenuron, Milbemycin or Praziquantel; (ix) rights in Milbemycin, Lufenuron, or Praziquantel for human use; and, (x) accounts receivable related to the Canine Health Products as of the Closing Date;

provided further, however, that in cases in which documents or other materials included in the assets to

be divested contain information: (i) that relates, on the one hand, to a Canine Health Product and to a Retained Product, on the other hand, and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Canine Health Product; or, (ii) for which any Respondent has a legal obligation to retain the original copies, the Respondents 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 provides the Acquirer with the above-described information without requiring the Respondents completely to divest themselves of information that, in content, also relates to Retained Product(s).

Q. "Canine Health Product Core Employees" means the Product Marketing Employees, the Product Research and Development Employees, the Product Manufacturing Employees and the Product Sales Employees.

R. "Canine Health Product Divestiture Agreements" means the following:

1. The Amended and Restated Asset Purchase Agreement between Eli Lilly and Company and Virbac S.A., dated as of October 22, 2014, and as submitted to the Commission on December 5, 2014;

2. The Technology License Agreement between Eli Lilly and Company and Virbac Corporation, as contained as an Exhibit to the Asset Purchase Agreement, to be executed on the Closing Date;

3. The Transition Services Agreement between Eli Lilly and Company and Virbac Corporation, as contained as an Exhibit to the Asset Purchase Agreement, to be executed on the Closing Date;

4. The Manufacturing and Supply Agreement between Eli Lilly and Company and Virbac Corporation as contained as an Exhibit to the Asset Purchase Agreement, to be executed on the Closing Date; and

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Canine Health Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Canine Health Product Divestiture Agreements are contained in Non-Public Appendix I.

S. "Canine Health Product License" means the following for use in any of the Species, to the extent applicable:

1. a perpetual, non-exclusive, fully paid-up, fully transferable, and royalty-free license(s) with rights to sublicense under all Product Licensed Intellectual Property and all Product Manufacturing Technology (to the extent any Product Manufacturing Technology is not either licensed or assigned to the Acquirer under another license or assignment pursuant to this Order) related to general manufacturing know-how that was owned, licensed, or controlled by Novartis:

   a. to research and Develop the Canine Health Products for marketing, distribution or sale of the Canine Health Products within the Geographic Territory;

   b. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Canine Health Products within the Geographic Territory;

c. to import or export the Canine Health Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the Canine Health Products in the Geographic Territory; and

d. to have the Canine Health Products made anywhere in the world for distribution or sale within, or import into the Geographic Territory; *provided, however,* that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by Novartis, 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 Novartis; and

2. a perpetual, non-exclusive, fully paid-up, fully transferable, royalty-free, full, complete, and unlimited Right of Reference or Use with rights to sublicense to the following Applications: NADA #140-915, NADA #141-338, NADA #141-105, NADA #141-026, NADA #141-205, NADA #141-035, and NADA #141-062 and any INAD filed related thereto, to reference or use in the following NADAs: NADA #141-084, NADA #141-204, NADA #141-333, and any New Application;

3. a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to the Easy Chew Patents and Technology for any Product that is all of the following: (i) a Parasiticide, (ii) for use in the field of the prevention or treatment of any disease or indication recognized by the FDA in any of the Species, and (iii) to be distributed, marketed or sold within the Geographic Territory;

4. a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to the Flavor Tabs Patents and Technology (other than the Sentinel Patents) for any Product that is all of the following: (i) a Parasiticide, (ii) for use in the field

of the prevention or treatment of any disease or any indication recognized by the FDA in any of the Species, and (iii) to be distributed, marketed or sold within the Geographic Territory; and

5. a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to the Flavorings for any Product that is all of the following: (i) a Parasiticide, (ii) for use in the field of the prevention or treatment of any disease or any indication recognized by the FDA in any of the Species, and (iii) to be distributed, marketed or sold within the Geographic Territory; and,

6. at the Acquirer's option, a non-exclusive, fully paid up and royalty-free license for a transitional period (as such period is approved by the Commission in the Remedial Agreements) under the Capstar® Trademark (U.S. registration #2510863) to use in the labeling for Products approved under NADA #141-333 and NADA #141-204.

T. "Canine Health Product Releasee(s)" means the following Persons:

1. the Acquirer for the Canine Health Product Assets;

2. any Person controlled by or under common control with the Acquirer; and,

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Canine Health Products.

U. "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.

V. "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 Canine Health Product Assets to an Acquirer pursuant to this Order.

W. "Confidential Business Information" means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Business related to any Canine Health Product. The term "Confidential Business Information" excludes the following:

1. information relating to any Respondent's general business strategies or practices that does not discuss with particularity any Canine Health Product;

2. information specifically excluded from the Canine Health Product Assets conveyed to the Acquirer;

3. information that is contained in documents, records or books of any Respondent that is provided to the Acquirer by a Respondent that is unrelated to any Canine Health Product or that is exclusively related to Retained Product(s); and

4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

X. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer;

2. to manufacture, or to cause to be manufactured, a Product that is the therapeutic equivalent (as that

term is defined by the FDA) and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product on behalf of an Acquirer; and/or,

3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.

Y. "Contract Manufacture Product(s)" means the Canine Health Products that are the subject of the following Applications:

1. NADA #141-084;

2. NADA #141-333; and,

3. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient, excipients or packaging materials to the extent necessary to produce the final end-use Product;

provided, however, that, with the consent of the Acquirer, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of that Respondent's agreement to Contract Manufacture.

Z. "Development" means all pre-animal study and animal study drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Animal Studies 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.

AA. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee; *provided, however,* that in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement, "Direct Cost" means such cost as is provided in such Remedial Agreement.

BB. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

CC. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. The term "Domain Name" excludes any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

DD. "Easy Chew Patents and Technology" means:

1. the following Patents (as registered in the countries listed, and the European Union):

    a. United States of America patent application #14/103,373 (pending);

    b. United States of America patent #8,541,019;

    c. United States of America patent #8,628,794;

d. European Union patent #1675474 (with associated national registrations);

e. Commonwealth of Australia patent #2004262492;

f. Canada patent #2531150;

g. Republic of China patent #200480021551.0;

h. Republic of Columbia patent #19245;

i. Hellenic Republic patent #3067891;

j. United Mexican States patent #267922;

k. New Zealand patent #544890; and,

l. Russian Federation patent #2356534;

2. all trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information related to the foregoing Patents; and,

3. 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 Patents.

EE. "Flavor Tabs Patents and Technology" means:

1. the following Patents (as registered in the countries listed):

a. Commonwealth of Australia patent #695656;

b. Federal Republic of Germany patent #69612088;

c. Republic of Finland patent #118788;

d. Hellenic Republic patent #3036058;

e. State of Israel patent #117226;

f. Japan patent #3980638;

g. Republic of Korea patent #418238;

h. New Zealand patent #302661;

i. Kingdom of Saudi Arabia patent #1467/96; and,

j. Canada patent #2213612.

2. all trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information related to the foregoing Patents; and

3. 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 Patents.

FF. "Flavorings" means any flavor developed for or used in a Canine Health Product.

GG. "Geographic Territory" means the United States of America, including all of its territories and possessions, unless otherwise specified within this Order.

HH. "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.

II. "High Volume Account(s)" means any retailer, wholesaler, governmental purchaser, or distributor

whose annual or projected annual aggregate purchase amounts (on a company-wide level), first, in terms of units and second, in terms of dollars of sales revenue, of a Canine Health Product in the United States of America from the Novartis Animal Health Group was, or is projected to be, among the top twenty highest of such purchase amounts by Novartis Animal Health Group's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the Acquisition Date; (ii) the end of the last quarter that immediately preceded the Closing Date; or, (iii) the end of the last quarter following the Acquisition Date or the Closing Date.

JJ. "Humacao Facility" means the Novartis sites at (i) Route 909 Km 1.3Bo, Mariana, Humacao, PR 00791, Puerto Rico and (ii) Catano Industrial Park road 3 Km 82.2, Humacao, PR 00791, Puerto Rico that will be contributed to the OTC Joint Venture.

KK. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

LL. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

MM. "Lufenuron" means the active pharmaceutical ingredient lufenuron (referenced in the following Applications: NADA #141-084 and/or NADA #141-204) for use in the field of the prevention or treatment any disease or any indication recognized by the FDA in any Species in the Geographic Territory.

NN. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Canine Health Product on behalf of the Acquirer.

OO. "Master Cell(s)" means the master cell(s), working cell(s), and production cell(s) that are (i) in existence,

(ii) in which Novartis has rights to, as of the date the Respondents sign the Agreement Containing Consent Orders and (iii) required or used in the production of a Product(s).

PP. "Master File(s)" 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 the master files maintained by the FDA Center for Drug Evaluation and Research (generally referred to as "Drug Master File(s)" or "DMF(s)") and those maintained by the FDA Center for Veterinary Medicine (generally referred to as "Veterinary Master File(s)" or "VMF(s)").

QQ. "Master Seed(s)" means the master seed(s), working seed(s), and production seed(s) (i) in existence, (ii) in which Novartis has rights to, as of the date the Respondents sign the Agreement Containing Consent Orders and (iii) required or used in the production of a Product(s).

RR. "Milbemycin" means the active pharmaceutical ingredient Milbemycin oxime (referenced in the following Applications: NADA #141-084, NADA #141-204, and/or NADA #141-333) for use in the field of the prevention or treatment of any disease or indication recognized by the FDA in any Species in the Geographic Territory.

SS. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

TT. "New Application" means any NADA for any Product for use in the field of the prevention or treatment of any disease or indication recognized by the FDA in any of the Species and to be distributed, marketed or sold within the Geographic Territory except a Product

that either: (i) contains as its sole active pharmaceutical ingredient either Milbemycin or Lufenuron, or (ii) contains as its only two active pharmaceutical ingredients Milbemycin and Praziquantel.

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

VV. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

WW. "OTC Joint Venture" means the consumer health joint venture between GSK and Novartis pursuant to: (i) a Deed of Amendment and Restatement, dated May 29, 2014, relating to a Contribution Agreement between Novartis, GSK, and Leo Constellation Limited, dated April 22, 2014; and (ii) Agreed Terms of a Shareholders' Agreement between GSK, Novartis, and GSK Consumer Healthcare Holdings Limited, dated May 29, 2014 (together the "JV Agreements"). The JV Agreements were submitted to the Commission. The JV Agreements are contained in Non-Public Appendix II to the Decision and Order in FTC File Number 141-0141.

XX. "OTC Joint Venture Date" means the date on which the OTC Joint Venture is consummated.

YY. "OTC MSA" means the OTC Manufacturing and Supply Agreement between Ex-Lax, Inc., Novartis Consumer Health Inc. and Eli Lilly and Company to be executed by the parties on or before the date of the closing for the OTC Joint venture. The OTC MSA will be contributed to and assumed by the OTC Joint Venture. The OTC MSA is contained in Non-Public Appendix II to this Order.

ZZ. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

AAA. "Parasiticide" means any substance that kills parasites, whether internal or external to the animal, or inhibits or impairs the parasites' growth or reproduction.

BBB. "Patent(s)" means, whether United States or foreign: (i) patents; (ii) patent applications, including provisional patent applications; (iii) invention disclosures; and, (iv) 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.

CCC. "Praziquantel" means the active pharmaceutical ingredient praziquantel (referenced in the following Application: NADA #141-333) for use in the field of the prevention or treatment of any disease or indication recognized by the FDA in any Species in the Geographic Territory.

DDD. "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.

EEE. "Process and Analytical Documents" means, to the extent in the custody or control of the Respondents, or to the extent the Respondents have a right of access to, the following documents related to the processes and Product Manufacturing Technology used to manufacture Milbemycin and the analytical methods used to manufacture Milbemycin:

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, and selection/cloning, if any, and stability data);

b. Preliminary Master Cell and Master Seed Bank Preparation Technical Report (including: description of banking procedures and 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 and 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 Records (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 solutions 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 of 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).

FFF. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient for the prevention or treatment of disease in any species of non-human animals and/or that is the subject of an Application.

GGG. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of a Product within the Geographic Territory, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

HHH. "Product Contracts" means all of the following contracts, agreements, or legally binding written arrangements that a Respondent is a party to:

1. that make specific reference to a Canine Health Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Canine

Health Product from Novartis or the Novartis Animal Health Group;

2. pursuant to which Novartis or the Novartis Animal Health Group had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of a Canine Health Product;

3. relating to any Animal Studies involving a Canine Health Product;

4. with universities or other research institutions for the use of a Canine Health Product in scientific research;

5. relating to the particularized marketing of a Canine Health Product or educational matters to the extent related to a Canine Health Product;

6. pursuant to which a Third Party manufactures a Canine Health Product on behalf of Novartis or the Novartis Animal Health Group;

7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Canine Health Product on behalf of Novartis or the Novartis Animal Health Group;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to a Canine Health Product to Novartis or the Novartis Animal Health Group;

9. pursuant to which a Third Party is licensed by Novartis or the Novartis Animal Health Group to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving a Canine Health Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving a Canine Health Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of a Canine Health Product to Novartis or the Novartis Animal Health Group including, but not limited to, consultation arrangements; and/or,

13. pursuant to which any Third Party collaborates with Novartis in the performance of research, Development, marketing, distribution or selling of a Canine Health Product or the Business related to such Canine Health Product;

provided, however, that, where any such contract or agreement also relates to a Retained Product(s), the 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 Canine Health Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

III. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Canine Health Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all pre-animal study, animal study and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing

or sale of that Product, including all copyrights in raw data relating to Animal Studies of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze animal study data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law) in connection with a divestiture under this Order; all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

JJJ. "Product Development Reports" means:

1. Pharmacokinetic study reports related to a Product;

2. Bioavailability study reports (including reference listed drug information) related to a Product;

3. Bioequivalence study reports (including reference listed drug information) related to a Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to a Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to a Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to a Product;

8. FDA approved circulars for animal owners or breeders related to a Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to a Product;

10. summary of Product complaints from veterinarians related to a Product;

11. summary of Product complaints from customers related to a Product;

12. Product recall reports filed with the FDA related to a Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in a Product;

14. reports related to a Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any

product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce a Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of a Product;

16. analytical methods development records related to a Product;

17. manufacturing batch records related to a Product;

18. stability testing records related to a Product;

19. change in control history related to a Product; and,

20. executed validation and qualification protocols and reports related to a Product.

KKK. "Product Employee Information" means the following, for each Canine Health Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Canine Health Product Core Employee (including former employees who were employed by Novartis within ninety (90) days of the Closing Date);

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

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Canine Health Product; *provided, however*, that, in lieu of this description, the Respondents may

provide the employee's most recent performance appraisal;

d. the base salary or current wages;

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

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

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

LLL. "Product Intellectual Property" means all of the following related to a Canine Health Product except the intellectual property rights that are the subject of the Canine Health Product License:

1. Patents;

2. Product Copyrights;

3. Product Trademarks;

4. Product Trade Dress;

5. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and,

6. rights to obtain and file for patents, trademarks, and copyrights and registrations related to any of the foregoing 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;

7. Master Files related to any Application including, without limitation, Master Files related to any active pharmaceutical ingredient used in a Product that is the subject of an Application; and,

8. Flavorings used in, or developed for, a Product.

The term "Product Intellectual Property" excludes the corporate names or corporate trade dress of "Eli Lilly", "Elanco" or "Novartis" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by any Respondent or the related corporate logos thereof, or general registered images or symbols by which Eli Lilly, Elanco, or Novartis can be identified or defined.

MMM. "Product Licensed Intellectual Property" means the following:

1. Patents (other than the Sentinel Patents) that are related to a Canine Health Product;

2. Product Software; and,

3. trade secrets, know how, techniques, data, inventions, practices, methods, technology, formulas, 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 Canine Health Product, but, that a Respondent can demonstrate have been used for any Retained Product as of April 22, 2014;

The term "Product Licensed Intellectual Property" excludes the Easy Chew Patents and Technology and the Flavor Tabs Patents and Technology.

NNN. "Product Manufacturing Employee(s)" means all salaried employees of Novartis Animal Health Group who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of a Canine Health Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the twelve (12) month period immediately prior to the Closing Date.

OOO. "Product Manufacturing Technology" means all of the following related to a Canine Health Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, animal study data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third

Party, at the Acquirer's option, all such equipment used to manufacture that Product.

PPP. "Product Marketing Employee(s)" means all management-level employees of Novartis Animal Health Group who directly have participated (irrespective of the portion of working time involved and regardless of where the employee is physically located throughout the world) in the marketing, contracting or promotion of a Canine Health Product in the United States of America within the twelve (12) month period immediately prior to the Closing 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, but excluding administrative assistants.

QQQ. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of a Canine Health Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of dollars and units for each month), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to a Canine Health Product.

RRR. "Product Research and Development Employee(s)" means all salaried employees of Novartis Animal Health Group who have directly participated in the

research, Development, regulatory approval process, or Animal Studies of a Canine Health Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the twelve (12) month period immediately prior to the Closing Date.

SSS. "Product Sales Employee(s)" means all employees of Novartis Animal Health Group who directly have participated (irrespective of the portion of working time involved) in the detailing, marketing or promotion of the Canine Health Products in the United States directly to veterinarians, animal breeders, and/or professional distributors, within the twelve (12) month period immediately prior to the Closing Date. This includes employees trained to perform such detailing for the Canine Health Products within the twelve (12) month period immediately prior to the Closing Date.

TTT. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Animal Study materials and information.

UUU. "Product Software" means computer programs (including hosted software applications, software-as-a-service and enterprise software) related to the Canine Health Products, 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. The term "Product Software" includes software purchased, licensed, or used by Novartis from Third Parties that has been modified or customized for use in Business related to the Canine Health Products to the extent necessary to access or use databases and compilations, including any and all data and collections of data and

documentation related to the Canine Health Products. The term "Product Software" excludes software that is readily purchasable or licensable from sources other than Novartis that has not been modified in a manner material to the use or function thereof (other than through user preference settings).

VVV. "Product Trade Dress" means the current trade dress of a Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

WWW. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

XXX. "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.

YYY. "Reagents(s)" means the reagents, microorganisms, antibodies, sera, proteins, clinical and tissue samples and raw materials used to perform the applicable potency, immunogenicity and/or antigen compatibility test with respect to the Product(s).

ZZZ. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred,

delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Canine Health Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or,

4. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Canine Health 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.

AAAA. "Retained Product(s)" means any product(s) other than a Canine Health Product, including all Products to be marketed or sold pursuant to the following Applications: NADA #140-915, NADA #141-338, NADA #141-105, NADA #141-026, NADA #141-205, NADA #141-035, NADA #141-062; Capstar®, and all Products approved to marketed or sold outside the Geographic Territory. The term "Retained Products" also includes Products in Development by Novartis on or before the Acquisition Date that contain either Lufenuron, Milbemycin, or Praziquantel in combination with active pharmaceutical ingredients other than Lufenuron, Milbemycin, or Praziquantel. The term "Retained Products" excludes all Products that are the subject of the Applications listed in the definition of Canine Health Product(s) and any Product(s) Developed by an Acquirer using any such Applications.

BBBB. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation of the quality, safety and/or efficacy of a Product (including any or all such investigations conducted in vitro, in vivo, and/or in silico and any or all Animal Studies), Product Development Reports, and/or Product Scientific and Regulatory Material for the purpose of obtaining approval of an Application, including the ability to make available the underlying raw data from the investigation, Product Development Reports, or Product Scientific and Regulatory Material for FDA audit, if necessary.

CCCC. "Sentinel Patents" means the following Patents (as registered in the countries listed):

1. United States of America patent #5,776,982;

2. United States of America patent #5,994,395;

3. United States of America patent #6,201,012; and,

4. Japan patent #4101898.

DDDD. "Species" means the Canis Lupus (canine), Felis Catus (feline) and/or Mustela Putorius (ferret) species.

EEEE. "Supply Cost" means a cost not to exceed average direct per unit cost in United States dollars of manufacturing the Canine Health Product ascribed to the Novartis Animal Health Group for the twelve (12) month period immediately preceding the Acquisition Date. The term "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however,* that, in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Canine Health Product, the term "Supply Cost" means the cost as specified in such Remedial Agreement for that Canine Health Product.

FFFF. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to the Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, inter alia,

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Canine Health Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to each of the Canine Health Products that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, inter alia, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and,

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

    a. manufacture each of the Canine Health Products in the quality and quantities achieved by the Novartis Animal Health Group, or the manufacturer and/or developer of such Product on behalf of the Novartis Animal Health Group;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell each of the Canine Health Products in commercial quantities and to meet all Agency-approved specifications for Products; and

    c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to each of the Canine Health Products.

GGGG. "Third Party(ies)" means any non-governmental Person other than the following: the Respondents; or, the Acquirer.

HHHH. "Virbac" means Virbac S.A., a corporation organized under the laws of the French Republic with its headquarters address located at 13ere rue LID - BP 27. 06511 Carros CEDEX France, and its United States subsidiary, Virbac Corporation, located at 3200 Meacham Blvd., Ft. Worth, Texas 76137.

IIII. "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. The term "Website" excludes the following: (i) 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 (ii) content unrelated to any of the Canine Health Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Canine Health Product Assets and grant the Canine Health Product License, absolutely and in good faith, to Virbac pursuant to, and in accordance with, the Canine Health Product Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Virbac or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement is incorporated by reference into this Order and made a part hereof;

provided, however, that, if Respondents have divested the Canine Health Product Assets to Virbac 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 Virbac is not an acceptable purchaser of the Canine Health Product Assets, then Respondents shall immediately rescind the transaction with Virbac, in whole or in part, as directed by the Commission, and shall divest the Canine Health Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that, if Respondents have divested the Canine Health Product Assets to Virbac 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 Canine Health Product Assets to Virbac (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

provided further, however, that Respondents may retain the rights and assets that are necessary for Novartis or the OTC Joint Venture to provide transitional services to the Acquirer and/or to Contract Manufacture for the Acquirer, until the conclusion of the provision of such services or Contract Manufacture.

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 determining whether or not 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 Canine Health Product Assets and to grant the Canine Health Product License to an Acquirer, and to permit the Acquirer to continue the Business of each of the Canine Health Products;

provided, however, that 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, upon reasonable written notice and request, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to each of the Canine Health Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any Confidential Business Information that is exclusively related to Sentinel® Spectrum® (NADA 141-333) or Sentinel® Flavor Tabs® (NADA 141-084) 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 that is exclusively related to Sentinel® Spectrum® (NADA 141-333) or Sentinel® Flavor Tabs® (NADA 141-084), directly or indirectly, to any Person except (i) the Acquirer, (ii) another Respondent, but solely for the purposes enumerated in Paragraph II.D.4; (iii) other Persons specifically authorized by the Acquirer to receive such information, (iv) the Commission, or (v) the Interim Monitor (if any has been appointed); and,

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information exclusively related to Sentinel® Spectrum® (NADA 141-333) or Sentinel® Flavor Tabs® (NADA 141-084) to the Respondents' employees associated with the Business related to those Retained Products that are indicated for the prevention or treatment of parasite(s) in any Species.

E. Respondents shall provide, or cause to be provided (through assignment, license, or otherwise) to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to each Canine Health Product; and,

2. all rights to all Product Manufacturing Technology (including all related intellectual property) related to each Canine Health Product that is owned by a Third Party and that, prior to the Closing Date, was licensed by Novartis for use in connection with the manufacture of such Products;

Respondents shall obtain any consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Canine Health Products. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to 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. Respondents shall:

1. upon reasonable written notice and request from the Acquirer to Respondent Eli Lilly, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Supply Cost, for a period of time sufficient to allow the Acquirer (or its Manufacturing Designee) 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 Respondents, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) from Persons other than Respondents;

2. make representations and warranties to such Acquirer that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the supplying Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving that Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

   provided, however, that a Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with that Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that, in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;

4. make representations and warranties to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

   provided, however, that, in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of the Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate directly to the manufacture of the Contract

Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

7. in the event Respondents become (i) unable to supply or produce a Contract Manufacture Product from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer and (ii) that Product is the subject of an ANADA, then Respondents shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from another of Respondents' facility or facilities in those instances where such facilities are being used or have previously been used, and continue to be able to be used, by Respondents to manufacture such Product(s);

8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture; and,

9. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or its Manufacturing Designee) to obtain all Product Approvals to manufacture the Contract Manufacture Products in the same quality achieved by, or on behalf of, Novartis and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or its Manufacturing Designee's

personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

The foregoing provisions, II.F.1. - 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer (or its Manufacturing Designee(s)) is approved by the FDA to manufacture and sell such Contract Manufacture Product in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture a particular Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture a particular Contract Manufacture Product, or (iv) the date four (4) years from the Closing Date.

G. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of the Canine Health Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are indicated for the prevention or treatment of parasite(s) in any species of companion animal, 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 as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

H. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the

restrictions on the use and disclosure of the Confidential Business Information 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. 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 maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

I. Respondents shall:

1. for a period of one (1) year from the Closing Date, provide the Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Canine Health Product Core Employees. Each of these periods is hereinafter referred to as the "Canine Health Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by the Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Canine Health Product Core Employees unless the Law requires a mandatory notice period prior to the release of such information in which case the information shall be provided not later than ten (10) days after the expiration of the notice period. Failure by Respondents to provide the Product Employee Information for any Canine Health Product Core

Employee within the time provided herein shall extend the Canine Health Product 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 Canine Health Product Core Employees the opportunity to enter into employment contracts during the Canine Health Product Core Employee Access Period, (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, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

3. during the Canine Health Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Canine Health Product Core Employees, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Canine Health Product Core Employee who has received a written offer of employment from the Acquirer or its Manufacturing Designee;

   provided, however, that, subject to the conditions of continued employment prescribed in this Order,

this Paragraph shall not prohibit Respondents from continuing to employ any Canine Health Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Canine Health Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Canine Health Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of those Products and to ensure compliance with the Order to Maintain Assets. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

   provided, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Canine Health Product Core Employees in connection with the Acquisition; and,

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Canine Health Product ("Canine Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Canine Product Employee;

   provided, however, that Respondents may hire any former Canine Product Employee whose

employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Canine Product Employees; or (ii) hire a Canine Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

J. Prior to the Closing Date, Respondent Novartis shall take all actions as are necessary to ensure that Respondent Eli Lilly owns or controls (i) all the Canine Health Product Assets, and (ii) the intellectual property subject to the Canine Health Product License for the purposes of the divestitures and licenses required to be effected by Respondent Eli Lilly by this Order. In addition, Respondent Novartis shall ensure that the OTC Joint Venture is fully bound to comply with the provisions of the OTC MSA that affect the Contract Manufacture and technical services related the Canine Health Products (including, without limitation, ensuring the availability of the Humacao Facility for a period of up to four (4) years from the Acquisition Date for the purposes of such Contract Manufacture).

K. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to each Canine Health Product to the Acquirer, Respondents shall comply with the Order to Maintain Assets to the extent that the Business and assets related to the Canine Health Product that are required to be divested to the Acquirer pursuant to this Order remain under the Respondents' control.

L. Respondents shall maintain or cause to be maintained a facility that is fully ready capable and approved by the FDA to manufacture the Contract Manufacture Products in commercial quantities, in a manner consistent with cGMP until the earlier of the following dates: (i) four (4) years from the Acquisition Date; or (ii) the date the Acquirer (or its Manufacturing Designee(s)) is approved by the FDA to manufacture (wherever in the world) such Contract Manufacture Product for marketing and sale in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

M. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Canine Health Product Releasee(s) of the Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Canine Health Products for the purposes of the marketing, sale or offer for sale within the United States of America of those Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale within,

the United States of America of the Canine Health Products. Each Respondent shall also covenant to the Acquirer that as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer or the related Canine Health Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Canine Health Products for the purposes of the marketing, sale or offer for sale within the United States of America of those Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Canine Health Products. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

N. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the 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 Canine Health Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Canine Health Products for the purposes of the marketing, sale or offer for sale within the United States of America of such Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Canine Health Products.

O. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Canine Health Product(s) for the purposes of the marketing, sale or offer for sale within the United States of America of such Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Canine Health Products, that Respondent shall:

1. cooperate with the Acquirer and provide in a timely manner, at no greater than Direct Cost, any and all necessary technical assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Product; and,

3. permit the transfer to the 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 Product.

P. Respondents shall not, in the Geographic Territory:

1. use the Product Trademark(s) related to any Canine Health Product or any mark confusingly similar to such Product Trademark(s), as a trademark, trade name, or service mark;

2. attempt to register such Product Trademarks;

3. attempt to register any mark confusingly similar to such Product Trademarks; and/or,

4. challenge or interfere with Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties.

Q. The purpose of the divestiture of the Canine Health Product Assets, the grant of the Canine Health Product License, and the provision of the related Product Manufacturing Technology, to an Acquirer 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 related to each Canine Health Product within the Geographic Territory;

2. to create a viable and effective competitor, that is independent of Respondents in the Business of each Canine Health Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

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

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Canine Health Product Assets and the

transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Canine Health Product that is a Contract Manufacture Product, until the earliest of: (i) the date the Acquirer (or the Manufacturing Designee(s) of the Acquirer) is approved by the FDA to manufacture and sell that Canine Health Product and able to manufacture the Canine Health Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture the particular Canine Health Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture the particular Canine Health Product;

provided, however, that the Interim Monitor's service shall not exceed four (4) years from the Closing 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 Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however,* that beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer

toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Canine Health Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Canine Health Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, 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,* that 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 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. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality

agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

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

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where redacted documents or 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 Canine Health Products or the assets and Businesses related to those Canine Health Products;

provided, however, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, however, that pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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 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 Canine Health 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 Eli Lilly shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within five (5) days of the Closing Date, Respondent Eli Lilly shall submit to the Commission a letter certifying the date on which the divestiture required by Paragraph II.A. occurred.

C. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A., II.B., II.C., II.D.1. – II.D.3, II.E., II.F., II.G., II.H., II.I. and II.J., Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and

has complied with this Order. Respondents shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

D. Within five (5) days of OTC Joint Venture Date, Respondent Novartis shall submit to the Commission a letter certifying the date of the closing for the OTC Joint Venture.

E. One (1) year after the Order Date, annually for the next nine 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 Respondents shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of a Respondent;

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

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on February 20, 2025.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Novartis AG ("Novartis" or "Respondent") of certain assets related to certain oncology products of GlaxoSmithKline plc, 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 Orders ("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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtrasse 35, Basel, Switzerland, V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York.

2. GlaxoSmithKline plc is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9FS, United Kingdom.

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

ORDER

I.

IT IS ORDERED that, as used in this Order 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. "Novartis" or "Respondent" means the following: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Glaxo" means the following: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Glaxo SmithKline plc, 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. "Oncology Product Assets" means the B-Raf Inhibitor Product Assets and the MEK Inhibitor Product Assets, individually and collectively.

F. "Oncology Product Business(es)" means the Business of the Respondent related to each of the Oncology Products to the extent that such Business is owned, controlled, or managed by the Respondent and the Oncology Product Assets to the extent such Assets are owned by, controlled by, managed by, or licensed to, the Respondent.

G. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

H. "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 Respondent fully transfers and delivers the Oncology Product Assets to an Acquirer, Respondent shall take such actions with respect to the Oncology Product Assets as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Oncology Product Businesses, to minimize any risk of loss of competitive potential for such Oncology Product Businesses, and to prevent the

destruction, removal, wasting, deterioration, or impairment of such Oncology Product Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the Oncology Product 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 related Oncology Product Businesses.

B. Until Respondent fully transfers and delivers the Oncology Product Assets to an Acquirer, Respondent shall maintain the operations of the related Oncology 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 marketability, viability, and competitiveness of such Oncology Product Businesses and shall use its best efforts to preserve the existing relationships with the following: clinical research organizations; suppliers; end-use customers; Agencies; employees; and others having business relations with each of the respective Oncology Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Oncology 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 Oncology Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Oncology Product Businesses authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, Development (including ongoing Clinical

Trials), manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Oncology Products;

4. making available for use by each of the respective Oncology 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 Oncology Product Business; and

5. providing such support services to each of the respective Oncology Product Businesses as were being provided to such Oncology Product Business by Respondent as of the date the Consent Agreement was signed by Respondent.

C. Until Respondent fully transfers and delivers each of the respective Oncology Product Assets (including the ongoing Clinical Trials) to an Acquirer, Respondent 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 Oncology Products for the relevant Oncology Product's last fiscal year.

D. Respondent shall:

1. for a period of two (2) years from the Closing Date, and for the purposes of the Orders, provide the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with the opportunity to enter into employment contracts with the Oncology Product Core Employees. Each of these periods is hereinafter referred to as the "Oncology Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Oncology Product Core Employees unless the Law requires a mandatory notice period prior to the release of such information in which case the information shall be provided not later than ten (10) days after the expiration of the notice period. Failure by Respondent to provide the Product Employee Information for any Oncology Product Core Employee within the time provided herein shall extend the Oncology Product 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 to consider whether to provide or continue providing to Oncology Product Core Employees the opportunity to enter into employment contracts during an Oncology Product Core Employee Access Period and not for any other purpose whatsoever, (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, (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends and (v) ensure that any Manufacturing Designee(s) or Clinical Research Organization Designee(s) agrees to abide by the preceding conditions, if the Acquirer provides such information to it;

3. during the Oncology Product Core Employee Access Period(s), not interfere with the hiring or

employing by the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s) of the Oncology Product Core Employee, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s), including, but not limited to, any noncompete or nondisclosure provision of employment with respect to an Oncology Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s). In addition, Respondent shall not make any counteroffer to such an Oncology Product Core Employee who has received a written offer of employment from the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s);

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondent from continuing to employ any Oncology Product Core Employee under the terms of that employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) to that employee;

4. until the Closing Date, provide all Oncology Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Oncology Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Oncology Products and to ensure successful execution of the pre-Acquisition plans for the

Oncology Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Closing Date(s) has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided further, however, that this Paragraph does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the Oncology Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with any amount of responsibility related to an Oncology Product ("Oncology Product Employee") to terminate his or her employment relationship with the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s); or hire any Oncology Product Employee;

   provided, however, that Respondent may hire any former Oncology Product Employee whose employment has been terminated by the Acquire, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, however, that Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Oncology Product Employees; or (ii) hire an Oncology Product Employee who contacts Respondent on his or her

own initiative without any direct or indirect solicitation or encouragement from Respondent.

E. Pending divestiture of the Oncology Product Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information that is exclusively related to the Oncology Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's 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 of the particular Oncology Product(s), (ii) other Persons specifically authorized by that Acquirer to receive such information(including, without limitation, those employees of the Respondent authorized to receive such information), (iii) the Commission, (iv) the Interim Monitor (if any has been appointed); or (v) Government Entities that have jurisdiction and regulatory authority over the Acquisition or pharmaceutical marketing or manufacturing (including the European Commission and any monitoring trustee appointed or approved by the European Commission, or the EMA);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information that is exclusively related to the particular research and Development (including, without limitation, the ongoing Clinical Trials) of each respective Oncology Product to the employees of the Respondent that both: (i) are

being Developed for the treatment of the identical indication (disease and disease state), and (ii) use the same mechanism of action to treat such disease, other than is necessary to accomplish the requirements of this Order or the related Remedial Agreements, (e.g., providing transitional services to the Acquirer or ongoing Clinical Trial services as agreed to in the Remedial Agreements related to the Oncology Products);

4. institute procedures and requirements to ensure that the employees of the Respondent:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and,

   b. do not solicit, access or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose other than as is permitted by the Orders.

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, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all of its employees who:

   1. has or may have had access to Confidential Business Information; and/or

   2. has responsibilities related to the research, Development, marketing or sales of those Retained Products that both: (i) are on the market in the Geographic Territory, or are in Phase II or III Clinical Trials, for the identical indication (disease and disease state) as the Oncology Product(s) as of

the Acquisition Date, and (ii) use the same mechanism of action to treat such disease.

G. 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. 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 stating that the acknowledgment program has been implemented and is being complied with. Upon the request of an Acquirer, Respondent shall provide that Acquirer with copies of all such certifications sent to the Commission and all such notifications and reminders sent to Respondent's personnel.

H. 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.

I. After the Closing Date, Respondent's obligations under Paragraphs II.A., II.B., and II.C. of this Order to Maintain Assets shall be as set forth in the Oncology Product Divestiture Agreements referenced in the Decision and Order unless the Commission determines not to make the relevant agreement or agreements Remedial Agreements.

J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Oncology Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Oncology Product Businesses within the Geographic Territory,

and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Oncology Product Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim 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 Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with

the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Oncology Product Assets and the transfer and delivery of the related Product Manufacturing Technology and related ongoing Clinical Trials in a manner that fully satisfies the requirements of the Orders and, with respect to each Oncology Product, until the earliest of: (i) the date the Acquirer (or the Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Oncology Product and able to manufacture that Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondent; (ii) the date the Acquirer notifies the Commission and Respondent of its intention to abandon its efforts to manufacture that Oncology Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Oncology Product;

provided, however, that, with respect to each Oncology Product, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim 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. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim 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 Interim Monitor's duties and responsibilities.

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

H. Respondent shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the

reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders; *provided, however,* that, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VII.B. of the Decision and Order, and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Oncology Product and obtaining the ability to manufacture each Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent.

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

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondent has fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondent 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 Orders. Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. 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 relevant assets and rights, (ii) transitional services being provided by the Respondent to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; 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 Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of the Respondent;

B. any proposed acquisition, merger or consolidation of the 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 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 Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

A. the later of:

1. 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

2. the day after the completion of all of the following: (i) the divestiture of all of the Oncology Product Assets to an Acquirer, (ii) the transfer of the Product Manufacturing Technology related to each of the Oncology Products to an Acquirer, and (iii) the transfer of the Clinical Trials related to each of the Oncology Products to an Acquirer, as required by and described in the Decision and Order; and, the Interim Monitor, 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 such divestitures and technology and clinical transfers are complete; or,

B. the date the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Novartis AG ("Novartis"), which is designed to remedy the anticompetitive effects of Novartis' proposed acquisition of oncology assets from GlaxoSmithKline PLC ("GSK"). The Commission has placed the proposed Consent Agreement 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 any comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order ("Order").

Pursuant to an agreement dated April 22, 2014 (the "Agreement"), Novartis proposes to acquire GSK's marketed oncology products and two pipeline oncology compounds for approximately $16 billion (the "Transaction"). GSK currently has a BRAF inhibitor and an MEK inhibitor approved by the FDA, as well as the only BRAF/MEK combination therapy approved for sale in the United States. BRAF and MEK inhibitors are medicines that inhibit molecules associated with the development of cancer. Novartis has BRAF and MEK inhibitors in late-stage development, as well as a BRAF/MEK combination therapy that it expects to launch in the near future.

The Commission alleges in its Complaint that the 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, by substantially lessening competition in U.S. markets for BRAF inhibitors and MEK inhibitors. The proposed Consent Agreement will remedy the alleged violations by preserving competition that the Transaction would otherwise eliminate. Under the terms of the Consent Agreement, Novartis is required to divest all rights and

assets related to LGX818, its BRAF inhibitor, and MEK162, its MEK inhibitor, to Array BioPharma Inc. ("Array").

II. The Relevant Products and Markets

The relevant markets in which to analyze the Transaction are the development and sale of BRAF inhibitors and MEK inhibitors. BRAF and MEK inhibitors are orally administered, targeted oncology products. Physicians currently use BRAF and MEK inhibitors, increasingly in combination, to treat metastatic, late-stage melanoma. Last year in the United States, there were approximately 76,100 new cases of melanoma and 9,710 deaths caused by melanoma.[1] In addition to melanoma, researchers are studying BRAF and MEK inhibitors as potential treatments for a range of cancers, including ovarian cancer, colorectal cancer, and non-small cell lung cancer.

The United States is the relevant geographic market in which to assess the competitive effects of the Transaction because the FDA must approve BRAF and MEK inhibitors, as well as the use of the two inhibitors in combination, for marketing and sale in the United States. Accordingly, products sold outside of the United States, but not approved by the FDA, are not alternatives for U.S. consumers.

The BRAF and MEK inhibitor markets in the United States are highly concentrated. Tafinlar®, sold by GSK, and Zelboraf®, sold by F. Hoffman-La Roche AG ("Roche"), are currently the only FDA-approved BRAF inhibitors. Novartis' BRAF inhibitor in development, LGX818, is the only other product likely to begin competing with GSK and Roche in the near future. GSK's Mekinist® is currently the only FDA-approved MEK inhibitor, while Novartis' MEK162 is one of only a small number of MEK inhibitors in late-stage clinical development. GSK also sells the only FDA-approved BRAF/MEK combination therapy, which is comprised of Tafinlar and Mekinist. Aside from GSK, Roche and Novartis are the only companies with BRAF/MEK combinations in late-stage development.

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[1] U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, "Melanoma," http://www.cancer.gov/cancertopics/types/melanoma.

III. Entry

Entry into U.S. markets for BRAF inhibitors and MEK inhibitors would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Transaction. Like other oncology products, BRAF and MEK inhibitors must complete clinical trials and garner approval by the FDA before they can enter the U.S. markets. Development of new oncology medicines is expensive, time consuming, and has a high rate of failure. The time and resources required to develop and market a new oncology medicine make it unlikely that *de novo* entry into the relevant markets would be sufficient to offset the anticompetitive effects of the Transaction, and no firms currently have products in development that are likely to enter and prevent competitive harm from the Transaction.

IV. Effects of the Acquisition

Without a remedy, the Transaction will eliminate likely future competition between GSK and Novartis in the concentrated markets for BRAF and MEK inhibitors. Absent the acquisition, Novartis likely would have obtained FDA approval for and launched its LGX818 and MEK162 products in the near future in direct competition with GSK's combination offering for treating metastatic melanoma patients. The Transaction would also likely reduce the development of BRAF and MEK inhibitors to treat other types of cancer, because GSK and Novartis are currently developing their respective BRAF and MEK inhibitors for several of the same indications beyond melanoma. By eliminating the potential head-to-head competition between Novartis and GSK, the Transaction will likely result in higher prices for BRAF and MEK inhibitors and reduced choice for U.S. health care consumers.

V. The Consent Agreement

The proposed Consent Agreement effectively remedies the Transaction's anticompetitive effects by requiring Novartis to divest to Array all of its rights and assets related to LGX818 and MEK162. The divestiture will preserve the competition that otherwise would have been lost in the markets for BRAF and MEK inhibitors.

Array is a biopharmaceutical company headquartered in Boulder, Colorado, that focuses on the discovery, development, and commercialization of oncology medicines. Array is well suited to acquire LGX818 and MEK162 because it initially developed MEK162 and is currently a partner with Novartis in the development of both products. Array is a sophisticated company that possesses both the incentive and ability to develop and commercialize LGX818 and MEK162 either independently or with a new partner.

The Order requires Novartis to divest its rights and interests in LGX818 and MEK162 to Array no later than ten days after consummation of the proposed transaction or on the date that the Order becomes final, whichever is earlier. The divestiture includes regulatory approvals, intellectual property, assets related to ongoing clinical trials and manufacturing processes, and other confidential business information related to the divested compounds. To ensure that the divestiture is successful, the Order requires Novartis to provide transitional support to Array and to manufacture and supply the divested compounds while it transfers manufacturing processes to Array.

The Commission has agreed to appoint an Interim Monitor to ensure that Novartis complies with all of its obligations under the Consent Agreement and to keep the Commission informed about the status of the transfer of rights and assets to Array.

The Commission's goal in evaluating possible divestiture purchasers is to maintain the competitive environment that existed prior to the Transaction. If the Commission ultimately determines that Array is not an acceptable acquirer, or that the manner of the divestiture is unacceptable, then the parties must unwind the sale of rights and assets to Array and divest them to a Commission-

approved acquirer within six months of the date that the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the rights and assets if the parties fail to divest them as required.

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

Opinion of the Commission

IN THE MATTER OF

JERK, LLC, D/B/A JERK.COM, AND JOHN FANNING

OPINION OF THE COMMISSION GRANTING COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION AND FINAL ORDER

Docket No. D-9361; File No. 122 3141
Complaint, April 2, 2014 – Decision, March 13, 2015

In April 2014, the Commission filed an administrative complaint against Jerk LLC and John Fanning ("Fanning") for violations of the FTC Act. According to the complaint, Jerk LLC and Fanning owned and operated Jerk.com, a website that harvested personal information and photos from Facebook to create profiles of more than 73 million individuals, including children, and then labeled these people as "Jerk" or "Not a Jerk." Jerk LLC and Fanning then charged consumers a $30 membership fee for the ability to revise their online profile. The complaint alleged that, in most cases, however, consumers paying the membership fee received nothing in return. Following discovery, complaint counsel filed a motion with the Commission for summary decision. Fanning filed an opposition arguing that the evidence failed to show the website was controlled by Jerk LLC or Fanning or that any misrepresentations were made to consumers regarding the website's content. Fanning further argued that labeling consumers as "Jerk" or "Not a Jerk" amounted to free speech, which the Commission lacked the authority to regulate. In its opinion, the Commission granted summary decision, finding that there was no material dispute that Jerk LLC and Fanning misled consumers by claiming that its website content was posted by other users or misrepresented the benefits of a paid membership. The Commission's order requires Jerk LLC and Fanning to delete all personal and customer information collected during the operation of the Jerk.com website within 30 days. The order further bars them from selling or disclosing such information and prohibits them from misrepresenting the source of any content on a future website.

Participants

For the *Commission: Yan Fang, Kerry O'Brien, Sarah Schroeder,* and *Boris Yankilovich.*

For the *Respondents: Peter R. Carr II, Eckert Seamans Cherin & Mallott, LLC; Maria Crimi Speth, Jaburg & Wilk P.C.;* and *David Duncan* and *David Russcol, Zalkind Duncan & Bernstein LLP.*

OPINION OF THE COMMISSION

By McSWEENY, Commissioner, for a unanimous Commission.

In this case we address allegations of deception by Respondents Jerk, LLC ("Jerk") and John Fanning ("Fanning" or "Mr. Fanning") in their operation of the Jerk.com website. Jerk.com was a social media website that invited users to create profiles of other individuals and rate those profiled as a "jerk" or "not a jerk." Hundreds of consumers filed complaints about Jerk.com with the Commission and other law enforcement agencies.

In 2014, the Commission issued a two-count administrative complaint alleging that Respondents had engaged in deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act. In Count I, Complaint Counsel allege that Respondents falsely represented that content on Jerk.com was generated by users, when in fact it was almost entirely "scraped" from Facebook. In Count II, Complaint Counsel allege that Respondents falsely represented that users would receive additional benefits, including the ability to dispute information posted to the site by purchasing a membership, when in fact consumers received nothing in return. Before us is Complaint Counsel's Motion for Summary Decision.[1] Complaint Counsel contend that Respondents made false or misleading and material representations. Complaint Counsel also argue that Mr. Fanning is individually liable because he participated in the deceptive

[1] We use the following abbreviations for purposes of this opinion:
Comp.: Complaint
CCMSD: Complaint Counsel's Motion for Summary Decision
CCSMF: Complaint Counsel's Statement of Material Facts Not in Dispute
JOppB: Respondent Jerk LLC's Opposition to Complaint Counsel's Motion for Summary Decision
FOppB: Respondent John Fanning's Opposition to Complaint Counsel's Motion for Summary Decision
FAff: Respondent Fanning's Affidavit
CCRJ: Complaint Counsel's Reply to Respondent Jerk, LLC's Opposition
CCRF: Complaint Counsel's Reply to Respondent Fanning's Opposition
FS: Respondent Fanning's Surreply
CX: Complaint Counsel's Exhibit

conduct and controlled the acts and practices at issue. Both Respondents oppose the Motion.

For the reasons explained below, we grant Complaint Counsel's motion. We conclude that there is no genuine issue of material fact concerning Jerk's liability for the alleged misrepresentations, and we grant summary decision on both counts against Jerk. We also conclude that there are no genuine issues of material fact as to Mr. Fanning's personal involvement in, and control over, Jerk's unlawful conduct, and we grant summary decision on both counts against Mr. Fanning. We issue an order that, *inter alia*, prohibits Respondents – in connection with the marketing, promoting, or offering for sale of any good or service – from misrepresenting the source of any content on a website, including any personal information, or the benefits of joining any service.

I. The Complaint And Procedural Chronology

On April 2, 2014, the Commission issued an administrative complaint against Jerk, a Delaware limited liability company doing business as Jerk.com, and John Fanning, who, the Complaint alleges, "formulated, directed, controlled, or had authority to control the acts and practices of Jerk, LLC." Comp. ¶¶ 1-2. The Complaint alleges that Respondents operated a social networking site from 2009 until 2013 that invited users to create individual profiles using the site's "Post a Jerk" feature. Comp. ¶ 4. The site earned revenue by selling memberships for $30, charging consumers a $25 customer service fee to contact the website, and placing third-party advertisements on Jerk.com. Comp. ¶ 5.

According to the Complaint, Respondents disseminated statements to consumers representing that profiles on the website reflected the views of Jerk users. This led consumers to believe that a Jerk.com user had created their profiles, when in fact it was the Respondents themselves who created the profiles by "scraping" information from Facebook. Comp. ¶¶ 8-10. The Complaint alleges that Jerk's website contained between 73.4 and 81.6 million unique profiles, including several million profiles with pictures of children. Comp. ¶¶ 4, 7.

The Complaint also alleges that Respondents told consumers if they purchased a $30 subscription to Jerk.com they would obtain "additional paid premium features," including the ability to dispute information posted on Jerk.com. Numerous consumers believed that a membership would allow them to alter or delete their Jerk profile and to dispute any false information it contained. Comp. ¶ 12. However, in many instances, consumers allegedly received nothing in return. *Id.*

The Complaint further alleges that Respondents made it difficult for consumers to register complaints. Comp. ¶ 13. Respondents charged consumers $25 just to e-mail the Jerk customer service department, and ignored requests funneled through Jerk's registered agent and web host asking that consumer photos and other profile information be removed. *Id.*

There are two counts in the Complaint. Count I alleges that Respondents falsely represented to consumers that content on the Jerk.com website was user-generated, when in fact it was almost entirely scraped from Facebook. Count II alleges that Respondents falsely represented that by purchasing a membership users would receive additional benefits, including the ability to dispute information posted to the site, but in fact received nothing in return.

Accordingly, the Complaint alleges that "Respondents' practices . . . constitute deceptive acts or practices in . . . violation of Section 5(a) of the Federal Trade Commission Act." Comp. ¶ 19.

On May 19, 2014, Respondents filed their answers, disputing liability. Following discovery, Complaint Counsel moved for summary decision on September 29, 2014, contending that there remained no genuine dispute about any material fact. Both Respondents filed opposition briefs responding to Complaint Counsel's motion, and Complaint Counsel filed reply briefs. Mr. Fanning also filed a Surreply.[2]

[2] Respondents do not dispute that the Commission has jurisdiction over the conduct challenged in the Complaint. Section 5 of the Federal Trade Commission Act grants the Commission authority to prevent "unfair or

II. Standard For Summary Decision

We review Complaint Counsel's motion for summary decision pursuant to Rule 3.24 of our Rules of Practice, the provisions of which "are virtually identical to the provisions of Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts." *Polygram Holding, Inc*., 2002 WL 31433923, at *1 (FTC Feb. 26, 2002).

A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotations omitted); 16 C.F.R. 3.24 (a)(1) (requiring moving party to provide "a separate and concise statement of the material facts as to which [it] contends there is no genuine issue for trial"). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc*., 929 F.2d 604, 608 (11th Cir. 1991).

The "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading" and must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24 (a)(3); *Celotex*, 477 U.S. at 323; *see, e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment."); *SEC v. Research Automation Corp*., 585 F.2d 31, 33 (2d Cir. 1978) (explaining that a party opposing summary

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deceptive acts or practices in or affecting commerce" by "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(1)-(2). Jerk, a limited liability company, Jerk Ans. ¶ 1, is a partnership or corporation over which, and Mr. Fanning is a person over whom, the FTC has jurisdiction. In addition, Respondents admit "[t]he acts and practices of respondents . . . have been in or affecting commerce, as 'commerce' is defined in Section 4 of the Federal Trade Commission Act." Jerk Ans. ¶ 3; Fanning Ans. ¶ 3.

judgment cannot rest on generalized assertions, but must set forth "concrete particulars" showing the need for trial). Otherwise, "the policy favoring efficient resolution of disputes, which is the cornerstone of the summary judgment procedure, would be completely undermined." *Research Automation*, 585 F.2d at 33.

In accord with this policy, Commission Rules require a party opposing summary decision to identify "those material facts as to which the opposing party contends there exists a genuine issue for trial." 16 C.F.R. §3.24 (a)(2). The response must set forth "specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24 (a)(3). "If no such response is filed, summary decision, if appropriate, shall be rendered." *Id*. Further, under our Rules, any "[a]ffidavits shall set forth such facts as would be admissible in evidence and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." *Id*. Conclusory, speculative and self-serving affidavits are insufficient to create a factual dispute. *See, e.g.*, *Valley Forge Ins. Co. v. Health Care Mgmt. Ptnrs, Ltd*, 616 F.3d 1086, 1095 n.2 (10th Cir. 2010) ("conclusory and self-serving affidavit is insufficient to create a factual dispute") (internal quotation omitted); *FTC v. MacGregor*, 360 F. App'x 891, 893 (9th Cir. 2009) (finding respondents' affidavits, proffered without evidentiary support, "conclusory and thus fail[ing] to create a genuine issue of material fact"); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact."); *FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, 1053 (C.D. Cal. 2002) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.").

When the "evidence [favoring the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). However, at the summary judgment stage, we are not to make credibility determinations or weigh conflicting evidence, and must view the inferences "drawn from the underlying facts . . . in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. Legal Standard For Deception

Section 5 of the FTC Act makes unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45. This case involves only alleged deception; there are no allegations of unfair acts or practices.

"An act or practice is deceptive if (1) there is a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1063 (C.D. Calif. 2012) (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)), *appeal docketed*, No. 14-56528 (9th Cir. Sept. 17, 2014); *accord FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S. D. Fla. 2007) (citing, *e.g.*, *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)); *FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). Thus, "[t]he FTC may establish corporate liability under section 5 with evidence that a corporation made material representations or omissions likely to mislead a reasonable consumer." *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005).

In determining whether a representation is false or misleading, we consider the overall "net impression" of the representation or act. *See, e.g.*, *POM Wonderful LLC v. FTC*, 2015 WL 394093, at *8, *18 (D.C. Cir. Jan. 30, 2015); *Commerce Planet, Inc.*, 878 F. Supp. 2d at 1063 (A court should "consider the overall, common sense 'net impression' of the representation or act as a whole to determine whether it is misleading") (citing *FTC v. Gill,* 265 F.3d 944, 956 (9th Cir. 2001) and *Stefanchik*, 559 F.3d at 928). A representation is considered material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." *E.g.*, *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 960 (N.D. Ill. 2006) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)), *aff'd*, 512 F.3d 858 (7th Cir. 2008); *Commerce Planet*, 878 F. Supp. 2d at 1063 (citing *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006)). Complaint Counsel "need not present proof of subjective

reliance by each victim." *Transnet Wireless*, 506 F. Supp. 2d at 1266.

"To hold an individual liable for a corporation's deceptive practices, [Complaint Counsel] must first prove an underlying corporate violation of section 5 of the FTC Act." *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005). "Upon establishing corporate liability, the FTC is obligated to demonstrate that the individual defendants either participated directly in the deceptive acts or practices or had authority to control them" in order to hold the individual personally liable for the unlawful conduct. *Id.* at 764.

IV. Jerk's Liability

In analyzing Jerk's liability for deception, we focus on three questions: (1) did Jerk make the representations alleged in the Complaint; (2) if so, were the representations false or misleading; and (3) even if false or misleading, were they material? We conclude that Complaint Counsel have established an affirmative answer to all three questions. We find Respondents failed to raise any genuine issue of disputed material fact and therefore summary decision is appropriate.

A. Count I: Misrepresentation About The Source Of Jerk.Com's Content

1. The Representation

The first question we address is whether Complaint Counsel have presented sufficient evidence that Jerk made the representation the Complaint alleges: namely, whether Jerk represented "expressly or by implication, that content on Jerk, including names, photographs, and other content, was created by Jerk users and reflected those users' views of the profiled individuals." Comp. ¶ 15. Complaint Counsel contend that "Respondents expressly conveyed this claim through statements made on Jerk.com and Twitter . . . ." CCMSD 18. They emphasize, in particular, the following statement that appears in Section 4 of the "About Us" portion of the website entitled "Online Content": "Opinions, advice, statements, offers, or other

information or content made available through jerk.com are those of their respective authors and not of Jerk LLC. . .” CCMSD 4; CCSMF ¶ 43. They also identify additional statements on the Jerk.com website that allegedly send the same message, CCMSD 18; CCSMF ¶¶ 42-46, and they identify extrinsic evidence that allegedly shows that Respondents intended to convey that message to consumers and that consumers so interpreted it, CCMSD 5-9; CCSMF ¶¶ 47-51. Respondents dispute Complaint Counsel’s interpretation of the statements on the Jerk.com website. Thus, the key question we must resolve is whether the statements on the Jerk.com website would convey to consumers that the content on the website, including the profiles, was generated by the website’s users.

Our framework for analyzing this issue is well-established. We deem the statements to convey the representation alleged if consumers, acting reasonably under the circumstances, would so interpret them. *See Deception Statement*, 103 F.T.C. at 176. The primary evidence we consider in making that determination is the statements themselves, and what we seek to determine is the “net impression” they convey. *See, e.g.*, *id.* at 176, 178; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008). Where the statements convey a representation that is “reasonably clear,” extrinsic evidence of how consumers actually interpreted the statements is not required. *See, e.g.*, *Kraft, Inc.*, 970 F.2d at 319. Further, although evidence of intent to make a particular representation is not required to establish liability under Section 5 (*see, e.g.*, *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 363 n.5 (D.C. Cir. 1977), evidence that the respondent intended to make the alleged representation can help demonstrate that the alleged representation was in fact conveyed to consumers. *See, e.g.*, *Novartis Corp.*, 127 F.T.C. at 683. And, as Respondent Fanning correctly acknowledges (FOppB 9), our authority extends to implied as well as express claims. *See, e.g.*, *Kraft, Inc*. 970 F.2d at 322.

In accordance with this framework, our analysis initially focuses on the statements themselves. Complaint Counsel highlight the following statements that appeared on the Jerk.com

website,[3] and urge us to find that these statements, in conjunction with a statement Jerk posted on Twitter,[4] convey the message to consumers that the content of Jerk.com was user-generated:

- "Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not that of Jerk LLC. . ." which was set out in Section 4, entitled "Online Content," on the "About Us" webpage. *See* CCSMF ¶ 43.[5]

- "You shall remain solely responsible for the content of your postings on jerk.com," which was set out in Section 5 entitled "Removal of Information," on the "About Us" webpage. *See id*.

- "You agree that: You are solely responsible for the content or information you publish or display (hereinafter, 'post') on jerk.com" which was set out in Section 2 of the "About Us" portion of the website. *See id*.

- "Fill out the form below to find or create a profile on jerk. Include a picture if you can and as much other information as possible," which appeared on the "Post a Jerk" section of the website. *See* CCSMF ¶ 45.

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[3] *See* CCSMF ¶ 40, *citing, e.g.*, CX0047; CX0048; CX0258 ¶ 16; CX0259; CX0272; CX0273; CX0274; CX0275.

[4] Jerk made the following statement on Twitter: "Find out what your 'friends' are saying about you behind your back to the rest of the world!" CCSMF ¶ 46.

[5] Section 4 states, in full:

> 4. Online Content
> Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC, and should not necessarily be relied upon. Such authors are solely responsible for the accuracy of such content. Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made. Under no circumstances will Jerk LLC be responsible for any loss or damage resulting from anyone's reliance on information or other content posted on jerk.com.

- "Want to join the millions of people who already use Jerk for important updates for business, dating and more," which appeared on the "Welcome" page of the website. *See* CCSMF ¶ 42.

- "Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others," which appeared on the "Remove Me" page of the website. *See* CCSMF ¶ 44.

See CCMSD 4-5.

Respondents challenge Complaint Counsel's interpretation. With respect to the first statement, from Section 4 of the "About Us" page, Jerk says that it is not a factual assertion about the source of information on Jerk.com, but rather a disclaimer, which Jerk was entitled to make under the Communications Decency Act. JOppB 5-6. Further, Jerk contends that if the statement contains any representation of fact, that representation is true because "[t]he evidence proffered by Complaint Counsel indicates that content on jerk.com came from a variety of sources, including Facebook, Intelius, other web sources, and jerk users themselves" and "Section 4 . . . accurately conveys that Jerk accepts no responsibility for content not created by Jerk." JOppB 6. Likewise, Jerk argues that Sections 2 and 5 of the "About Us" page constitute contract "terms and conditions," not factual representations, and, to the extent they convey any facts, the statements are truthful. *Id.*

Jerk argues that the statements in the "Post a Jerk" and "Remove Me" sections were true. It contends that the "Welcome" page statement – "[M]illions of people already use Jerk for important updates for business, dating and more" – is mere puffery and was not material because consumers would not have relied on it. JOppB 7-9.

Mr. Fanning, who addressed only the first statement, similarly argues that it was a legal disclaimer. He maintains that this statement could not embody a cognizable claim under Section 5 of the FTC Act because it was not "an advertisement intended to lure users to the Jerk.com site." FOppB 9. Additionally, he contends that claims interpretation is a question of fact. *Id.* at 8.

Having considered the parties' respective arguments and examined the statements at issue, we conclude that neither the language in Section 4 nor that language in combination with the other statements Complaint Counsel identify constitutes an *express* representation that the content on Jerk.com was created by Jerk users and reflected their views of the profiled individuals.

On the other hand, our facial analysis of the Section 4 statement, in conjunction with the various other statements on the website, does lead us to conclude that Jerk's statements constitute an *implied* representation that the content on the website, including names, photographs, and other content, was created by Jerk users and reflected those users' views of the profiled individuals. Thus, a consumer clicking on the "Welcome to Jerk" tab would see:

> Welcome to Jerk. Looking for the latest scoop on a world filled with Jerks? Want to join millions of people who already use Jerk for important updates for business, dating, and more? Don't worry we have room for one more!

The reference to "millions of people who already use Jerk" introduces the website as a vibrant source of user participation and social interaction. The Welcome page then goes on to say:

> Subscribers on Jerk . . . receive free benefits including:
>
> . . .
>
> 4. Enter comments and reviews for people you interact with.
>
> 5. Help others avoid the wrong people.
>
> 6. Praise those who help you and move good people closer to sainthood!

CX0048-035. All of these statements in our view convey the essential message that Jerk.com is based on content generated by its users.

That message is further underscored by the "Post a Jerk" feature which invited consumers to post profiles of other individuals to the site. It stated: "Fill out the form below to find or create a profile on jerk. Include a picture if you can and as much other information as possible." CCSMF ¶ 45, *citing* CX0048-031.

A consumer clicking on the "About Us" tab would see still other statements that also give the impression that the content was generated by website's users. Section 4's language, stating that "[o]pinions, advice, statements . . . or other information or content made available" on the website is from "their respective authors and not that of Jerk LLC," is particularly telling. CX0048-78. Section 2, entitled "Online Conduct," and Section 5, entitled "Removal of Information," refer only to information posted by users. *Id*. A consumer who went further and clicked on the "Remove Me" tab would find a similar message – that users generate Jerk's content. As it stated, "Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others." CX0048-032.

The impression conveyed by these statements is that the content on Jerk.com was created and posted by users and reflected their views. Both the basic "Welcome" and "About Us" screens – central to the website's self-description – speak in terms of user-posted content, and the latter states that "content" posted on the website is "not" that "of Jerk LLC." Other key screens yield the same impression. The "Post-a-Jerk" screen – describing the website's central function – again focuses on user-generated postings. The removal screens also reference only user-generated material and suggest that the postings reflect the views of other users. Each of these screens speaks only of user-posted profiles and user-generated content. Respondents have not identified countervailing statements indicating that Jerk posted the profiles and content.[6]

[6] The two statements Mr. Fanning highlights, *see* FS 3, do not change the net impression. The statement that "Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made," further suggests that Jerk.com's content is user-generated and not placed on the site by Jerk. And the statement that "No one's profile is ever removed, because Jerk is based on searching free open Internet

Our interpretation is bolstered by the substantial extrinsic evidence presented by Complaint Counsel that Respondents *intended* to convey the message that the content on the Jerk.com site was user-generated, and that consumers actually *believed* that their profiles were posted by other users. Evidence shows that Jerk staff prepared a Wikipedia entry at Mr. Fanning's direction describing Jerk.com as a user-generated network.[7] The evidence shows that Jerk represented to investors that Jerk.com was a user-generated website.[8] There is also evidence that Jerk's counsel represented to the FTC, state officials and Facebook that content on Jerk.com was user-generated.[9] All this evidence manifests

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searching databases and it's not possible to remove things from the Internet," suggests nothing regarding *who* posted the Internet-sourced content to Jerk.com. The net impression remains that the content on Jerk.com, including the profiles, was user-generated.

[7] *See* CCSMF ¶ 48, *citing, e.g.*, CX0670 (e-mail from Fanning: "I figured this is a good time to finish the Wikipedia page for jerk.com . . . . The first Anti Social Network."); CX0636-001 ("Jerk.com is an online social networking and reputation management service which attempts to determine whether its users are good (denoted as Saints) or bad people (denoted as Jerks) based on the opinions of those around them. Each user has his own profile which consists of a picture, brief biographical information, personality quiz, and reviews from other Jerk users.") (Wikipedia links omitted); CX0642-002.

[8] *See* CCSMF ¶ 49, *citing, e.g.*, CX0112-001 (e-mail from Fanning to investor: "jerk.com will provide a framework for uploading and posting ratings, reviews, feedback, photos, and data on an individual basis. Like Wikipedia this content will be grown organically from the users themselves and reflect the view of the people who have personal, first-hand knowledge of the jerk.com individual who is profiled."); CX0117-002-003 (e-mail from Fanning to investor: "Jerk.Com – Company Summary . . . [Jerk.com] offers a framework for posting praise and disputes, computing ratings, and gathering feedback and comments; the system provides for users to include photos and personal information."); CX0046-047 (presentation on NetCapital's website: "Jerk com provides consumer reputation management . . . Designed to offer Wikipedia-like information on doing business and for social interactions on the web, the content is growing organically from the users themselves and reflect the view of the people who have personal first hand knowledge of the profiled individual.").

[9] CCSMF ¶ 50, *citing, e.g.*, CX0291-001 (representing to the Commission in its Petition to Quash, "Profiles are submitted to Jerk.com by users by choosing the 'post a jerk' option."); CX0528-001; CX0529-001; CX0531-001 (letters to the offices of the attorneys general of Missouri, Connecticut and New York: "Jerk, LLC operates the forum, but the content is provided by users.") CX-0107-003 (letter from Jerk's counsel to Facebook: "You claim jerk.com

Jerk's intention to produce the impression that the Jerk.com profiles were user-generated. While these representations were not conveyed directly to *consumers*, as Jerk correctly notes, they are nevertheless relevant to the message Jerk intended to convey to consumers. Evidence of that intent is relevant to our consideration of whether the statements on Jerk's website actually conveyed the representation alleged. *See, e.g.*, *Telebrands Corp.*, 140 F.T.C. 278, 304 (2005) (concluding that "evidence that respondents intended to convey the challenged claims" provided further support for the conclusion that advertisements made the alleged claims); *Novartis Corp.*, 127 F.T.C. at 683 ("evidence of intent to make a claim may support a finding that the claims were indeed made").

Our interpretation is also supported by extrinsic evidence showing that consumers believed someone they knew had created their Jerk.com profiles. *See* CCSMF ¶ 51. One consumer in her sworn declaration stated, "Initially, I was worried that someone had created the Jerk.com profile against me. I was mortified and embarrassed that my name and the photo of me with my children were on this website." CX0036-001 ¶ 3. Another stated:

> When I visited jerk.com, I saw a profile with my full name and a photograph of me as a child. I immediately thought that someone who didn't like me put me on there. The website bragged about success stories of posting and rating 'jerks,' and these stories were like ads encouraging people to post and rate more people. I was alarmed. I thought that someone was messing with me.

CX0037-001 ¶ 3. This extrinsic evidence, though not required for us to determine that Respondents have made the alleged representations,[10] lends support to our interpretation. Neither

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uses automated means to collect Facebook user data. Again, jerk.com users – not Jerk LLC – post content to jerk.com.").

[10]*See, e.g.*, *Kraft*, 970 F.2d at 319 ("the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement"); *see also Kroger*, 98 F.T.C. 639, 728 (1981) ("It is settled that the Commission has sufficient expertise to determine an advertisement's meanings – express and implied – without necessarily

Respondent has given any reason to doubt the evidence's reliability.[11]

We considered Respondents' various legal arguments about the representation, but are unpersuaded. First, we reject Mr. Fanning's assertion that Complaint Counsel's failure to point to "specific, affirmative statements that were made to advertise or promote Jerk.com" was a "fatal defect . . . requi[ring] denial of [summary decision]." FOppB 8. There is no need to identify a single, express deceptive statement; it is well established that deception may be found based on the net impression conveyed. *POM Wonderful*, 2015 WL 394093, at *8; *Kraft*, 970 F.2d at 318-20. Nor is it necessary that the deceptive representation arise in advertising or similar promotional material. Although many of the cases we decide involve advertising or other types of promotional claims, Section 5 applies broadly to "deceptive acts or practices in or affecting commerce." Thus, the Commission's authority is not confined to claims that can be identified as advertising or other promotional claims. *See FTC v. AMG Servs., Inc*., 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014) (summary judgment granted to FTC where loan note disclosure was likely to mislead consumer borrowers acting reasonably under the circumstances); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626-31 (D.N.J. 2014) (rejecting dismissal of deception count based on defendant website's statements about its privacy

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resorting to evidence of consumer perceptions.") (citing *National Dynamics Corp*., 82 F.T.C. 488, 548 (1972)), *aff'd*, 492 F.2d 1333 (2d Cir. 1974).

[11] Complaint Counsel attach further extrinsic evidence – the Expert Report of Milolaj Jan Piskorski – as an Exhibit to their Reply to Jerk's Opposition. It addresses issues relevant to what reasonable consumers would have understood regarding the source of content on Jerk.com. This exhibit was submitted after Mr. Fanning's briefing had closed and shortly after Jerk's second counsel had withdrawn. To avoid any possible prejudice to Respondents we have reached our determinations without relying on the expert's report.

Complaint Counsel also attach their Second Request for Admissions to Respondent Jerk, LLC, to which Jerk responded only after an extended deadline. Complaint Counsel argue that pursuant to Commission Rules, 16 C.F.R. § 3.32(c), the matters in the Requests for Admission are now "conclusively established" as to Jerk. However, given the nature of Jerk's defense and our rulings, based on other evidence regarding Respondents' liability, Jerk's failure to timely respond to the Second Request for Admissions does not affect this Opinion.

policy); *cf. Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960) (referring to the FTC's "extensive" power "to prevent the use of [deceptive] acts").[12] In any case, the representation that content on Jerk.com was user-generated drove traffic to the Jerk.com website, as explained in the discussion of materiality below. *See infra* Section IV.A.3. It pertained to a central characteristic of the website, important to consumers, *see id*., and its display was indeed promotional.

Second, we also reject Respondents' attempt to dismiss certain of their statements as mere legal disclaimers or other legalese unlikely to be read by consumers. A material representation that is likely to deceive a consumer acting reasonably violates Section 5, regardless of whether it is found in the terms and conditions or elsewhere. *See AMG Servs.*, 29 F. Supp. 3d at 1349-52 (loan note disclosure found deceptive); *Wyndham Worldwide*, 10 F. Supp. 3d at 626-31 (rejecting dismissal of deception count based on defendant website's statements about its privacy policy). Moreover, our conclusion is based on far more than just the statements that Jerk labels contractual "terms and conditions."

Finally, we reject Mr. Fanning's argument that claims interpretation is a matter of fact rather than of law and that we therefore cannot interpret the meaning of the statements in considering a motion for summary decision. *See* FOppB 7. The issue is not whether claims interpretation is more akin to a question of fact rather than law, but whether there is a *genuine factual dispute in this case* as to whether Respondents made the statements at issue and whether those statements convey the message to consumers that Complaint Counsel allege. *See FTC v. Gill*, 71 F. Supp. 2d 1030, 1035 (C.D. Cal. 1999) ("Where the operative facts are substantially undisputed, and the heart of the

[12] Mr. Fanning also criticizes Complaint Counsel for failing to follow "the rubric that is supposed to govern" the analysis here. FOppB 8. As is evident from the very language cited by Mr. Fanning, however, the rubric that he identifies applies to analyzing the adequacy of substantiation for advertising claims in proceedings brought under Sections 5 and 12 of the FTC Act; it has no relevance in this case. As to Mr. Fanning's suggestion that Complaint Counsel must establish "inducement," FOppB 10, while a lack of evidence of inducement may be relevant to a false advertising claim brought under Section 12 of the FTC Act, such evidence is not required in an action brought under Section 5, which is the case here.

controversy is the legal effect of such facts, such a dispute effectively becomes a question of law that can, quite properly, be decided on summary judgment."), *aff'd*, 265 F.3d 944 (9th Cir. 2001); *AMG Services*, 29 F. Supp. 3d at 1349-50 (noting that "numerous Ninth Circuit cases . . . have found the net impression of a representation to be suitable for summary judgment determination."). To be sure, on a motion for summary decision, we must draw all *factual* inferences against the movant, and may rule in the movant's favor only if we are persuaded that no genuine issue of material *fact* exists. However, "the critical issue is not whether the alleged claims are [express or] implicit, but simply whether they are so clearly conveyed . . . that no genuine issue as to their existence can be raised." *In re Kroger*, 98 F.T.C. 639, 729 (1981). "Where such certainty exists, the movant may be said to have fully discharged its burden of proof under Rule 3.24." *Id.*

Here, neither Respondent has raised any genuine issue of disputed fact as to whether Jerk made the representation alleged in the Complaint. Thus, we find that Jerk conveyed the implied representation that "content on [Jerk.com], including names, photographs, and other content, was created by [the website's] users and reflected those users' views of the profiled individuals."

2. Falsity of the Representation

Having determined that Jerk made the representation alleged in the Complaint, we consider whether Complaint Counsel establish that it was false or misleading, and whether Respondents raise any genuine issues of disputed material fact. We ask whether the representation is likely to mislead; Complaint Counsel need not prove actual deception. *Deception Statement*, at 103 F.T.C. at 176 (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)); *accord Commerce Planet*, 878 F. Supp. 2d at 1073 ("To establish a section 5 violation, proof of actual deception is unnecessary; it only requires a showing that misrepresentations 'possess a tendency to deceive.'") (citing *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979)).

Complaint Counsel assert that uncontroverted evidence demonstrates that Respondents' representation about the source of the Jerk.com content, including the profiles, was false, because the vast majority of the content on Jerk.com, including the profiles, was created, not by Jerk.com users, but rather by Jerk itself or those under Jerk's control, largely from profile and other information taken from Facebook. Indeed, Complaint Counsel cite extensive deposition testimony, documents, and other evidence establishing that: (1) the vast majority of Jerk.com profiles were created by automated means, which included bulk loading information from Facebook;[13] (2) Jerk obtained this information by registering as a Facebook developer;[14] and (3) Jerk did nothing when consumers and Facebook itself complained to the company about using photos and other data from Facebook.[15]

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[13] CCSMF ¶ 57, *citing, e.g.*, CX0057 ¶ 8; CX0438-30:3-20; CX0181-138:22-139:2. Some Jerk.com profiles were created when consumers entered their Facebook login credentials on Jerk.com to search for people they knew on Jerk.com; doing that caused a program to automatically generate Jerk.com profiles based upon the consumers' contact information and Facebook friends lists. CCSMF ¶ 58, *citing, e.g.*, CX0629-003 ¶ 10; CX0438-17:7-14. Respondents also added comments from other sources to populate Jerk.com profiles. CCSMF ¶ 60, *citing, e.g.*, CX0305-001. Through these means, Jerk.com grew to displaying more than 85 million profiles in just a few months, CCSMF ¶ 59, *citing, e.g.*, CX0317; CX0153-002, although approximately 99 percent of Jerk.com profiles did not contain user comments or a vote of Jerk/Not a Jerk, CCSMF ¶ 66, *citing* CX0063-002 ¶ 11; CX0307-003.

[14] CCSMF ¶ 73, *citing, e.g.*, CX0094-004 ¶¶ 15, 16. By having its agent register as a Facebook Developer, Jerk gained access to Facebook's application programming interface (API), which allowed it to retrieve Facebook user[s'] publicly available and non-public data. CCSMF ¶ 74, *citing, e.g.*, CX0094-002-003 (Facebook Declaration).

[15] Jerk failed to delete photos it obtained from Facebook upon user requests to delete the data. CCSMF ¶ 80, *citing, e.g.*, CX0528-001; CX0006-001 ¶ 6; CX0011-001-003 ¶¶ 5-15; CX0027-001-002 ¶¶ 7-8; CX0037-001 ¶ 5; CX0043-001-002 ¶¶ 3, 5-6 (Jerk ignored a request from a sheriff's deputy to remove a Jerk.com profile that was endangering a 13-year old girl); CX0534 (Jerk refused to remove a profile of a child who was a victim of abuse). Users complained to Facebook about Jerk.com posting their data from Facebook. CCSMF ¶ 77, *citing, e.g.*, CX0105-001 ¶ 3. Facebook investigated its user[s'] complaints about Jerk.com and sent Jerk a cease and desist letter in March 2012. CCSMF ¶ 82, *citing, e.g.*, CX0106-001; CX0107. Jerk maintained information obtained through Facebook after Jerk's Facebook access was disabled. CCSMF ¶ 81, *citing* CX0094-005 ¶ 19; CX107-005; CCSMF 32.

Jerk's counsel previously represented to the Federal Trade Commission that the content on Jerk.com was user-generated and not taken from Facebook (*see* CCSMF ¶ 50, CX0291-001, CX0528-001, CX0529-001; CX0107-003-04), but Respondents no longer dispute that Facebook was the source of the vast majority of profiles. Jerk states that it does not dispute the facts set forth in Complaint Counsel's Statement of Material Facts. JOppB 2. Rather, it argues that the statements cited by Complaint Counsel, taken individually, are literally true, and hence cannot create a net impression that is false or misleading. *Id*. at 2, 4, 6-8.

Likewise, Mr. Fanning does not dispute that profile information from Facebook was loaded onto the Jerk.com site. *See* FOppB 11, Fanning Aff. ¶ 5. Nor does he dispute any of the specific factual assertions in Complaint Counsel's Statement of Material Facts on this issue. The only rebuttal he offers is in ¶ 5 of his Affidavit, which disputes Complaint Counsel's contention that the information was taken *in violation of Facebook rules and policies.*

In view of Respondents' failure to dispute or controvert any of Complaint Counsel's factual assertions,[16] there is no genuine dispute as to the source of the vast majority of Jerk.com content. Most of it was taken from Facebook, and Jerk occasionally augmented the profiles with information drawn from other sources. Notwithstanding Jerk's claim that individual statements cited by Complaint Counsel are truthful,[17] Respondents'

[16] Mr. Fanning's disavowal of "hacking" is not a denial that Jerk generated profiles by scraping them from Facebook. Mr. Fanning's affidavit argues that the profiles could be derived from portions of Facebook available to the public. If so, the affidavit suggests, "hacking" was unnecessary. Mr. Fanning's statement that "any user of Jerk.com . . . *could have* accessed the directory and posted the information on Jerk.com," FAff ¶ 5 (emphasis added), is not a denial that the vast majority of the content on Jerk.com was generated by Jerk itself, rather than by the website's users.

[17] Jerk argues that statements cited by Complaint Counsel, taken individually, are literally true. For example, Jerk observes that Jerk.com's invitation to "[f]ill out the form below to find or create a profile on jerk" and to "[i]nclude a picture if you can and as much other information as possible" was truthful: "users did have the capability to post profiles, vote people as 'jerks' or 'not jerks,' and post comments on profiles." JOppB 7-8. That may be true, but it is not dispositive. The implied representation that we find false – that content on Jerk was created by Jerk users and reflected those users' views of the

representation – that the content on Jerk.com was generated by Jerk.com users and reflected those users' views – is false, and summary decision as to that issue is appropriate.

We have, however, concluded that there remains a genuine issue of disputed fact about whether Jerk's "scraping" the profile information from Facebook and its use of that information violated Facebook rules and policies. Paragraph 16 of the Complaint alleges in pertinent part that Respondents took:

> information from Facebook in violation of Facebook's policies, including by (1) failing to obtain users' explicit consent to collect certain Facebook data, including photographs; (2) maintaining information obtained through Facebook even after respondents' Facebook access was disabled; (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data; and (4) failing to delete data obtained from Facebook upon a consumer's request.

Complaint Counsel propose factual findings regarding this issue,[18] and urge us to conclude that Respondents' conduct violated the Facebook rules and policies as set out in the Complaint. CCMSD 36. However, Mr. Fanning maintains that the information was obtained in ways that do not violate Facebook policies. In any

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profiled individuals – is distinct from the express statements that contribute to the net impression left by Jerk.com. *See, e.g.*, *FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008) ("When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement."); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("The impression created by the advertising, not its literal truth or falsity, is the desideratum."); *AMG Services, Inc.*, 29 F. Supp. 3d at 1349 ("[T]he Court considers the overall, common sense net impression of the representation or act as a whole to determine whether it is misleading, and a Section 5 violation may still be found even if the fine print and legalese were technically accurate and complete.") (internal quotation omitted).

[18] *See* CCSMF ¶¶ 69, 76, 77 ("Jerk failed to obtain users' explicit consent to collect certain Facebook data, including photos, in violation of Facebook's policies"), ¶¶ 78-79, 80, 81 ("in violation of Facebook policy").

event, he argues, whether Jerk violated Facebook rules is not relevant to this case. FOppB 10-12.

We conclude that factual disputes remain regarding whether Respondents violated Facebook's rules by "scraping" profile content from Facebook for use on Jerk.com. However, it is not necessary for us to decide whether Respondents violated Facebook's rules in order to determine that Jerk's statements were deceptive, and therefore the possibility of a Facebook rule violation is not an issue we need to resolve in this case. Accordingly, we grant summary decision on Count I only with respect to the alleged deceptive representation regarding the source of content on Jerk.com. We find it unnecessary to determine whether Respondents also violated Facebook rules.

3. Materiality

Finally, we consider whether Complaint Counsel have established that the representation was material and, if so, whether there are issues of disputed fact as to the representation's materiality. A false or misleading representation will violate Section 5 only if it is also "material," that is, if it "is likely to affect a consumer's conduct with respect to the product or service." *POM Wonderful LLC*, 2013 WL 268926, at *52 (FTC Jan. 16, 2013) (citing *Deception Statement*, 103 F.T.C. at 182), *aff'd*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015); *accord*, *FTC v. Cyberspace.com LLC*, 453 F.3d at 1201 ("A misleading impression created by a solicitation is material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'") (citing *Cliffdale Assocs.*, *Inc.*, 103 F.T.C. 110,165 (1984)).

We presume that "express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product [or service]" are material. *POM Wonderful LLC*, 2013 WL 268926, at *52 (citing *Novartis Corp.*, 127 F.T.C. 580, 686 (1999) (citing *Deception Statement*, 103 F.T.C. at 182)), *aff'd*, 2015 WL 394093 (D.C. Cir. Jan. 30, 2015). The presumption also applies to intended implied claims. *POM Wonderful*, 2013 WL 268926, at *52; *Novartis*, 127 F.T.C. at 687; *Deception Statement*, 103 F.T.C. at 182. A respondent may rebut the presumption of materiality by providing evidence that the

claim is not material – *i.e.*, "evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle." *Novartis*, 127 F.T.C. at 686.

We conclude that it is appropriate to presume that Respondents' representation about the source of content posted on Jerk.com is material. The representation here is not express, but Complaint Counsel identify evidence showing that persons involved in the creation and operation of the Jerk.com site (i) intended to represent to consumers that content was created by Jerk users and reflected those users' views of profiled individuals; and (ii) considered user-generated content to be a key feature of what Jerk.com offered to consumers. CCSMF ¶¶ 48-50, 54; *see, e.g.*, CX0112-001 (e-mail from Mr. Fanning to investor, stating, "Like Wikipedia this content will be grown organically from the users themselves . . . ."); CX0057-001-02 ("I believed that the website would only have value to users if people manually created the Jerk.com profiles. People would be more likely to use the website if they believed their peers were using it."); CX0629-002-03 ¶ 9 ("To my understanding, the organic growth of Jerk.com profiles would increase traffic to the website . . . .").

Even if the presumption of materiality were not applicable, we would still conclude that Complaint Counsel make a sufficient showing that the representation was, in fact, material to consumers – that it was important to them and affected their conduct.

As Jerk.Com's creators believed, the understanding that the website's content was user-generated drove traffic to the website; it also prompted some consumers to complain and seek their profiles' removal. See CCSMF ¶¶ 158-59. Consumers testified that they were "mortified," "embarrassed," and "alarmed" when they saw profiles of themselves or their loved ones because they thought that some person who knew them created those profiles. CX0037-001 ¶ 3 ("I immediately thought that someone who didn't like me put me on there. . . . I was alarmed. I thought that someone was messing with me."); CX0036 ¶¶ 3, 5 ("Initially, I was worried that someone had created the Jerk.com profile against me. I was mortified and embarrassed . . . . I immediately

tried everything I could think of to remove my name and photo. I went through the Jerk.com website and tried several different ways to contact them . . . ."); CX0536-001 ("I know that there are people out there . . . . that . . . tried to humiliate my husband through your website. . . . I keep on crying on why there are people who never stop torturing me. My family and my husband's family are very affected. They want to know who is the person responsible for this post."). Another consumer testified about the impact of Jerk.com content on the consumer's business reputation – a concern that would most likely arise from believing that the content was user-generated – and as a result decided to pay for a Jerk.com membership. CX0038 ¶ 4 ("Although I did not want to support jerk.com and the website's extortionate practices, I was concerned about my business reputation so I paid jerk.com $30 for an annual membership."). This evidence demonstrates that Respondents' representations about the source of content on Jerk.com were important to consumers' decisions about whether to purchase Jerk.com memberships or otherwise engage with the site.

Respondents' counter-arguments are unpersuasive. Mr. Fanning addresses only the Section 4 "legal disclaimer" and contends that no reasonable consumer would have bothered to read such legalese; Jerk echoes that argument with respect to all the statements set out in the "About Us" section of the website, which it characterizes as mere legal terms and conditions. FOppB 10; FS 4; JOppB 7, n. 3. Respondents disregard the appearance of the relevant statements on such key website locations as the "Welcome," "About Us," and "Post a Jerk" pages. Jerk argued that the statement that "millions of people . . . use Jerk for important updates for business, dating, and more" was mere "puffery," upon which no reasonable consumer would have relied. JOppB 8-10. However, this statement was only one contributor to the net impression conveyed by the website regarding user-generation of content. More fundamentally, Respondents ignore the evidence that user-generation was vital to driving consumer traffic to the website and disregard the effects on consumer conduct represented by their investment of time and money in trying to get their postings removed.

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In sum, we conclude that Complaint Counsel have established that Jerk made the representation alleged in Count I of the Complaint, the false or misleading nature of that representation, and its materiality. There are no genuine issues of disputed material fact with respect to these issues. Accordingly, we grant Complaint Counsel's motion for summary decision on Count I.

B. Count II: Misrepresentation of The Benefits of Jerk Membership

Count II of the Complaint alleges that "[R]espondents represented, expressly or by implication, that consumers who subscribe to Jerk by paying for a standard membership would receive additional benefits, including the ability to dispute information posted on Jerk," but that, "in numerous instances, consumers who subscribed to Jerk by paying for a standard membership received nothing in return for their payment." Comp. ¶¶ 17-18. To determine whether summary decision on Count II is appropriate, we again consider whether Complaint Counsel established the alleged representation was made, was false or misleading and was material to consumers. We conclude that Complaint Counsel met this burden and that Respondents raised no genuine issue of material fact. Accordingly, we grant summary decision on Count II.

1. The Representation

Complaint Counsel assert that Respondents represented that consumers who paid a $30 standard membership fee would receive additional benefits, including the ability to dispute information posted on the website. CCMSD 13-14; 21. They point to website text stating that consumers would gain access to "additional paid premium features" by paying the membership fee and users "must be a subscriber in order to create a dispute." CCMSD 13; CCSMF ¶¶ 84-88. Additionally, Complaint Counsel point to evidence that Respondents intended to convey this representation (CCMSD 21; CCSMF ¶ 90) and further that it is the message consumers "took away" from the website. CCMSD 21; CCSMF ¶ 91.

Neither Respondent disputes any of these facts. Jerk does not even mention Count II in its Opposition. Mr. Fanning's Declaration does not contain any information relevant to this issue. Mr. Fanning does not deny that the statements at issue appeared on the Jerk.com website. Nor does he dispute that Jerk offered to make dispute resolution contingent on consumers paying a $30 membership fee, or that consumers believed that they could dispute, alter, or delete their profiles by paying the fee. Rather, he argues that "Complaint Counsel com[m]ingles and interchanges references to enhanced membership benefits, subscriptions, and the ability to dispute or remove posted information from profiles," and "conflates" a representation from "various sources." FOppB 13. According to Mr. Fanning, Complaint Counsel has not identified a "specific claim," and, consequently, "no deception exists." *Id.*

We disagree. To be sure, Complaint Counsel's Opposition and Statement of Material Facts do include references not only to the $30 membership fee, but also to another $25 customer service fee that Jerk charged to enable consumers to contact the website. *See, e.g.*, CCMSD 8 & n.2; CCSMF ¶ 79. However, Count II challenges only Jerk's representation as to the $30 membership fee, and it is the evidence relating to that fee upon which we base our conclusions.

Complaint Counsel have identified specific statements on the Jerk.com website that represent that paying $30 for a membership subscription unlocks additional benefits, including the ability to dispute information in profiles. A consumer accessing the Jerk.com website would have seen the following:

> Subscribers on Jerk. . . receive free benefits including:
>
> 1. Fast notifications of postings about you!
>
> 2. Updates on people you know and are tracking
>
> 3. Search for people you know, and read about people you are interested in.
>
> 4. Enter comments and reviews for people you interact with.

5. Help others avoid the wrong people.

6. Praise those who help you and move good people closer to sainthood!

CX0047-002-03, ¶ 9 (Kauffman Dec.). Directly below this, the page had a button titled "Subscribe," which, if clicked, directed a consumer to an online "Billing Information" form. *Id.* ¶10. The top stated: "Become a Subscriber. . . You must be a subscriber member in order to create a dispute!" *Id.* The bottom contained a field for the consumer to choose between a "Gold Membership," which was "(under development)," or a "standard membership for $30/year." *Id.*

Another statement, on the "Remove Me!" and "Remove" pages of the website, conveyed the same basic message. It stated, in pertinent part, "You can however use Jerk to manage your reputation and resolve disputes with people who you are in conflict with. There are also paid premium features that are available http://www.jerk.com/signin.php." CX0275 (attachment to Ortiz Dec); CX0048-032 (Kauffman Dec. attachment A-32).[19] We conclude that these statements represent exactly what the Complaint alleges in Count II – that consumers who subscribed to Jerk.com by paying the $30 standard membership fee would receive additional benefits, including the ability to dispute information posted on Jerk.com.

Our conclusion is bolstered by uncontroverted evidence that Jerk intended to convey to consumers that they could receive

[19] Mr. Fanning's Surreply highlights a statement under the "Remove Me" tab that "No one's profile is ever removed, *because Jerk is based on searching free open Internet searching databases and it's not possible to remove things from the Internet*, " FS 3 (emphasis in original), but cites it only in connection with Count I. In a previous filing to the Commission, Jerk explained that this statement was meant "to educate consumers that removal from Jerk.com is not removal of the content from the source on the Internet" and further indicated that the statement had been removed from the Jerk.com website. *See* CX0291, at 002-03 (Jerk LLC Petition to Quash CID, March 15, 2013). In any event, the sentence does not controvert the representation at issue – that consumers would receive additional premium features, including the right to dispute information on the website, in return for payment of a $30 membership fee.

additional features, including dispute resolution, by purchasing a Jerk.com membership. *See* CCSMF ¶ 90; CX0117-004 (e-mail from Fanning: "Other potential revenue streams include advertising, as well as subscription services. For example, users may be charged for access to dispute resolution or other premium and for fee services."); CX0438-29:3-7 (Depo. "A: With monetizing, I know John would occasionally bring up the Yelp business model, which was that businesses could subscribe to Yelp and pay fees, for instance, to have negative reviews removed from their Yelp pages, or at least buried deeper down."); CX0112-002 (e-mail from Fanning: "Once a dispute is created with respect to an item it will not be published until both parties agree on the content of the posting so long as you continue to maintain your active access to the dispute resolution membership service."). *See also* CX0080 (chat between Fanning and business partner with business partner observing: "the only negative of the jerk.com business plan is the blackmail-feeling revenue model.").

Equally important, Complaint Counsel offer uncontroverted evidence that consumers believed purchasing a subscription enabled them to alter or remove their profiles. *See* CCSMF ¶ 91; CX0038 ¶ 4 ("I read a statement on jerk.com that indicated I could remove information from my profile by joining jerk.com."); CX0005 ¶ 5 ("The website said that if you became a member of jerk.com for about $2 to $5 a month, you could make changes to your profile"); CX0026 ¶ 5 ("I explored the website, searching for a way to remove my profile. At several points, the website asked me to submit my credit card information in order to make a change to my profile . . . I believed I could edit my profile if I paid jerk.com the requested fee, so I set up a PayPal account in order to make the payment."); CX0040 ¶ 6 ("I was desperate to remove my daughter from the website, and I paid the $30 charge three times").

In sum, we conclude that Complaint Counsel establish that Jerk.com represented that consumers who subscribed to Jerk.com would receive additional benefits, including the ability to dispute information posted on the website, and that there is no genuine dispute as to any material fact regarding this issue.

2. Falsity of the Representation

Complaint Counsel assert that "uncontroverted documentary and testimonial evidence establishes that consumers who subscribed to Jerk.com by paying for a standard membership did not receive the promised additional benefits." CCMSD 22. In fact, Complaint Counsel provided evidence that consumers did not receive any benefits in exchange for purchasing a Jerk.com membership,[20] and did not even receive the password that was purportedly necessary to activate their account.[21]

Far from disputing any of Complaint Counsel's Statements or the underlying evidence Complaint Counsel cites, Respondent Jerk does not even mention Count II in its Opposition. The only evidence Mr. Fanning offers in rebuttal is one paragraph in his declaration, which states:

> Jerk, LLC established an agent, a lawyer in Phoenix, Arizona, to accept service of complaints about Jerk.com while Jerk, LLC held a paid option to purchase the domain name. As far as I am aware, Jerk, LLC took action including to remove content from Jerk.com whenever it was obligated to do so. As far as I am aware, Jerk, LLC would refund money to users who claimed they had paid but had not received membership services via a web form. Jerk, LLC experienced a number of problems in

[20] CCSMF ¶ 94, *citing, e.g.*, CX0005 ¶ 6 ("After I paid, there were no new features available to me to remove my profile. The benefit they promised – the ability to remove or change your profile – was nowhere to be found."); CX0026 ¶ 6 ("Immediately after I made the payment, I found that there were no new features available to me that would allow me to remove my profile. I kept trying, and at one point, a pop-up window appeared that said, "Are you having fun yet?" At that moment, I knew the website was a scam."); CX0038 ¶ 4 ("After I paid the fee, nothing changed. . . . The membership was a complete waste."). In addition, an FTC investigator purchased a $30 Jerk.com membership and did not receive any additional benefits. CCSMF ¶ 96, *citing* CX0047 ¶¶ 6-16, CX0050-52.

[21] CCSMF ¶ 95, *citing* CX0001 ¶ 3 "(After paying $30 to Jerk.com, I monitored my email account for an email message from Jerk.com. I checked all my email folders, including [the] spam folder. I never received an email message from the company and, thus, never received the promised password needed to access my Jerk.com membership."); CX0038 ¶ 4 ("I checked my email folders, including my spam folders, but did not receive a password for my jerk.com membership.").

> operating the site, including the site being hacked and being "snaked" by the FTC which disrupted the services. The FTC also made demands on Jerk, LLC to take corrective action. I understand that Jerk, LLC complied with the FTC's demands, although the company denied any liability.

FAff ¶ 4. His brief argues that "the evidence does not conclusively establish that memberships did not exist, or that there were no actual subscriptions, or that the only way to remove a post was by paying money," and asserts, without citation to evidence, that "there was a legitimate process for rectifying complaints and removing profiles" and that "Complaint Counsel has not established a clear pattern or practice of deception." FOppB 13.

The assertion that Complaint Counsel fail to establish "a clear pattern or practice of deception" is an argument characterizing Complaint Counsel's showing, not evidence rebutting it. Moreover, it is not Complaint Counsel's burden to prove the negative – to "conclusively" prove that "memberships did not exist, or that there were *no* actual subscriptions, or that the *only* way to remove a post was by paying money." FOppB 13 (emphasis added). Once Complaint Counsel have presented evidence that Jerk made the representation, and that that representation was false or misleading and material, the burden shifts to Respondents to establish that there exists a genuine issue of material fact that makes summary decision with respect to Count II inappropriate.

The only evidence either Respondent offers – Mr. Fanning's affidavit – is not sufficient to create a disputed issue of material fact. Mr. Fanning does not dispute the consumers' sworn declarations that they never received any benefit in return for their subscription fees. He does not dispute that the FTC investigator had the same experience as those consumers. He states only that "[*a*]*s far as [he is] aware*," Jerk "took action including to remove content from Jerk.com *whenever it was obligated to do so*" and "would refund money to users who claimed they had paid but had not received membership services via a web form." FAff ¶ 4 (emphasis added). Similarly, Mr. Fanning's statement that "Jerk LLC experienced a number of problems in operating the site,

including the site being hacked and being 'snaked' by the FTC which disrupted the services," FAff ¶ 4, did not directly address the issue or create a disputed factual issue.

Moreover, Mr. Fanning's statements are not relevant to the critical issue: whether the representation Jerk made as to membership benefits was false or misleading. For example, whether Jerk had a process in place to deal with consumer complaints, as Mr. Fanning's affidavit asserts, is not at issue. Similarly, his statement that "[a]s far as [he is] aware," Jerk made refunds to some consumers who purchased memberships, is likewise not material with respect to either the falsity of the claim or its materiality.[22] To be sure, Complaint Counsel present evidence that may call into question the accuracy of a number of the statements contained in Paragraph 4 of Mr. Fanning's affidavit.[23] However, even if completely accurate, Mr. Fanning's

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[22] *See FTC v. Publishers Bus. Servs*., 821 F. Supp. 2d 1205, 1222, n.12 (D. Nev. 2010), *rev'd in part on other grounds*, 540 Fed. Appx 555 (9th Cir. 2013) ("Whether [respondent] received any monetary benefit from the misrepresentation is not necessary to establish a Section 5 violation."); *Cyberspace.com LLC*, 453 F.3d at 1201-02 ("the fact that the companies provided consumers a toll free number to call for refunds does not affect our conclusion that [their] solicitation violated [the FTC Act]").

[23] For example, Complaint Counsel have presented abundant evidence that Jerk made it difficult for consumers to request deletion of their information and ignored complaints and requests by consumers that Jerk remove their profiles and other information from the Jerk.com website. *See* CCSMF ¶ 79 *citing, e.g.*, CX0004-001 ¶ 5 ("I could not find any other way to contact jerk.com to remove my profile. I did research on the website and found hundreds of complaints by other customers who had paid money and were unable to remove their profiles."); CX0006-01 ¶¶ 5-6 ("I also wanted to contact the website through the customer support page on the website, but they requested $25.00 to contact them. I refused to pay to contact customer support. Instead, I did some research on jerk.com on the Internet and found an e-mail address that was supposed to be their customer service e-mail account (support @jerk.com). I e-mailed this address over five times . . . I never received any response."); CX0007-001 ¶ 4 ("I tried to remove my profile by clicking on a page that said I could remove my name from the website if I paid jerk.com $25.00. I did not want to pay this money, so instead I wrote jerk.com a letter. I sent the letter via certified mail to DMCA Complaints, Jerk, LLC . . . which was the address I found on their website. . . . The letter was returned to me 'undeliverable' because the address was 'unknown' and no forwarding address was available."); CX0028-001 ¶ 6 ("Jerk.com also required you to pay to have your profile removed. I paid the amount required to contact the company's customer support, but never received an email response."); CX0027-001 ¶¶ 6-7 ("I never

statements do not involve *material* issues of disputed fact as to this Count.

We conclude that Complaint Counsel provide sufficient evidence that the representation at issue was false – that although Jerk promised subscribers additional benefits, including the right to dispute information contained on Jerk.com, it provided nothing in return for the membership fees. That evidence consists not only of sworn declarations by consumers who paid the $30 fee and received no benefits, but also a sworn declaration of an undercover FTC investigator explaining that he likewise paid the $30 fee and received nothing in return. *See* CCSMF ¶¶ 94-96. Nothing submitted by Respondents creates a genuine dispute of material fact as to this issue.

3. Materiality

Finally, we consider the materiality of the representation at issue in Count II. The representation was express and it clearly pertained to the central characteristic of Jerk's offering – benefits promised in exchange for the $30 fee. For both these reasons, the representation is presumptively material, and neither Respondent has argued otherwise.

Moreover, Complaint Counsel present uncontroverted evidence that consumers acted on the representation by purchasing Jerk.com memberships expecting to receive additional benefits, including the right to dispute information on the website. *See, e.g.*, CX0026 ¶ 5 ("I believed I could edit my profile if I paid

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got a chance to complain to anyone at jerk.com because there was no way to contact the company. . . . In February 2012, I filed a complaint with the Better Business Bureau in Delaware on behalf of my brother. The BBB told us that they contacted the company about our complaint, but no one from jerk.com ever got back in touch with them. No one from Jerk ever contacted me."); CX0738-01 (Feb. 2012 e-mail from Fanning to Jerk's registered agent: "Just ignore them…. These are customers trying to get service from us without paying the service charge.").

Likewise, although Mr. Fanning's Affidavit states that Jerk would refund the cost of the membership fees to consumers who complained, Jerk, in responding to Complaint Counsel's interrogatories, stated that "The Company has no formal refund policy," and "knows of no requests for refunds." *See* CX0286-006 (Jerk LLC's Responses to Civil Investigative Demand).

jerk.com the requested fee, so I set up a PayPal account in order to make the payment."); CX0038 ¶ 4 ("Although I did not want to support jerk.com and the website's extortionate practices, I was concerned about my business reputation so I paid jerk.com $30 for an annual membership."). This evidence establishes that the representation was likely to affect consumers' choice or conduct regarding the offered service and therefore that it was material.

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In sum, we conclude that Complaint Counsel present sufficient evidence to establish that Jerk's representation as to membership benefits was false and material, and that Respondents failed to identify a genuine dispute of material fact. Accordingly, we grant Complaint Counsel's motion for summary decision on Count II.

V. Mr. Fanning's Individual Liability

An individual may be liable for the deceptive acts or practices committed by a corporate entity if the individual either participated directly in or had the authority to control the acts or practices at issue. *E.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233 (11th Cir. 2014); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Amy Travel Services, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). "If the FTC proves direct participation in or authority to control the wrongful act, then the individual may be permanently enjoined from engaging in acts that violate the FTC Act." *Commerce Planet*, 878 F. Supp. 2d at 1079 (citing *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004)).

"Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel Services*, 875 F.2d at 573; *see also FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) (individual's "authority to sign documents on behalf of the corporation [helped to] demonstrate that she had the requisite control over the corporation"); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla 2007) (individual held liable where he was a signatory on corporate bank accounts, held himself out as an

officer or manager of the company, and had the power to hire and fire employees).

"[D]irect participation can be demonstrated through evidence that the defendant developed or created, reviewed, altered and disseminated the deceptive . . . materials." *FTC v. Ross*, 897 F. Supp. 2d 369, 383 (D. Md. 2012), *aff'd*, 743 F.3d 886 (4th Cir. 2014). "Active supervision of employees as well as the review of sales and marketing reports related to the deceptive scheme is also demonstrative of direct participation." *Ross*, 897 F. Supp. 2d at 383.

Complaint Counsel assert that Mr. Fanning both had the authority to control, and participated in, the allegedly deceptive conduct. CCMSD 22-27. Complaint Counsel offer evidence that Mr. Fanning founded Jerk; controlled Jerk's shares; signed numerous agreements and documents on behalf of Jerk; handled Jerk's finances and budgeting and met and communicated with potential investors; and managed Jerk's day-to-day operations by directing Jerk's strategy, setting Jerk's business objectives, and hiring contractors and staff. CCSMF ¶¶ 97-116, 122-40. According to Complaint Counsel, Mr. Fanning and Jerk staff worked out of Mr. Fanning's house and shared several addresses. CCMSD 25; CCSMF ¶¶ 117-21.

Complaint Counsel also point to evidence that allegedly shows that Mr. Fanning participated in creating and directing Jerk's content by hiring its software developers; participating in the website design; and deciding publishing standards and whether consumer complaints could remove profiles. CCMSD 25-26; CCSMF ¶¶ 141-50, 157. Notably, the evidence allegedly shows that Mr. Fanning advocated auto-generating profiles from Facebook to boost traffic and enhance Jerk's attractiveness as a potential acquisition candidate. CCMSD 26; CCSMF ¶¶ 18, 58, 151-56.

Mr. Fanning does not dispute any of the factual statements or any of the evidence Complaint Counsel cite. Mr. Fanning argues he was merely an "advisor" to Jerk as an agent of NetCapital, and asserts that "exposing [him] to personal liability for actions taken on behalf [of NetCapital] with respect to Jerk, LLC unlawfully ignores the corporate structure." FOppB 21. The only evidence

Mr. Fanning offers is his affidavit, in which he states, in pertinent part:

> 2. I formerly served as an advisor to Jerk, LLC through another company called NetCapital.com, LLC, and not in my individual capacity. NetCapital.com LLC is a private equity/venture capital firm, with a number of partners, that invests in and provides advisory services to a wide-range of technology start-ups including those in its portfolio of companies. My authority was limited, and at all times I acted on behalf of NetCapital.com, LLC with respect to Jerk, LLC. I never acted in my individual capacity.
>
> 3. Jerk, LLC, as an internet technology start-up, was not a large company with levels of management and regular employees. Jerk.com essentially was operated and controlled by Louis Lardass [sic][24] of Internet Domains, which owned the Jerk.com domain, and foreign software developers who were reportedly supported by various interns, college students, and other independent contractors working for their own benefit. I was not responsible for spearheading and operating Jerk, LLC or Jerk.com. Through and on behalf of NetCapital.com LLC, I was part of a group involved in efforts to launch, finance, and expand the Jerk brand through the Jerk.com website. I did not write any software code for Jerk, LLC to operate Jerk.com, and did not place any consumer content on Jerk.com. I was not a software developer or web developer for Jerk, LLC. I had no authority over or advisory agreement with the primary developers of the Jerk, LLC software.

[24] The correct spelling of the name is "Lardas," not "Lardass." *See* CX0526-002.

Based solely on his affidavit, Mr. Fanning contends that "[a] live issue exists about the scope of [his] agency and control, which must be decided by the finder of fact on a full record after weighing credibility" and that "[s]ummary decision is not appropriate as a matter of law on the issue of [his] personal liability." FOppB 23 (citing *FTC v. Ross*, 2012 WL 2126533, at *4 (D. Md. 2012)).

We disagree. The applicable legal standard is not based on any piercing-the-corporate veil principles as Mr. Fanning argues. FOppB 21-22. Instead, individual liability for purposes of Section 5 hinges on an individual's authority to control the acts or practices at issue *or* his direct participation in the unlawful conduct. If Complaint Counsel put forward sufficient evidence to establish *either* that Mr. Fanning had the authority to control Jerk's unlawful conduct *or* that he participated directly in that conduct, Mr. Fanning should be held personally liable. *E.g.*, *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) ("Either participation or control suffices.").

Complaint Counsel present sufficient and uncontroverted evidence establishing both prongs of the test. Complaint Counsel establish that Mr. Fanning was the founder of Jerk and its sole managing member.[25] Evidence shows that Mr. Fanning hired a registered agent to incorporate Jerk in early 2009, certified that Jerk was paying applicable state taxes, and signed Jerk's IRS taxpayer ID form as the person authorized to do so.[26] The evidence shows that Mr. Fanning negotiated and signed employment agreements with those working on Jerk.com, as well as agreements with Internet Domains to lease the Jerk.com domain.[27] Mr. Fanning established the web hosting for Jerk, and signed the service orders with the data hosting company.[28] Mr.

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[25] *See* CCSMF ¶ 97, *citing* CX0210-001; CX0133-002; CX0139-001; CX0368-007; CX0181-53:11-18; CCSMF ¶ 100, *citing* CX0737-003.

[26] CCSMF ¶ 98, *citing* CX0041-002 ¶ 4; CCSMF ¶ 99, *citing* CX0737-005; CCSMF ¶ 102, *citing* CX0507.

[27] CCSMF ¶ 114, *citing* CX0464 ¶ 1; CX0466; CX0735; CCSMF ¶ 115, *citing* CX056-002.

[28] CCSMF ¶ 141, *citing* CX0081-001, 003; CCSMF ¶ 142, *citing*, *e.g.*, CX0401-002-04 ¶¶ 6, 8.

Fanning recruited people and hired outside companies, including a web design firm and Software Assist, the Romanian software firm referenced in Mr. Fanning's affidavit, to work on Jerk.com.[29] Mr. Fanning opened bank and other payment accounts in Jerk's name, disbursed funds from those accounts on behalf of Jerk, and, in general, handled the finances and budgeting for Jerk.[30] Mr. Fanning took the lead in soliciting investors for capital to fund Jerk.com and established business strategies and objectives for Jerk.com.[31] And, importantly, the evidence also shows that Mr. Fanning controlled how consumer complaints were to be handled and decided whether to remove profiles from the Jerk.com website in response to consumer complaints.[32]

Moreover, there is also undisputed evidence that Jerk staff and outside parties regarded Mr. Fanning as the person in charge of Jerk.com. CCSMF ¶ 139; *see, e.g.*, CX0181-104:7 (Fanning "seemed to be running – calling the shots"); CX0057 ¶ 3 ("Jerk.com was John Fanning's pet project and at that point in

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[29] CCSMF ¶ 138, *citing, e.g.*, CX0464-001 ¶¶ 1-2; CX0181-106:7-10; CX0438-85:25-86:2; CX0438-10:5-11; CX0057 ¶ 3; CX0304-003; CX0629-001 ¶ 2; CX0308; CX0466; CX0735; CX0302 ¶¶ 3-4; CCSMF 143, *citing* CX0629-002 ¶ 7; CX0279-001; CX0135-001; CX0428; CX0181-104:11-22; CX0438-024:16-24; CX0711-003; CX0663; CX0491-001; CX0167-001; CX0302 ¶ 6.

[30] CCSMF ¶ 122, *citing* CX-0411-001-02; CCSMF ¶ 123, *citing* CX0411-003; CCSMF ¶ 124, *citing* CX0417-001; CX0092-108:12-13; CCSMF ¶ 125, *citing* CX0427-001-03; CCSMF ¶ 126, *citing* CX0421-001-02; CCSMF ¶ 128, *citing, e.g.*, CX0308-001; CX0167-001; CX0076.

[31] CCSMF ¶ 129, *citing, e.g.*, CX0308-001; CX0367-001; CX0141-001; CCSMF ¶ 131, *citing, e.g.*, CX0082-001; CCSMF ¶ 133, *citing* CX0139-001; CX0153-001; CCSMF ¶ 136, *citing* CX0643-001; CCSMF ¶ 137, *citing* CX0309-001; CX0181-108:4-7; CX0629-001 ¶ 8; CX0151-002.

[32] CCSMF ¶¶ 120, 157; *see, e.g.*, CX0041-002-03 ¶ 6 ("HBS [Jerk's registered agent] mailed the complaint letters to John Fanning. . . . I also personally called Mr. Fanning on several occasions to express concern about the number of complaints HBS was receiving about jerk.com."); CX0401-004 ¶ 11 ("Immedion received various [consumer] complaints about the website, www.jerk.com, during the time frame when Immedion was providing services to Jerk, LLC. When these complaints came in to Immedion, Immedion forwarded the complaints to John Fanning . . . To the best of my knowledge, Mr. Fanning was responsible to respond to these complaints on behalf of the website, www.jerk.com"); CX0403-007 (e-mail from Fanning: "The photo has been removed.").

time, he was involved in all decisions about the website of which I was aware."); CX0109:51: 18-20 (Depo: "Q: Is there anything – anyone else besides Fanning that you associate with jerk.com? A: No."); CX0438-26:5-12 (Depo: "Q: And who would you say led the Jerk.com website? Who was in charge? A: At that time, it certainly seemed to me that it was John Fanning. Q: And do you know who had final decision-making authority over the website? A: When I worked on it, I believe it was John Fanning."). Indeed, Mr. Fanning himself identified Jerk as "a new venture of mine." CX0139-001 (e-mail from Fanning to potential investor, "I wanted to update you on some of the progress we've made so far on Jerk.com – a new venture of mine"); *see also* CX0643-001 (e-mail from Fanning: "I want to introduce [y]ou to an exciting new venture I am involved in. . . . We have the founder of napster (me), the founder of MySpace, and Individual Inc. . . . all actively involved.").

This evidence of Mr. Fanning's control would be sufficient, in and of itself, to support the conclusion that Mr. Fanning is individually liable for Jerk's unlawful conduct. Yet Complaint Counsel also present evidence of Mr. Fanning's direct participation in Jerk's deceptive conduct. Indeed, Mr. Fanning advocated in favor of using Facebook to create profiles on Jerk.com. *See* CCSMF ¶ 151. One of Jerk's staff members testified in his deposition as follows:

> Q: When talking about scraping from Facebook, was there anyone at Jerk.com who was particularly in favor of this idea?
>
> A: I know John was certainly in favor of the idea during the stages where we were making investor pitches. Because it was beneficial to show what kind of capacity the website could handle, to show that it was possible to have that many profiles on the site.
>
> Q. Is there anybody else that advocated for that mechanism?
>
> A: No one that I can think of, that I spoke to, no.

CX0438-033:11-22.

The evidence shows that Mr. Fanning deflected suspicions raised by Jerk staff and investors about whether the profiles on Jerk.com were in fact all created by Jerk.com users. Another staff member who worked on Jerk.com under Mr. Fanning stated:

> Around August 2009, I noticed that thousands of new profiles per day were being added to Jerk.com – a much higher pace than before . . . . [T]his profile growth struck me as odd and it occurred to me that perhaps Jerk was using other means to generate profiles. I emailed [one of the Romanian developers] to inquire about the growth and ask him about its true source . . . . [The developer's] response to my email did not describe the means by which Jerk.com profiles were generated, but he confirmed that jerk.com profiles came from Facebook."

CX0629-003-04 ¶ 11. The staff member further stated that he "expressed [his] concerns to Mr. Fanning," but that "neither [Mr. Fanning] nor his developers were giving [him] answers that made [him] feel confident." *Id.* ¶¶ 12-13.

Similarly, one of the Jerk investors testified at his deposition as follows:

> Q. Do you recall what was said during that conversation?
>
> A: Well, I had raised the question, did the company have the ability or the right to create these profiles by traversing Facebook information?
>
> Q: How did you know that the company was creating profiles by traversing Facebook for information?
>
> A: John and I talked about it and it had a rapid growth in the number of profiles that were on the site and John explained that it had something to do with getting information off of Facebook.
>
> Q. Can you remember any more details about what John said about that issue?

> A. Just that he believed that it was legal.
>
> Q. But was John the one who informed you that Jerk was getting profiles by traversing Facebook for that information?
>
> A. Yes.

CX0181-138:17-139:9.

Finally, there is also undisputed evidence that Mr. Fanning instructed the Romanian programmers to create the Jerk.com profiles using information from Facebook. *See* CCSMF ¶¶ 18, 155; *see, e.g.*, CX0640-001 (August 2009 e-mail exchange between Fanning and Romanian programmers: "Fix 'People I Know'. This is important because we need to create at least 5,000 more profiles [b]efore August (3 days and counting). Specifically, make sure the facebook part [w]orks." Response from Romanian programmer: "we have created 7000 profiles so far – at the end of the day we [w]ill have 20,000 new profiles"). Other evidence likewise shows that Mr. Fanning was a driving force behind Jerk's unlawful conduct. *See, e.g.*, CX0492-003 (e-mail from Fanning: "How about this. We try to boost our profiles up by another say 250M, we try to boost our traffic up as high as we can get it . . . . We could do that within 90 days easy and just sell jerk.com to them before you graduate. You would make millions."); CX0153-002 (e-mail from Fanning: "In the first 6 months of Jerk.com's launch: Awesome viral user acquisition – Our data base has grown to over 85 million profiles"); CX0307-001-02 (e-mail from Fanning: "I think you don't understand how truly large 85 million is. If you tried to count to 85 million you could not do it in your lifetime."); CX0360-001 (e-mail from Romanian programmer to Fanning discussing exporting Jerk.com profiles to an iPhone app: "As we underlined in a previous email, the populating of current profiles it's a work in progress operation. There are 80 million profiles to add to the database . . . . Will take more days to populate face recognition database with all pictures."). In short, the evidence shows that Mr. Fanning not only had the authority to control Jerk's conduct but also that he was at the center of the unlawful conduct alleged in Count I.

Likewise, the evidence shows that Mr. Fanning participated directly in the unlawful conduct alleged in Count II. Mr. Fanning advocated collecting subscriptions and charging consumers for dispute resolution and other premium services, and further defended his idea to one of his business partners who objected to Jerk's "blackmail-feeling revenue model." CCSMF ¶ 90; *see* CX0117-004; CX0438-29:3-10; CX0112-002; CX0080.

Complaint Counsel thus present sufficient evidence to establish that Mr. Fanning had the authority to control Jerk's unlawful conduct and that he participated directly in that conduct. To controvert all this evidence, drawn from a wide variety of depositions, sworn declarations, and documents,[33] Mr. Fanning submits only his own affidavit. We must consider whether that affidavit creates a genuine issue of disputed fact.

We conclude that it does not. It is well-established that conclusory, self-serving affidavits are not sufficient to create a factual dispute for purposes of summary judgment. *See, e.g.*, *Valley Forge*, 616 F.3d at 1095 n.2; *MacGregor*, 360 F. App'x at 893; *Hansen*, 7 F.3d at 138; *Medicor*, 217 F. Supp. 2d at 1053; *see also supra* Section II. Here, Mr. Fanning has not pointed to *any* evidence to support his bare assertions. Mr. Fanning's assertion that he lacked authority over the primary developers of Jerk's software is a conclusory statement contradicted by evidence that he hired the software developers, instructed them to create Jerk.com profiles, and directed their work. CCSMF ¶¶ 143, 155; *see, e.g.*, CX0181-104:11-22 (Depo. of Jerk investor: "Q: What made you think that he [Fanning] was running – or calling the shots? A: Just the tenor of our conversations and, you know, various things we would discuss and then he would say that happened or he had a development team in Romania that he was directing. . . .").

The remaining assertions in Mr. Fanning's affidavit are not material. He asserts that he personally did not write the software code for Jerk.com or post the Facebook profile information on Jerk.com. Complaint Counsel do not need to establish that Mr.

[33] Although Mr. Fanning stated that he had no responsive documents in response to Complaint Counsel's CID, Complaint Counsel received over 13,800 pages of documents from other sources. CCMSD 33 n.22.

Fanning personally performed every aspect of Jerk's operations to establish authority to control the unlawful conduct of the company. *See FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, 1057 (C.D. Cal. 2002) (defendant's evidence that other people had control over certain aspects of business insufficient to defeat summary judgment on defendant's individual liability).

We are also unpersuaded by Mr. Fanning's legal arguments. Although Mr. Fanning argues that he was a mere "advisor" to Jerk, that characterization, even if true, would not mean that he cannot be held individually liable for Jerk's conduct. *See, e.g.*, *Medicor*, 217 F. Supp. 2d at 1055-56 (holding "consultant" individually liable on summary judgment for company's deceptive policies and practices when he was active in the company's operations, had authority to formulate and implement company policies and practices, and had knowledge of the company's deceptive acts and practices); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1181-82 (C.D. Cal. 2000) (holding "consultant" liable because he had "ownership in and/or control over" the company).

Mr. Fanning's reliance on *FTC v. Ross* for the proposition that summary decision is inappropriate as a matter of law for determining individual liability is misplaced. *Ross* involved a deceptive, internet-based scheme to market computer security software. The district court initially granted default judgment as to the corporation and all but one of the individual defendants, but denied summary judgment with respect to the remaining individual defendant (Ross), who argued that she was a mere employee and not a "control person" of the company. *Ross*, 2012 WL 2126533.[34] The court however, stated no rule of law precluding findings of individual liability on summary judgment. Rather, the court based its ruling on the specific evidence at hand and the conflicting inferences that could be drawn from that

[34] After a bench trial, the court determined that the Commission had shown both that Ross had the authority to control the company's deceptive acts and that she had participated directly in those acts and concluded that she was individually liable. *FTC v. Ross*, 897 F. Supp. 2d 369 (D. Md. 2012), *aff'd*, 743 F.3d 886 (4th Cir. 2014). Ross was not only enjoined from engaging in future deceptive marketing, she was also held jointly and severally liable with her co-defendants for more than $163 million in consumer redress.

evidence. *Id*. at *5-7. Other courts have not hesitated to grant summary judgment regarding individual liability when the evidence has supported such a determination. *See Publ'g Clearing House*, 104 F.3d 1168; *Nat'l Urological Group*, 645 F. Supp. 2d 1167; *Medicor*, 217 F. Supp. 2d 1048.

Complaint Counsel present sufficient uncontroverted evidence establishing Mr. Fanning's authority as to Jerk and his actual exertion of control, as well as his direct participation in the unlawful conduct alleged in the Complaint. In response, Mr. Fanning chose not to address Complaint Counsel's Statement of Material Facts or the evidence cited in that Statement, and submitted only a legal argument and a self-serving affidavit without other evidentiary support. We conclude that summary decision is appropriate as to Mr. Fanning's individual liability for the deceptive acts and practices of Jerk.

VI. Respondents' Affirmative Defenses

A. First Amendment

Respondents maintain that the representations at issue constitute speech protected by the First Amendment and cannot be challenged by the Commission. Jerk claims the representations at issue under Count I constitute truthful, non-commercial speech that may be restricted only to serve a substantial governmental interest and only through means that advance that interest. JOppB 4-8. Jerk argues that the language cited from Jerk.com's "About Us" page was a contract between Jerk and its users and represented a disclaimer of liability and an assertion of Jerk's rights under Federal law. *Id*. at 4-6. Consequently, Jerk argues, the language was not related "solely to the economic interests of the speaker and its audience," but had "independent legal significance." *Id*. at 5 (internal quotation omitted). According to Jerk, the disclaimers were truthful. *Id*. at 6-8. Mr. Fanning argues that Complaint Counsel improperly seek to control the content in Jerk.com profiles. FOppB 15-17. Furthermore, he contends that Jerk's activities "expose[d] the falsity of Facebook's representations that all information posted was private," and provided a constitutionally protected "public referendum on Facebook." *Id*. at 17-18. We discuss each argument in turn.

It is well-established that misleading commercial speech lies outside First Amendment protection and may be regulated or prohibited. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (misleading commercial speech is "not protected by the First Amendment"); *Kraft, Inc. v. FTC*, 970 F.2d 311, 325 (7th Cir. 1992); *POM Wonderful* 2013 WL 268926, at *54-55, *aff'd*, 2015 WL 394093, at *18; *Daniel Chapter One*, 2009 WL 5160000, at *20, n.2 (FTC Dec. 24, 2009), *aff'd*, 405 F. App'x 505 (D.C. Cir. 2010); s*ee also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (to qualify for First Amendment protection, commercial speech must "concern lawful activity and not be misleading").

Here, the specific misrepresentations – that the "content on Jerk, including names, photographs, and other content, was created by Jerk users and reflected those users' views of the profiled individuals" and that "consumers who subscribe to Jerk by paying for a standard membership would receive additional benefits, including the ability to dispute information posted on Jerk" – are commercial speech designed to increase demand for a product. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Central Hudson*, 447 U.S. at 561 ("commercial speech [is] . . . expression related solely to the economic interests of the speaker and its audience"). Jerk's representation that content was user-generated was intended to increase interest in Jerk.com among consumers and potential investors. *See supra* Sections IV.A.1 and IV.A.3; CX0629-002-03; CX0317-001; CX0302-002. Similarly, the representation that additional benefits were available for a $30 membership proposed a commercial transaction and was designed to encourage the sale of those memberships. *See, e.g.*, CX0117-004 (e-mail from Mr. Fanning stating "Other potential revenue streams include advertising as well as subscription services. For example, users may be charged for access to dispute resolution or other premium and for fee services."). The fact that some of the statements may carry legal significance does not alter our analysis. The Complaint challenges specific net impressions relating to Jerk's economic interests. Consequently, the representations challenged in the Complaint are commercial speech.[35]

[35] Mr. Fanning suggests that the absence of any mention of Facebook on Jerk.com demonstrates that the statements on the website are not commercial

Moreover, we have determined, based on the uncontroverted evidence presented by Complaint Counsel discussed above, that Jerk's representations were false and material. False commercial speech like that at issue here is not protected by the First Amendment and may be prohibited. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 562 (2d Cir. 1984) (finding no violation of First Amendment because "it is clear that in this case the FTC made a factual finding, based on its investigation of Bristol's ads, that consumers viewing the ads would believe them to be making claims" and that the "ads were deceptive"); *POM Wonderful*, 2013 WL 268926, at *54-55; *Daniel Chapter One*, 2009 WL 5160000 at *20, n.2.

Respondents' arguments regarding other, allegedly truthful, representations are off point. It does not matter that Section 4 of the "About Us" page "accurately conveys that Jerk accepts no responsibility for content not created by Jerk," JOppB 6: the Complaint does not challenge this representation, but rather a different representation that the webpage also conveys. Nor does the Complaint challenge the representation that "users had the ability to post content on jerk.com." *See id*. at 7.

Similarly, while Mr. Fanning is correct that portions of the Complaint and Complaint Counsel's Statement of Material Facts describe in detail the content of many Jerk.com profiles, the Complaint does not challenge the nature of the content or comments found in Jerk.com profiles. Apart from the challenge to misrepresentations as to the *source* of the website's content, there are no allegations that the profiles' content violates the FTC Act. *See* Comp. ¶¶ 15-19. Moreover, the relief at issue contradicts Mr. Fanning's contention that this case is really a disguised effort to control content. The Order places no restrictions on the content of profiles or comments that users may place on any website operated by Respondents. It includes no content restrictions on Respondents other than prohibitions on specified misrepresentations. We thus find no support in either

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speech because they do not reference a competitor. *See* FS 4. The representations challenged in the Complaint, however, are commercial speech because they encourage commercial transactions involving Jerk.com, not because they characterize Jerk.com as a competitor to Facebook.

the Complaint's counts or the relief granted for the contention that this proceeding is an attempt to control content.

We also find no support for Mr. Fanning's contention that Jerk "provided a public referendum on Facebook" that triggers First Amendment protection. FOppB 17-18. Mr. Fanning points to no evidence that Jerk was attempting publicly to examine Facebook's privacy statements and thereby encourage marketplace discussion. *See id.* at 17. Indeed, Jerk's conduct was precisely the opposite of Mr. Fanning's current claim: the essence of Count I is that Respondents represented that users created the profiles on Jerk.com, not that Jerk scraped content from Facebook. S*ee supra* Section IV.A.1. Respondent offers no evidence that Mr. Fanning or Jerk considered public discussion regarding Facebook's privacy policy a reason for any action or representation by Jerk. Even if there were factual support, Respondents "should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (Brennan, J., concurring)).

Consequently, Respondents' deceptive conduct is not constitutionally sheltered from Section 5 liability.

B. Regulatory Authority

Mr. Fanning argues that this case expands and exceeds the Commission's deception authority by seeking to buttress Facebook's privacy policies. FOppB 18-20. He claims that Respondents made no representations to Facebook, *id*. at 19, and, "[s]o far as [he is] aware," never "violated any valid contract or agreement with Facebook with respect to Jerk.com." FAff ¶ 5. In any case, Mr. Fanning asserts, "[t]here is nothing to buttress" because Facebook "make[s] information readily accessible to the public through the internet." FOppB 20. More broadly, Mr. Fanning contends that "Congress has supplanted, and even preempted, the FTC's regulatory authority in the data privacy and security space . . . ." *Id*. Jerk adds the argument that the Commission's challenge to Jerk.com's "Terms and Conditions" improperly "regulate[s] the practice of law by restricting the words attorneys could use in crafting contracts." JOppB 4-5.

These arguments are also without merit. Congress granted the FTC broad authority to protect consumers against unfair and deceptive practices. This authority has not been curtailed as Mr. Fanning contends. *See, e.g.*, *In re LabMD, Inc.*, 2014 WL 253518, at *9 (F.T.C. Jan. 16, 2014) (holding that the Commission's unfairness authority applies in the data security context). In any event, as discussed above in Section IV.A.2, our liability findings are not predicated on any alleged representations to Facebook or violation of Facebook's policies. Complaint Counsel have shown false representations made directly to consumers about the source of Jerk.com profiles and the benefits of purchasing standard memberships.[36]

Jerk's contention that the FTC is seeking improperly to regulate the practice of law is also unavailing. As already noted, the representation at issue in Count I concerns the source of Jerk.com's content, not its disclaimer of liability. Beyond this, Jerk cites no authority for the principle that a business's statements to consumers constitute the practice of law merely because they relate to the business's views of its legal rights. To the contrary, courts have been willing to find liability for deception under the FTC Act based on the misleading net impression generated by statements in a Truth in Lending Act disclosure box and the "fine print" of a Loan Note and Disclosure document. *See AMG Servs.*, 29 F. Supp. 3d at 1350-51.[37]

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[36] The facts, consequently, preclude any argument that the Commission exceeded its authority by challenging deception of a business rather than false representations made directly to consumers. In any case, the argument would be flawed: although it may be unusual for the Commission to find misrepresentations to a business to be deceptive under Section 5, the Commission has done so when the circumstances justified an enforcement action. *See, e.g.*, *FTC v. ReverseAuction.com, Inc.*, 2000 US Dist. LEXIS 20761 (D.D.C. 2000) (Commission unanimously applied a deception theory based on a company's breach of agreements with eBay in a complaint that also alleged consumer deception).

[37] Jerk relies on *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), a case that addresses the applicability to attorneys, engaged in the practice of their profession, of privacy rules that govern the activities of "financial institutions" under the Gramm-Leach-Bliley Act. That case is inapposite to our challenge to Jerk's deceptive conduct under the FTC Act.

VII. Remedy

The FTC Act authorizes the Commission to issue an order that requires Respondents to cease and desist the deceptive acts or practices. 15 U.S.C. § 45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). Such an order must be sufficiently clear so that it is comprehensible to the violator and must be reasonably related to the violations that were found. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Yet, "'[t]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.'" *Id.* at 395 (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). The Commission is permitted "to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future." *Colgate-Palmolive*, 380 U.S. at 395.

The Complaint in this matter attached a notice of the form of order that might issue if the facts were found to be as alleged. Complaint Counsel urge us to issue an order that mirrors that Proposed Order, arguing that the provisions are clear, reasonably related to the unlawful practices, and implement appropriate fencing-in relief. CCMSD 35 & n.26. Mr. Fanning argues that the Proposed Order is overly broad, would restrain Mr. Fanning's entry into any internet or social media venture in the future, and imposes a prior restraint on free speech in violation of the First Amendment.

Having found liability for Jerk and for Mr. Fanning individually, the Order we issue applies to both Respondents. Several provisions in the Order parallel provisions in the Proposed Order, although, as explained below, we have modified or deleted some of the provisions that were originally proposed.

Part I of the Order prohibits Respondents from making the kinds of misrepresentations alleged in the Complaint. In particular, Respondents are prohibited from misrepresenting (A) the source of any content on a website, including personal information, which is defined to include, *inter alia*, photographs, videos, or audio files that contain an individual's image or voice; and (B) the benefits of joining any service.

Under the Order, these prohibitions are not limited to the now-abandoned Jerk.com website, but also apply to "the marketing, promoting or offering for sale of any good or service" by Respondents and their representatives. Although the prohibitions on misrepresentations apply broadly, these cease and desist requirements are reasonably related to the unlawful practices. When determining whether an order is reasonably related to the unlawful practices, the Commission considers "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994); *see also Telebrands Corp.*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992). "The reasonable relationship analysis operates on a sliding scale – any one factor's importance varies depending on the extent to which the others are found. . . . All three factors need not be present for a reasonable relationship to exist." *Telebrands Corp.*, 457 F.3d at 358-59.

We first consider the seriousness and deliberateness of the violation. Respondents do not contest the fact that as many as 85 million Jerk.com profiles were created by scraping content from Facebook and other internet sites. The false claim that profile content was user-generated led to substantial harm to consumers. Hundreds of consumers filed complaints with the Commission, state law enforcement agencies, and Facebook about Jerk.com.[38] Some reported being concerned about their safety and that of their family members. CCSMF ¶ 163-64. Many paid money to Respondents in an effort to have their profiles removed, and spent considerable time trying to get their profiles or those of loved ones deleted from the site.[39]

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[38] *See, e.g.*, CX0258-007 (Ortiz Dec. ¶ 26 (FTC investigator identifying 313 complaints against Jerk filed on the FTC's Consumer Sentinel Network)); CX0550-626 (sample of consumer complaints submitted through the Consumer Sentinel Network); CX0012-25; CX0528-001; CX0529-001; CX0531-001 (complaints to offices of Minnesota, Missouri, Connecticut and New York); CX0105-001 ¶ 3 (Facebook Dec. ¶ 3).

[39] *See, e.g.*, CCSMF ¶¶ 158-59; CX0001-001 ¶¶ 2-3; CX0005-001 ¶ 5; CX0026-001-02 ¶ 6; CX0038-001 ¶ 4; CX0040-001-02 ¶ 6; CX0007-001 ¶ 5; CX0031-001-02 ¶ 5; CX0011-004 ¶ 17; CX0036-002 ¶ 9; CX0037-001-02 ¶ 7.

Moreover, as previously discussed, Respondents intended Jerk.com visitors to obtain the impression that profile content was user-generated. *See supra* Sections IV.A.1 and IV.A.3. Respondents also made the false claim about benefits from a Jerk.com membership – which amounted to the sole reason for purchasing a $30 standard membership – while choosing not to provide any benefits in return for the membership fee. *See supra*, Section IV.B.[40] Respondents' misrepresentations were knowing, and their violations were both serious and deliberate. *See Telebrands Corp.*, 457 F.3d at 359.

Next, we consider the ease with which Respondents' claims may be transferred to other products. A violation is considered transferable when other products could be sold utilizing similar techniques. *See Colgate-Palmolive*, 380 U.S. at 394-95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982); *POM Wonderful*, 2013 WL 268926, at *64. Here, we need not speculate because Respondents already have demonstrated that they will use the same profiles and make the same representations on other websites they operate. When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the misrepresentations. *See* CX0258 ¶ 17. Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010. *See, e.g.*, CX0663 (e-mail explaining that there were nearly 90 million profiles on company's second brand, www.reper.com).[41]

Accordingly, we conclude that prohibiting Respondents from making the misrepresentations described in Part I of the Order in

[40]Mr. Fanning's broad statement that "Jerk LLC experienced a number of problems in operating the site, including the site being hacked and being 'snaked' by the FTC which disrupted the services," FAff ¶ 4, does not link any "problems in operating the site" to the failure to provide benefits. Respondents provided no evidence that the failure to offer benefits was inadvertent.

[41] Although there is no history of violations in this case, that factor is less important in our analysis considering the strength of the other factors, particularly the ease of transferability to other products. Courts look to the circumstances as a whole "and not to the presence or absence of any single factor." *Sears, Roebuck & Co.*, 676 F.2d at 392; *see also Telebrands Corp.* 457 F.3d at 362 (finding evidence of first two factors sufficient to establish there was a reasonable relationship between the remedy and violation).

the marketing, promotion, or sale of any good or service bears a reasonable relationship to the violation of the FTC Act found in this case. As courts have recognized, the Commission's authority includes power to issue orders "encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976); *see also Colgate-Palmolive*, 380 U.S. at 394-95.

Part II of the Order prohibits Respondents from disclosing, using, selling, or benefitting from customer information or consumers' personal information obtained in connection with Respondents' operation of Jerk. Order II.A, II.B. Consumers' personal information is defined to include photos and other data scraped from internet sites. Order, Definition 3. The Order also requires Respondents to dispose of consumers' personal and customer information within 30 days after entry of the Order. Order II.C. The customer information and consumers' personal information obtained in connection with the operation of Jerk are raw material that could be used by Respondents to transfer their claims to other products. Applying the same three-part analysis as for Part I of the Order, we conclude that these provisions bear a reasonable relationship to the violation and, therefore, are appropriate fencing-in relief. "Fencing-in provisions serve to 'close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity.'" *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *Ruberoid*, 343 U.S. at 473).

Parts III-VII of the Order impose certain record-keeping, notification, and reporting requirements, and properly serve to facilitate administration of the Order. Part VIII provides that the Order will terminate in twenty years.

Complaint Counsel seek two additional provisions in the Proposed Order. First, Complaint Counsel argue for a provision that would prohibit Respondents from misrepresenting compliance with any company's user agreement, privacy policy, or contract provisions pertaining to the collection, use, or disclosure of consumers' personal information. Complaint Counsel characterize this provision as fencing-in relief and claim that it "is important because Respondents' use of the Facebook

platform to build Jerk.com's profiles violated Facebook's terms for Developers." CCMSD 36. We do not include this provision in the Order. As discussed above, there are unresolved factual disputes regarding whether Respondents violated Facebook rules, but we do not regard that as an issue requiring resolution in order to determine liability for the deceptive conduct alleged in the Complaint. *See supra* Section IV.A.2. Complaint Counsel have not shown a sufficient relationship between the misrepresentations to consumers regarding the source of Jerk.com's content and the benefits of standard membership, on the one hand, and misrepresentations regarding Respondents' compliance with other companies' user agreements, privacy policies, or contract provisions to justify adding the requested provision as fencing-in relief.

Complaint Counsel also seek a provision, which they characterize as fencing-in relief, that would prohibit Respondents from misrepresenting their privacy practices. Mr. Fanning argues that this provision is unrelated to any alleged unlawful conduct, particularly when there is "no mention or reference to" Respondents' privacy protections in the Complaint. FOppB 24. We agree with Mr. Fanning. The Complaint alleges misrepresentations regarding the source of content on Respondents' website and the benefits of paid membership. The Complaint does not allege misrepresentations regarding the privacy practices of Respondents. We see no clear linkage between the Complaint's deception allegations and Respondents' privacy practices. Consequently, we conclude that the provision at issue does not bear a reasonable relationship to the violations of the FTC Act found in this case, and we do not include the provision in the Order.

We are unpersuaded by Respondents' remaining objections. Mr. Fanning argues that the Order "effectively prohibits or regulates [him] from engaging in any business that involves social media or the internet" and would restrain for twenty years his "involvement with respect to each and every actual or potential business venture involving the internet, public information, or personal data without exception or any degree of specificity" and thereby has no reasonable relation to the violation found in this case. FOppB 24-26. We disagree. Mr. Fanning is free to engage in any business so long as he abstains from making the

misrepresentations described in Part I of the Order or from using the consumer and customer data obtained in connection with operating Jerk.

Mr. Fanning also asserts that the Order "lacks specificity." Although he fails to identify the particular provisions that he finds insufficiently clear, Mr. Fanning claims that an order is inappropriate because this case "is not a situation where an order restricting or deterring certain future claims about a product or service is even possible where there is no specific advertisement or mode of presenting a claim." FOppB 24. We disagree. Many Commission cases are based on implied claims rather than express claims, and cease and desist orders in those cases, like the Order in this case, sufficiently identify the prohibited conduct. *See, e.g.*, *POM Wonderful*, 2013 WL 268926. Here, Part I of the Order identifies the specific prohibited misrepresentations, and Part II of the Order clearly identifies the types of information obtained from the operation of Jerk that Respondents are prohibited from using in the future. Thus, the Order's prohibitions are sufficiently "clear and precise in order that they may be understood by those against whom they are directed." *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948).

Mr. Fanning argues that the Order abrogates his First Amendment rights as a prior restraint of free speech. It is well-established that the First Amendment does not protect misleading commercial speech. *See Central Hudson*, 447 U.S. at 566. It is also clear that a FTC Order prohibiting the same conduct and claims that the Commission found to be misleading does not abrogate the First Amendment rights of respondents. *See, e.g.*, *POM Wonderful*, 2015 WL 394093, at *20; *Kraft*, 970 F.2d at 325-26. If the Commission's assessment of liability established that the past claims were deceptive, then, as a forward-looking remedy, limiting the same claims "is tightly tethered to the goal of preventing deception," and "is not more extensive than necessary to serve the [substantial government] interest in preventing misleading commercial speech." *POM Wonderful*, 2015 WL 394093, at *20. Thus, Part I of the Order prohibiting the specific misrepresentations found to be misleading does not violate Respondents' First Amendment rights.

Mr. Fanning also argues that the Order imposes a prior restraint on free speech to the extent that it restricts the use and dissemination of information gathered from public sources. According to Mr. Fanning, "taken literally, the injunction sought against Fanning would bar him from commenting on or utilizing any information that exists or potentially exists in the public domain . . . ." FOppB 25. We disagree. The Order only prevents Respondents from using or benefitting from personal consumer or customer information that was previously obtained by Respondents from operating Jerk and that has been found to have contributed to the misleading representations in this case. The provision prevents Respondents from repeating their prior conduct and acts to "'close all roads to the prohibited goal,'" so that Respondents cannot simply bypass the Order. *Litton*, 676 F.2d at 370 (quoting *Ruberoid*, 343 U.S. at 473). Accordingly, Part II of the Order advances the government's substantial interest in preventing deception and is not broader than necessary.

Finally, Mr. Fanning argues that "relief should not be adjudicated in summary fashion on this record" and that "the spirit of due process, with actual notice and an opportunity to be heard" should preclude the imposition of relief. FOppB at 26. As we previously explained, the Complaint in this case attached a notice of the form of order that would be issued if facts in the case established liability. Thus, Respondents received actual notice of the likely relief. Moreover, Mr. Fanning's Opposition to the Motion for Summary Decision belies his argument. Mr. Fanning challenged specific provisions in the Proposed Order and offered broad over-arching First Amendment objections to the Proposed Order. Respondents have been provided due process regarding relief and have been heard. We see no reason for further argument on the remedy and therefore issue the accompanying Order at this time.

For the foregoing reasons, the Commission concludes that Jerk, LLC and John Fanning violated the FTC Act, 15 U.S.C § 45, in connection with the website Jerk.com. Consequently, we issue a Final Order to remedy Respondents' violations and prevent their recurrence.

FINAL ORDER

The Commission has heard this matter upon the Motion For Summary Decision filed by Complaint Counsel, and upon the briefs filed in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to grant the Motion For Summary Decision. Accordingly,

IT IS ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Jerk, LLC, a limited liability company, its successors and assigns; and John Fanning, individually and as a member of the company.

2. "Customer information" shall mean information relating to consumers who purchased products or services from Jerk, LLC, including, but not limited to, a consumer's name, address, telephone number, e-mail address, Social Security number, other identifying information, billing information, or any other data that enables access to a customer's account (including a credit or debit card number, bank account, or other financial account).

3. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, such

as a name of a street, city or town; (c) an e-mail address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) a bank account, debit card, or credit card account number; or (h) photographs, videos, or audio files that contain an individual's image or voice.

I.
PROHIBITION ON MISREPRESENTING MEMBERSHIP BENEFITS AND THE SOURCE OF CONTENT ON A WEBSITE

IT IS ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the marketing, promoting, or offering for sale of any good or service, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication:

A. the source of any content on a website, including personal information; or

B. the benefits of joining any service.

II.
DISPOSITION OF CUSTOMER AND PERSONAL INFORMATION

IT IS FURTHER ORDERED that respondents are permanently restrained and enjoined from:

A. Disclosing, using, selling, or benefitting from customer information that any respondent obtained prior to entry of this Order in connection with the operation of Jerk, LLC;

B. Disclosing, using, selling, or benefitting from personal information that any respondent obtained prior to entry of this Order in connection with the operation of

Jerk, LLC; and

C. Failing to dispose of personal information and customer information in all forms in their possession, custody, or control that any respondent obtained prior to entry of this Order in connection with the operation of Jerk, LLC, within thirty (30) days after entry of this Order.

Provided, however, that information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

III.
MONITORING PROVISIONS

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

A. All advertisements and promotional materials containing any representation covered by this order;

B. All materials that were relied upon in disseminating any representation covered by this order;

C. Complaints or inquiries relating to any website or other online service, and any responses to those complaints or inquiries;

D. Documents that are sufficient to demonstrate compliance with each provision of this order; and

E. Documents that contradict, qualify, or call into question any respondent's compliance with this order.

IV.
ORDER ACKNOWLEDGMENTS

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

V.
COMPLIANCE MONITORING – JERK, LLC

IT IS FURTHER ORDERED that respondent Jerk, LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Jerk, LLC.

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. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Jerk, LLC.

VII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that respondents, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VIII.
ORDER TERMINATION

This order will terminate on March 13, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jerk, LLC, a limited liability company, and John Fanning, individually and as a member of Jerk, LLC, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Jerk, LLC, is a Delaware limited liability company, also doing business as JERK.COM, with its principal address at P.O. Box 277, Hingham, MA 02043.

2. Respondent John Fanning is a member and manager of Jerk, LLC. Individually or in concert with others, he has formulated, directed, controlled, or had authority to control the acts and practices of Jerk, LLC, including the acts or practices alleged in this complaint. His principal office or place of business is 165 Nantasket Avenue, Hull, MA 02045.

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

Jerk, LLC's Business Practices

4. From 2009 until 2013, respondents operated a purported social networking website estimated to contain between 73.4 and 81.6 million unique consumer profiles. At various times, the website was located at the following urls: www.jerk.com, www.jerk.be, and www.jerk.org (collectively "Jerk"). On Jerk, users could create profiles of other people using the "Post a Jerk" feature. Although Jerk, LLC, claims that its website contained only user-generated content, respondents actually created or caused to be created the vast majority of Jerk profiles using information from Facebook.

5. Respondents earned revenue by selling "memberships" for $30, by charging consumers a $25 customer service fee to contact the website, and by placing third-party advertisements on Jerk.

Jerk Profiles and Membership

6. Jerk profiles contained a profile subject's first and last name. Directly underneath the profile subject's name were voting buttons that any user could click to vote whether the person was a "Jerk" or "not a Jerk." Many profile subjects were identified as a "Jerk" or "not a Jerk." The profiles also contained fields where any user could enter the profiled subject's age, address, mobile phone number, email address, occupation, school, employer, home phone number, work phone number, license plate number, and Twitter, MySpace, LinkedIn, and eBay account information.

Figure 1 (Exhibit A) (photo and identifying information redacted by the FTC).

Jerk profiles also contained a comment field for users to write comments about the profiled subject. Some profiles included comments such as "Omg I hate this kid he\'s such a loser," "Address: gay boulevard," and "just can go f**cking slaughter herself . . . Nobody in their right mind would love you . . . not even your parents love [you]." (Exhibit B-13, B-14, B-16, filed under seal).

7. At times material to the complaint, Jerk had profiles for consumers of all ages, including children. (Exhibit B - filed under seal). An estimated 24.5 to 33.5 million profiles contained a large photo of the profiled subject. An estimated 2.7 to 6.8 million Jerk profiles contained a photo of a child who appeared to be under age 10. Some photos featured intimate family moments, including children bathing and a mother nursing her child. Often, Jerk profiles featured photographs of children, which were collected without their or their parents' knowledge or consent. Numerous consumers have complained that photographs and other information about them on Jerk were originally posted on Facebook using controls that enabled users to designate material for dissemination only to a limited group, and that the information was not designated for public viewing.

8. Respondents have disseminated or have caused to be disseminated statements to consumers about Jerk memberships and the source of Jerk profiles and their content, including but not necessarily limited to:

a. "Welcome to Jerk

. . . .

Want to join the millions of people who already use Jerk for important updates for business, dating, and more?"

(Exhibit C, webpage on Jerk)

b. "About Us: jerk.com and Jerk LLC

. . . .

4. Online Content

Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC."

(Exhibit D, webpage on Jerk)

c. "Post a Jerk
Fill out the form below to find or create a profile on jerk. Include a picture if you can and as much other information as possible."
(Exhibit E, webpage on Jerk)

d. "Find out what your 'friends' are saying about you behind your back to the rest of the world!"
(Exhibit F, respondents' Twitter account)

e. "Remove Me!
Just because you have a profile on Jerk does not mean you are a jerk. Less than 5% of the millions of people on Jerk are jerks. Jerk is where you find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others. No one's profile is ever removed because Jerk is based on searching free open internet, searching databases and it's not possible to remove things from the Internet. You can however use Jerk to manage your reputation and resolve disputes with people who you are in conflict with. There are also additional paid premium features that are available [hyperlink to Jerk's sign-in page]."
(Exhibit G, webpage on Jerk)

f. The sign-in link described in paragraph 8.e directs consumers to a subscription page, which states:
"Subscribers on Jerk yourself [sic] and receive free benefits including:
1. Fast notifications of postings about you!
2. Updates on people you know and are tracking.
3. Search for people you know, and read about people you are interested in.
4. Enter comments and reviews for people you interact with.
5. Help others avoid the wrong people.
6. Praise those who help you and move good people closer to sainthood!"
The following button is directly below the list of subscriber benefits:

(Exhibit C, webpage on Jerk)

g. The "Subscribe" button described in paragraph 8.f directs consumers to a payment form, which includes the following statement at the top:

"Become a Subscriber

. . . .

You must be a subscriber member in order to create a dispute."

(Exhibit H, webpages on Jerk)

9. Numerous consumers, including parents and job searchers, discovered Jerk profiles of themselves or family members. Jerk profiles often appeared in search engine results when a consumer searched for an individual's name. In numerous instances, consumers believed that the existence of a Jerk profile on them indicated that someone who knew them created their Jerk profile. As described in Paragraph 8, respondents represented that profiles reflected the views of other Jerk users.

10. Although Jerk contained some user-generated content, Respondents created the vast majority of profiles using improperly obtained Facebook information. Facebook is a social network that currently has over 1.2 billion members. Facebook permits third-party developers to integrate websites and applications with Facebook. Developers can access data for all Facebook users through Facebook's application programming interfaces ("APIs"), which provide sets of tools developers can use to interact with Facebook. Developers that use the Facebook platform must agree to Facebook's policies, which include (1) obtaining users' explicit consent to share certain Facebook data; (2) deleting information obtained through Facebook once Facebook disables the developers' Facebook access; (3) providing an easily accessible mechanism for consumers to request the deletion of their Facebook data; and (4) deleting information obtained from Facebook upon a consumer's request.

11. Beginning in February 2010, respondents, directly or indirectly, registered numerous websites with Facebook, including Jerk.com, Jerk2.com, Jerk3.com, Jerk4.com, and Jerk.be. Respondents accessed Facebook's data through Facebook's APIs and downloaded names and photographs of Facebook users.

Respondents used this data to create unique Jerk profiles for millions of consumers.

12. As described in Paragraph 8.e-g, respondents represented that, by purchasing a subscription to Jerk, users obtained "additional paid premium features," including the ability to dispute information posted on Jerk and receive fast notifications and special updates. Consumers subscribed to Jerk by paying $30 for a standard membership. Numerous consumers believed that purchasing a Jerk membership would permit them to alter or delete their Jerk profile and dispute false information on their profile. In numerous instances, consumers who paid for a standard membership received nothing from respondents in exchange for their payment of the membership fee.

13. Respondents made it difficult for consumers to contact Jerk. Respondents charged consumers a $25 fee to email Jerk's customer service department. (Exhibit I, webpage on Jerk). Numerous consumers were hesitant to provide their credit card information to Jerk and thus had no easy mechanism to contact the company. Some savvy consumers contacted Jerk's registered agent or web host and requested that respondents delete their photo, or a photo of their child, which was originally posted on Facebook. In numerous instances, Jerk did not respond to consumers' requests and did not remove their photos from Jerk's website.

14. Respondents also were unresponsive to law enforcement requests to remove harmful profiles. In at least one instance, respondents ignored a request from a sheriff's deputy to remove a Jerk profile that was endangering a 13-year old girl.

COUNT I
RESPONDENTS' DECEPTIVE REPRESENTATION REGARDING SOURCE OF JERK CONTENT

15. Through the means described in Paragraph 8, respondents represented, expressly or by implication, that content on Jerk, including names, photographs, and other content, was created by Jerk users and reflected those users' views of the profiled individuals.

16. In truth and in fact, in the vast majority of instances, content on Jerk was not created by Jerk users and did not reflect those users' views of the profiled individuals. Respondents populated or caused to be populated the content on the vast majority of Jerk profiles by taking information from Facebook in violation of Facebook's policies, including by (1) failing to obtain users' explicit consent to collect certain Facebook data, including photographs; (2) maintaining information obtained through Facebook even after respondents' Facebook access was disabled; (3) failing to provide an easily accessible mechanism for consumers to request deletion of their Facebook data; and (4) failing to delete data obtained from Facebook upon a consumer's request. Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

COUNT II
RESPONDENTS' DECEPTIVE REPRESENTATION REGARDING JERK MEMBERSHIPS

17. Through the means described in Paragraph 8, respondents represented, expressly or by implication, that consumers who subscribe to Jerk by paying for a standard membership would receive additional benefits, including the ability to dispute information posted on Jerk.

18. In truth and in fact, in numerous instances, consumers who subscribed to Jerk by paying for a standard membership received nothing in return for their payment. Therefore, the representation set forth in Paragraph 17 was, and is, false or misleading.

19. Respondents' practices, as alleged in this complaint, therefore constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

Notice is hereby given that the twenty-seventh day of January, 2015, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532-H, Washington, D.C. 20580, as the place when and where a 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 to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Federal Trade Commission an answer to this complaint on or before the 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 of fact and conclusions of law under § 3.46 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and to 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 will schedule an initial prehearing scheduling conference to be held not later than 10 days after the answer is filed by the last answering respondent in the complaint. 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-H, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five days after the answer is filed by the last answering respondent. Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

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

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Jerk, LLC, a limited liability company, its successors and assigns; and John Fanning, individually and as a member of the company.

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

3. "Customer Information" shall mean information relating to consumers who purchased products or services from Jerk, LLC, including, but not limited to, a consumer's name, address, credit or debit card number, and billing information.

4. "Individual online profile" shall mean a profile of an individual that contains personal information.

5. "Minor" shall mean an individual under the age of 18.

6. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, such as a name of a street, city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) a bank account, debit card, or credit card account number; or (h) photographs, videos, or audio files that contain an individual's image or voice.

I.
PROHIBITION ON MISREPRESENTING MEMBERSHIP BENEFITS AND THE SOURCE OF CONTENT ON A WEBSITE

IT IS ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the marketing, promoting, or offering for sale of any good or service, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication:

A. the source of any personal information;

B. the benefits of joining any service; or

C. any other fact material to consumers.

II.
PROHIBITION ON MISREPRESENTING COMPLIANCE WITH A COMPANY'S USER AGREEMENTS, PRIVACY POLICY, OR CONTRACT PROVISIONS

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the marketing, promoting, or offering for sale of any good or service, shall not make any misrepresentation or assist others in making any misrepresentation concerning compliance with any provision of any user agreement, privacy policy, or contract provision, pertaining to the collection, use, or disclosure of consumers' personal information.

III.
PROHIBITION ON MISREPRESENTING PRIVACY PROTECTIONS

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with respondents' operation of any website or other online service in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which any respondent maintains and protects the privacy and confidentiality of any personal information, including, but not limited to, misrepresenting: (1) the purposes for which any respondent collects and uses personal information, (2) the extent to which consumers may exercise control over the collection, use, or disclosure of personal information, and (3) the use, disclosure, or deletion of a consumer's personal information.

IV.
DISPOSITION OF CUSTOMER DATA AND ILLEGALLY OBTAINED PERSONAL INFORMATION

IT IS FURTHER ORDERED that respondents are permanently restrained and enjoined from:

A. Disclosing, using, selling, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any other data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any respondent obtained prior to entry of this Order in connection with the operation of Jerk, LLC;

B. Disclosing, using, selling, or benefitting from personal information that any respondent obtained prior to entry of this Order in connection with the operation of Jerk, LLC; and

C. Failing to dispose of personal information and customer information in all forms in their possession, custody, or control that any respondent obtained prior to entry of this Order in connection with the operation of Jerk, LLC, within thirty (30) days after entry of this Order.

Provided, however, that information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

V.
MONITORING PROVISIONS

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

A. All advertisements and promotional materials containing any representation covered by this order, including but not limited to respondents' terms of use, end-user license agreements, frequently asked questions, privacy policies, and other documents publicly disseminated relating to: (a) the collection of

data; (b) the use, disclosure or sharing of such data; and (c) opt-out practices and other mechanisms to limit or prevent such collection of data or the use, disclosure, or sharing of data;

B. All materials that were relied upon in disseminating any representation covered by this order;

C. Complaints or inquiries relating to any website or other online service, and any responses to those complaints or inquiries;

D. Documents that are sufficient to demonstrate compliance with each provision of this order; and

E. Documents that contradict, qualify, or call into question any respondent's compliance with this order.

VI.
ORDER ACKNOWLEDGMENTS

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

VII.
COMPLIANCE MONITORING – JERK, LLC

IT IS FURTHER ORDERED that respondent Jerk, LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary,

parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Jerk, LLC.

VIII.
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. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Jerk, LLC.

IX.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that respondents, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a

representative of the Commission, they shall submit additional true and accurate written reports.

X.
ORDER TERMINATION

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

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this second day of April, 2014.

Complaint

EXHIBIT A

Exhibit A

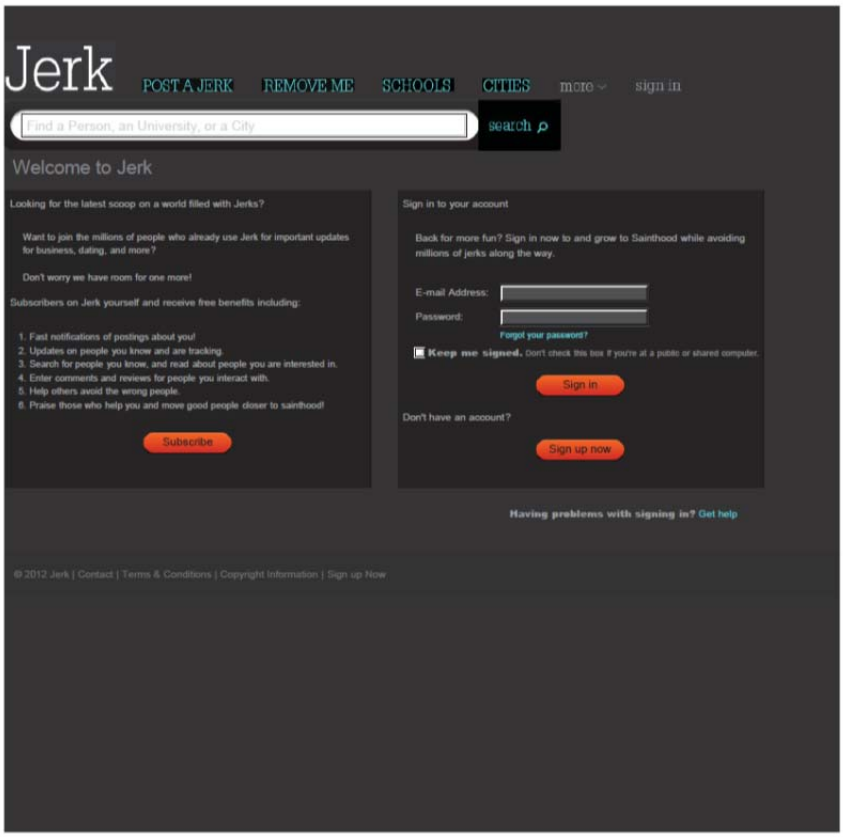
EXHIBIT B

Redacted from the Public Record, but Incorporated by Reference

Complaint

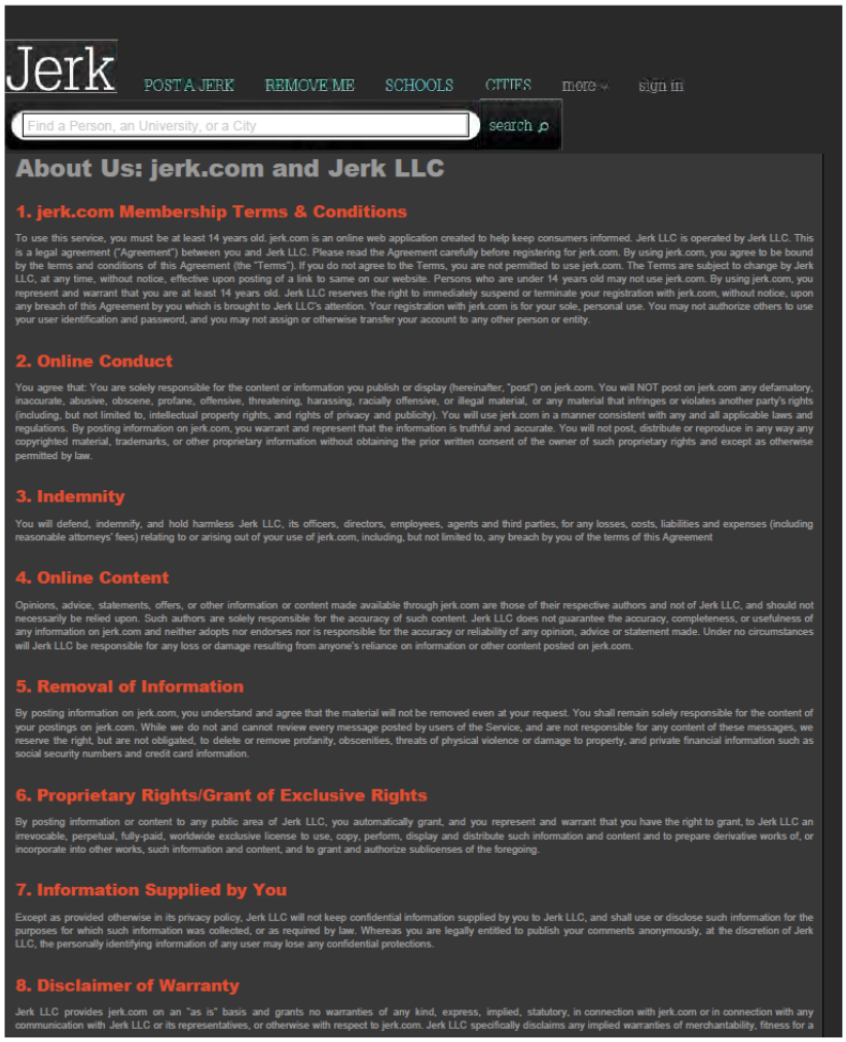
EXHIBIT C

Jerk.com - Public Service personal news



Complaint

EXHIBIT D



Jerk

POST A JERK REMOVE ME SCHOOLS CITIES more sign in

Find a Person, an University, or a City search

About Us: jerk.com and Jerk LLC

1. jerk.com Membership Terms & Conditions

To use this service, you must be at least 14 years old. jerk.com is an online web application created to help keep consumers informed. Jerk LLC is operated by Jerk LLC. This is a legal agreement ("Agreement") between you and Jerk LLC. Please read the Agreement carefully before registering for jerk.com. By using jerk.com, you agree to be bound by the terms and conditions of this Agreement (the "Terms"). If you do not agree to the Terms, you are not permitted to use jerk.com. The Terms are subject to change by Jerk LLC, at any time, without notice, effective upon posting of a link to same on our website. Persons who are under 14 years old may not use jerk.com. By using jerk.com, you represent and warrant that you are at least 14 years old. Jerk LLC reserves the right to immediately suspend or terminate your registration with jerk.com, without notice, upon any breach of this Agreement by you which is brought to Jerk LLC's attention. Your registration with jerk.com is for your sole, personal use. You may not authorize others to use your user identification and password, and you may not assign or otherwise transfer your account to any other person or entity.

2. Online Conduct

You agree that: You are solely responsible for the content or information you publish or display (hereinafter, "post") on jerk.com. You will NOT post on jerk.com any defamatory, inaccurate, abusive, obscene, profane, offensive, threatening, harassing, racially offensive, or illegal material, or any material that infringes or violates another party's rights (including, but not limited to, intellectual property rights, and rights of privacy and publicity). You will use jerk.com in a manner consistent with any and all applicable laws and regulations. By posting information on jerk.com, you warrant and represent that the information is truthful and accurate. You will not post, distribute or reproduce in any way any copyrighted material, trademarks, or other proprietary information without obtaining the prior written consent of the owner of such proprietary rights and except as otherwise permitted by law.

3. Indemnity

You will defend, indemnify, and hold harmless Jerk LLC, its officers, directors, employees, agents and third parties, for any losses, costs, liabilities and expenses (including reasonable attorneys' fees) relating to or arising out of your use of jerk.com, including, but not limited to, any breach by you of the terms of this Agreement

4. Online Content

Opinions, advice, statements, offers, or other information or content made available through jerk.com are those of their respective authors and not of Jerk LLC, and should not necessarily be relied upon. Such authors are solely responsible for the accuracy of such content. Jerk LLC does not guarantee the accuracy, completeness, or usefulness of any information on jerk.com and neither adopts nor endorses nor is responsible for the accuracy or reliability of any opinion, advice or statement made. Under no circumstances will Jerk LLC be responsible for any loss or damage resulting from anyone's reliance on information or other content posted on jerk.com.

5. Removal of Information

By posting information on jerk.com, you understand and agree that the material will not be removed even at your request. You shall remain solely responsible for the content of your postings on jerk.com. While we do not and cannot review every message posted by users of the Service, and are not responsible for any content of these messages, we reserve the right, but are not obligated, to delete or remove profanity, obscenities, threats of physical violence or damage to property, and private financial information such as social security numbers and credit card information.

6. Proprietary Rights/Grant of Exclusive Rights

By posting information or content to any public area of Jerk LLC, you automatically grant, and you represent and warrant that you have the right to grant, to Jerk LLC an irrevocable, perpetual, fully-paid, worldwide exclusive license to use, copy, perform, display and distribute such information and content and to prepare derivative works of, or incorporate into other works, such information and content, and to grant and authorize sublicenses of the foregoing.

7. Information Supplied by You

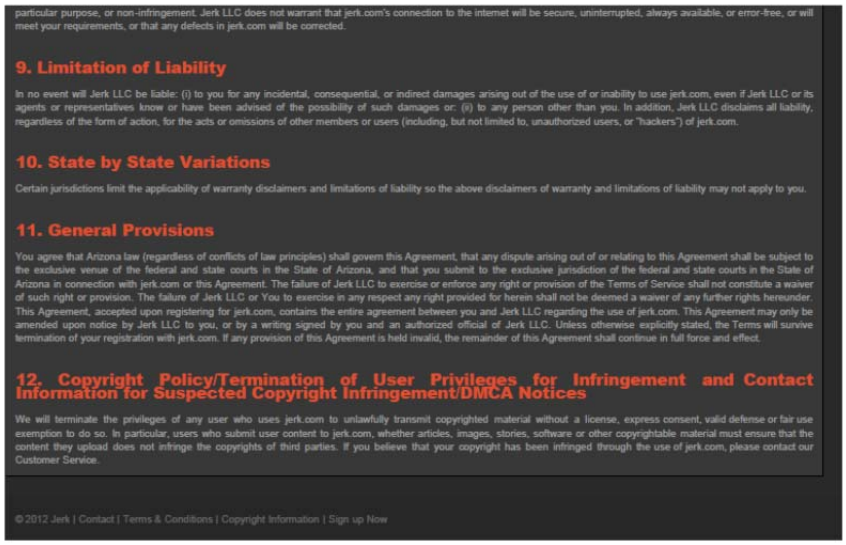
Except as provided otherwise in its privacy policy, Jerk LLC will not keep confidential information supplied by you to Jerk LLC, and shall use or disclose such information for the purposes for which such information was collected, or as required by law. Whereas you are legally entitled to publish your comments anonymously, at the discretion of Jerk LLC, the personally identifying information of any user may lose any confidential protections.

8. Disclaimer of Warranty

Jerk LLC provides jerk.com on an "as is" basis and grants no warranties of any kind, express, implied, statutory, in connection with jerk.com or in connection with any communication with Jerk LLC or its representatives, or otherwise with respect to jerk.com. Jerk LLC specifically disclaims any implied warranties of merchantability, fitness for a

Complaint

EXHIBIT D



particular purpose, or non-infringement. Jerk LLC does not warrant that jerk.com's connection to the internet will be secure, uninterrupted, always available, or error-free, or will meet your requirements, or that any defects in jerk.com will be corrected.

9. Limitation of Liability

In no event will Jerk LLC be liable: (i) to you for any incidental, consequential, or indirect damages arising out of the use of or inability to use jerk.com, even if Jerk LLC or its agents or representatives know or have been advised of the possibility of such damages or; (ii) to any person other than you. In addition, Jerk LLC disclaims all liability, regardless of the form of action, for the acts or omissions of other members or users (including, but not limited to, unauthorized users, or "hackers") of jerk.com.

10. State by State Variations

Certain jurisdictions limit the applicability of warranty disclaimers and limitations of liability so the above disclaimers of warranty and limitations of liability may not apply to you.

11. General Provisions

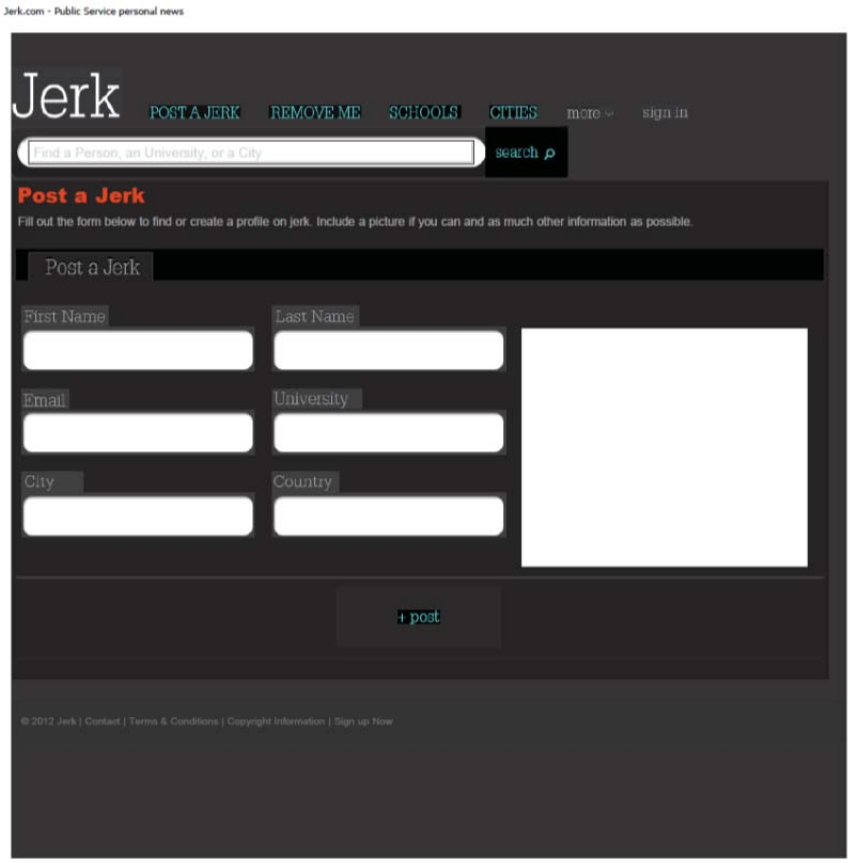
You agree that Arizona law (regardless of conflicts of law principles) shall govern this Agreement, that any dispute arising out of or relating to this Agreement shall be subject to the exclusive venue of the federal and state courts in the State of Arizona, and that you submit to the exclusive jurisdiction of the federal and state courts in the State of Arizona in connection with jerk.com or this Agreement. The failure of Jerk LLC to exercise or enforce any right or provision of the Terms of Service shall not constitute a waiver of such right or provision. The failure of Jerk LLC or You to exercise in any respect any right provided for herein shall not be deemed a waiver of any further rights hereunder. This Agreement, accepted upon registering for jerk.com, contains the entire agreement between you and Jerk LLC regarding the use of jerk.com. This Agreement may only be amended upon notice by Jerk LLC to you, or by a writing signed by you and an authorized official of Jerk LLC. Unless otherwise explicitly stated, the Terms will survive termination of your registration with jerk.com. If any provision of this Agreement is held invalid, the remainder of this Agreement shall continue in full force and effect.

12. Copyright Policy/Termination of User Privileges for Infringement and Contact Information for Suspected Copyright Infringement/DMCA Notices

We will terminate the privileges of any user who uses jerk.com to unlawfully transmit copyrighted material without a license, express consent, valid defense or fair use exemption to do so. In particular, users who submit user content to jerk.com, whether articles, images, stories, software or other copyrightable material must ensure that the content they upload does not infringe the copyrights of third parties. If you believe that your copyright has been infringed through the use of jerk.com, please contact our Customer Service.

Complaint

EXHIBIT E



Complaint

EXHIBIT F

Exhibit F

Complaint

EXHIBIT G

Complaint

EXHIBIT H

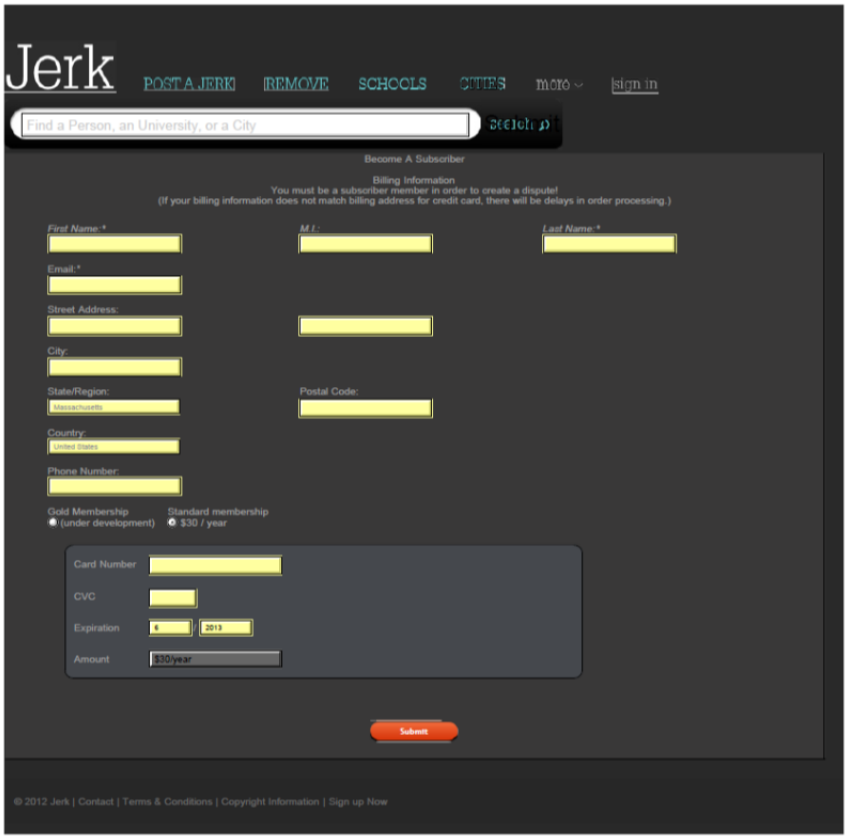


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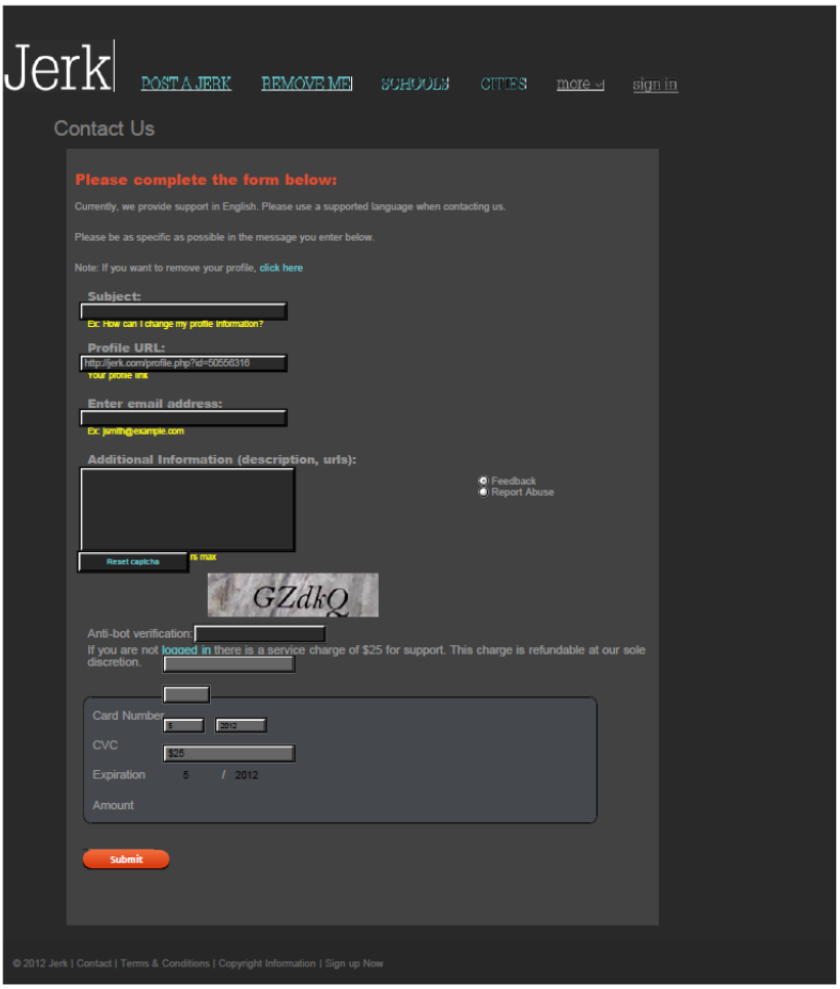
EXHIBIT I



Complaint

IN THE MATTER OF

TRUE ULTIMATE STANDARDS EVERYWHERE, INC., D/B/A TRUSTE, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4512; File No. 132 3219
Complaint, March 12, 2015 – Decision, March 12, 2015

This consent order settles allegations that TRUSTe, Inc ("TRUSTe") deceived consumers about its privacy seal program, its privacy practices, and its status as a non-profit entity. The complaint alleges that from 2006 until January 2013, TRUSTe failed to conduct annual recertifications of companies holding TRUSTe privacy seals in over 1,000 incidences, despite providing information on its website that companies holding TRUSTe Certified Privacy Seals receive recertification every year. In addition, the complaint alleges that, although TRUSTe became a for-profit corporation in 2008, the company failed to require its clients using TRUSTe seals to update references to TRUSTe's for-profit status. Under the terms of the order, TRUSTe is prohibited from making misrepresentations about its certification process, its corporate status, or whether an entity participates in its programs. TRUSTe is also barred from providing other companies or entities with the means to make misrepresentations about these facts. The order also requires the company in its role as a COPPA safe harbor to provide detailed information about its COPPA-related activities in its annual filing to the FTC, as well as maintaining comprehensive records about its COPPA safe harbor activities for ten years. Each of these provisions represents an added requirement over the reporting requirements laid out under the COPPA rule for safe harbor programs. The company is further required to pay $200,000 in disgorgement.

Participants

For the *Commission: Jamie Hine* and *Jessica Lyon.*

For the *Respondent: Adam J. Fleisher* and *D. Reed Freeman, Morrison & Foerster LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that True Ultimate Standards Everywhere, Inc., a corporation, has violated the 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 True Ultimate Standards Everywhere, Inc., also doing business as TRUSTe, Inc. ("TRUSTe"), is a privately-owned, Delaware corporation with its principal office or place of business at 835 Market Street, Suite 800, San Francisco, California 94103.

2. TRUSTe was formed as a California non-profit corporation on June 10, 1997. On June 20, 2008, TRUSTe formed a for-profit Delaware corporation and transferred all of the assets of the California non-profit entity to the for-profit corporation pursuant to an Asset Purchase Agreement effective July 3, 2008.

3. Respondent has advertised, offered for sale, and sold data privacy services to companies, including a variety of assessments and certifications, monitoring tools, and compliance controls.

4. The acts and practices of Respondent as alleged in this complaint are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

TRUSTE'S CERTIFIED PRIVACY SEALS

5. Since approximately June 1997, Respondent has offered clients Certified Privacy Seals ("Privacy Seals") for display on clients' websites. TRUSTe has more recently offered these seals for mobile applications. Respondent provides these seals to clients that meet designated requirements for the programs that Respondent administers ("Program Requirements"). These requirements include specifications related to transparency of company practices, verification of privacy practices, and consumer choice regarding the collection and use of consumer personal information.

6. Respondent advertises itself as "the #1 privacy brand" and asserts that its "Certified Privacy Seal is recognized globally by consumers, businesses, and regulators as demonstrating privacy best practices."

7. Respondent's Privacy Seal programs include, but are not limited to, TRUSTed Websites (since 1997), which certifies

websites; COPPA/Children's Privacy (2001), which certifies compliance with the FTC's Children's Online Privacy Protection Act Rule; EU Safe Harbor (2002), which assists with certification to the EU-US Safe Harbor framework for transatlantic data transfers; TRUSTed Downloads (2006), which certifies software; TRUSTed Cloud (2011), which certifies data processing services through cloud platforms; TRUSTed Apps (2011), which certifies mobile applications; and TRUSTed Data (2011), which certifies data collection practices of non-consumer facing entities.

8. Companies that meet the Program Requirements of a particular Privacy Seal must display to consumers a corresponding seal on their websites and mobile applications to demonstrate publicly to consumers their compliance with the relevant TRUSTe program.

9. In connection with its Privacy Seal programs, Respondent has provided clients with images of seals to display on their websites and mobile applications, including, but not limited to "Click-to-verify" seals containing a graphic icon, and text indicating to consumers an ability to click on the seal:

> These "Click-to-verify" seals are required and must be displayed by a client on its privacy policy webpage. They are linked to a webpage hosted on the www.truste.com website, which provides verification of the sealholder's name, the specific privacy seal(s) held, and the validity date for each seal. The website also links to the Program Requirements for the Privacy Seals.

10. Respondent tests and verifies client compliance with its Program Requirements underlying its Privacy Seals through scanning technology, client interviews, document collection, and manual testing and review of client websites and mobile applications.

11. TRUSTe purports to recertify privacy sealholders on an annual basis to identify, for example: (1) material changes to privacy policies (e.g., new or expanded collection/uses of personal information such as use of cookies for behavioral advertising); (2) seal validation (e.g., improper placement, old versions, and bad

links); (3) changes in company ownership or business model (e.g., adoption of advertising supported content); and (4) where relevant, compliance with external third-party program requirements (e.g., Federal Trade Commission Children's Online Privacy Protection Act safe harbor, or U.S. Department of Commerce self-certification to the US/EU Safe Harbor).

12. At all times relevant to this complaint, Respondent has controlled the design of its seals, as well as the design, content, and format of the www.truste.com webpage to which these seals link.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

MISREPRESENTATION OF CERTIFICATION STATUS OF TRUSTE CLIENTS

13. Since approximately 2011, Respondent has disseminated or has caused to be disseminated to consumers, on the www.truste.com website, Program Requirements containing the following statement:

> III. Minimum Program Requirements
> …
> B. Participant Accountability
> …
> 3. Annual Recertification
> a. Participant shall undergo recertification to verify ongoing compliance with these Program Requirements annually.
> (Exhibit A, Program Requirements, February 2011, available at www.truste.com)
> Prior to 2011, Respondent disseminated or had caused to be disseminated to consumers Program Requirements containing the following statement:
>
> II. Participant Responsibilities
> . . .
> C. Recertification. Participant must seek recertification by TRUSTe annually
> . . .

14. The statements set forth in Paragraph 13 have been included in Respondent's Program Requirements for at least each of the following programs: TRUSTed Websites (since 1997), COPPA/Children's Privacy (2001), EU Safe Harbor (2002), TRUSTed Cloud (2011), TRUSTed Apps (2011), TRUSTed Data (2011), and TRUSTed Smart Grid (2012).

COUNT 1

15. Through the means described in Paragraph 13, Respondent has represented, expressly or by implication, that TRUSTe has recertified annually all companies displaying a TRUSTe Certified Privacy Seal to ensure ongoing compliance with the Program Requirements.

16. In fact, from 2006 until January 2013, Respondent did not conduct annual recertifications for all companies holding TRUSTe Certified Privacy Seals. In over 1,000 instances, TRUSTe conducted no annual review of the company's compliance with applicable Program Requirements. Therefore, the representation set forth in Paragraph 13 was false or misleading.

MISREPRESENTATIONS REGARDING NON-PROFIT STATUS OF TRUSTE

17. Prior to its transition to a for-profit entity on July 3, 2008, Respondent required its clients to display in their privacy policies the following language TRUSTe developed:

> "TRUSTe is an independent, non-profit organization whose mission is to build users' trust and confidence in the Internet by promoting the use of fair information practices."

18. In early July 2008, Respondent notified all active and current clients that its tax status would change from non-profit to for-profit status. On July 15, 2008, the company issued a public press release announcing the company's transition to a for-profit entity.

19. In numerous instances since July 3, 2008, the date when TRUSTe formed a for-profit Delaware corporation and ceased to be a non-profit California corporation, Respondent has recertified clients who have failed to update references to the company's for-profit status. Some TRUSTe clients' privacy policies continued to describe TRUSTe as a non-profit entity until fall of 2013.

Count 2

20. Through the means described in Paragraphs 17 and 19, Respondent has represented, expressly or by implication, that TRUSTe is a non-profit organization.

21. In fact, Respondent has not been a non-profit organization since July 3, 2008. Therefore, the representation set forth in Paragraph 20 was false or misleading.

22. By providing clients with the language in Paragraph 17 and continuing to certify clients using that language as described in Paragraph 19, Respondent has furnished the means and instrumentalities for the commission of the deceptive acts or practices alleged in Paragraph 21.

23. 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 twelfth day of March, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A

TRUSTe Program Requirements

I. Structure

TRUSTed Websites requires compliance with the following program requirements. Upon satisfactory certification TRUSTe provides companies with a TRUSTe Privacy Seal as evidence of compliance - certified companies must display this seal on their website privacy policy page and may elect to place the seal on additional webpages as well.

II. Definitions

The following definitions shall apply herein:

A. "Behavioral Targeting" is the collection and use of information on an Individual's Online activity over a period of time for the purpose of developing and using predictive models to determine potential future behavior or interests.

B. "Clear and Conspicuous" means a notice that is reasonably easy to find, and easily understandable in terms of content and style to the average reader.

C. "Expressed Consent" means the affirmative consent (opt-in) to a practice by the Individual, after being provided notice, but prior to implementing the practice.

D. "Foreign Language Privacy Statement" is the Participant's Privacy Statement translated into a language other than English.

E. "Geo-location Data" is information obtained through an Individual's use of a Mobile Device and is used to identify or describe the Individual's actual physical location at a given point in time.

F. "Individual" means the discrete person to whom the collected information pertains.

G. "Inferred Consent" means consent which is implied by an Individual, regarding the collection, use, disclosure, distribution of PII after notice and opportunity to withdraw consent (opt-out) is given by Participant, but not taken by the Individual.

H. "Material Change" means degradation in the rights or obligations regarding the collection, use, or disclosure of PII for an Individual. This usually includes changes to Participant's:
   1. Practices regarding notice, collection, use, and disclosure of PII and/or Third Party Personally Identifiable Information;
   2. Practices regarding user choice and consent to how PII and/or Third Party Personally Identifiable Information is used and shared; or
   3. Measures for information security, integrity, access, or individual redress.

I. "Mobile Device" is a portable electronic geo-location enabled device which allows the user to process, receive, and send data without being limited to a specific geographical location.

J. "Online" is the state where an Individual is connected by computer or Mobile Device to one or more other computers, Mobile Devices, or networks, as through a commercial electronic information service or the internet.

K. "Participant" means the entity that has entered into an agreement with TRUSTe to participate in the TRUSTe program(s) and agreed to comply with the program requirements included therein.

L. "Personally Identifiable Information [PII]" means any information or combination of information that can be used to identify, contact, or locate a discrete Individual.

M. "Primary Purpose" means use of PII that is reasonably expected by the Individual (i) at the point of collection; and (ii) including compatible uses in features and services to the Individual that do not materially change expectations of user control and third party sharing. Such use may be at least those uses described in the Participant's terms of service governing the Participant's products or services which give rise to the Individual's interaction with the Participant.

N. "Privacy Statement" shall mean the statements of Participant's information collection and usage practices, as such practices are updated from time to time. Participant's Privacy Statement includes, but is not limited to:
   1. A single, comprehensive statement of all the Participant's information practices ("Comprehensive Privacy

Complaint

EXHIBIT A

Statement");

2. A summary notice highlighting the Participant's information practices ("Short Notice"); or
3. Disclosure of specific information practices posted at the point of information collection ("Just in Time Notice").

O. "Publicly Available Information [PAI]" means any information reasonably believed to be lawfully made available to the general public from:
1. Federal, state or local government records;
2. Widely available source(s) having no additional prohibition around onward transfer or use; or
3. Disclosures to the general public that are required to be made by federal, state or local law.

P. Recipient" means the Individual who receives an Email Message.

Q. "Retargeting" is a form of behavioral advertising by which online advertising is delivered to an Individual based upon the Individual's previous online actions.

R. "Search Engine" is a publicly facing service that collects and organizes content from across the internet for the primary purpose of responding to a search request. Such service may not retain information beyond caching or other service enhancing techniques, or use the information to create a persistent profile of the Individual for purposes other than enhancing search techniques.

S. "Secondary Purpose" is the use of PII in a way that is not reasonably expected by the Individual relative to the transactions or ongoing services provided to the Individual by Participant or the Participant's Service Provider. Such purpose may or may not be described by Participant's terms of service governing Participant's products or services which give rise to the Individual's interaction with the Participant.

T. "Service Provider" is anyone other than the Participant or the Individual that performs, or assists in the performance of, a function or activity which may involve the use or disclosure of PII or Third Party PII. Such use must only be on behalf of Participant or Individual and only for the purpose of performing or assisting in that specific function or activity as agreed to by the Participant and Individual.

U. "Social Network" is an online service that offers the following features:
1. A platform that enables the interaction between two or more Individuals for the purpose of creating social or business relationships, and sharing of information;
2. Functionality that enables Individuals to create a profile that includes information of their own choosing such as photos, and links to personal pages of other connected Individuals (e.g. friends, business contacts);
3. Mechanisms to communicate with other Individuals such as instant messenger, email, or posting to a profile or newsfeed; and
4. Search functionality that enables Individuals to search for other Individuals that is based upon that Individual's preferences.

V. "Third Party(ies)" is an entity(ies) other than the Participant or the Individual which is not directly affiliated with the Participant; and, if affiliated with the Participant, where such affiliation is not reasonably known to the Individual.

W. "Third Party Personally Identifiable Information [Third Party PII]" means PII that is collected by Participant from an entity other than the Individual.

III. Minimum Program Requirements

A. All Participants wanting to be certified that their Online information collection and use practices comply with TRUSTe's Privacy Program Requirements must comply with the following requirements:

B. Participant Accountability
1. Participant shall have processes in place to comply with these Program Requirements.
2. Cooperation with TRUSTe
   a. Provide, at no charge to TRUSTe or its representatives, full access to the Online properties (i.e., including password access to premium or members only areas) for the purpose of conducting reviews to ensure that Participant's Privacy Statement(s) is consistent with actual practices.
   b. Provide, upon TRUSTe's reasonable request, information regarding how PII gathered from and/or tracked through Participant's Online properties is used.

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EXHIBIT A

3. Annual Recertification
   a. Participant shall undergo re-certification to verify ongoing compliance with these Program Requirements annually.

4. Termination for Material Breach
   a. In the event TRUSTe reasonably believes the Participant has materially breached these Program Requirements, TRUSTe may terminate the Participant's participation in this program upon twenty (20) business days' prior written notice ("Notice of Termination") unless the breach is corrected within the same twenty (20) business day period ("Cure Period").
   b. Material breaches of these Program Requirements include but are not limited to:
      1. Participant's continual, intentional, and material failure to adhere to these Program Requirements;
      2. Participant's material failure to permit or cooperate with a TRUSTe investigation or review of Participant's Online properties or practices pursuant to the Program Requirements;
      3. Participant's continual, intentional, and material failure to comply with any Suspension Obligations;
      4. Participant's material failure to cooperate with TRUSTe regarding an audit, complaint or the compliance monitoring activities of TRUSTe; or
      5. Any deceptive trade practices by the Participant

5. Suspension Status
   a. In the event TRUSTe reasonably believes that Participant has materially violated these Program Requirements, Participant may be placed on suspension.
      1. Notice will be provided with a mutually agreed upon description of the violation and any remedial actions that TRUSTe will require Participant to take during the Suspension Period ("Suspension Obligations").
      2. Participant will be considered to be on Suspension immediately upon receiving notice from TRUSTe. Suspension shall last until such time as the Participant has corrected the material breach or Program Requirements violation to TRUSTe's satisfaction, but not for a period of greater than six (6) months ("Suspension Period") unless mutually agreed by the Parties.
      3. Suspension Obligations may include, but are not limited to:
         a. Compliance with additional Program Requirements;
         b. Cooperation with heightened compliance monitoring by TRUSTe; and
         c. Payment to TRUSTe of mutually agreed additional amounts as compensation for TRUSTe's additional compliance monitoring.
         d. Participant shall comply with all Suspension Obligations.
      4. During the Suspension Period, Participant's status may be indicated via a TRUSTe Validation webpage or TRUSTe may require Participant to cease using the TRUSTe trustmarks.
      5. At the end of the Suspension Period, TRUSTe will, in its discretion, either:
         a. Determine that Participant has complied with Participant's Suspension Obligations, thereby satisfying TRUSTe's concerns;
         b. Extend the Suspension Period by mutual agreement with the Participant; or
         c. Determine that Participant has failed to comply with Participant's Suspension Obligations and immediately terminate Participant for cause.

C. Privacy Practices
The following requirements apply if the Participant collects PII:

1. Collection Limitation
   a. Participant shall only collect PII where such collection is:
      1. Limited to information reasonably useful for the purpose for which it was collected and in accordance with the Participant's Privacy Statement in effect at the time of collection; or
      2. With notice to and consent of the Individual

2. Use of PII

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EXHIBIT A

a. Participant shall use PII in the provision of those services advertised or provided for, and in accordance with their posted Privacy Statement in effect at the time of collection, or with notice and consent as described in these Program Requirements.

b. Information collected by the Participant or the Participant's Service Provider may be used to tailor the Individual's experience on the Participant's Online property.

3. Choice
   a. Participant shall offer the Individual control over their collected Personally Identifiable Information as follows:
      1. Participant must provide the Individual an opportunity to withdraw consent to having PII used by the Participant for a Secondary Purpose.
      2. Participant must provide the Individual a Just in Time Notice and the opportunity to withdraw consent to having PII disclosed or distributed to Third Parties, other than Service Providers, at the time PII is collected;
      3. Participant shall honor and maintain the Individual's choice selection in a persistent manner until such time the Individual changes that choice selection; and
      4. Participant shall provide a means by which the Individual may change their choice selection.
   b. Consent is not necessary where the use, disclosure or distribution of PII is required by law, court order, or other valid legal process.
   c. Express Consent must be obtained from the Individual prior to the transfer of PII to Third Parties other than Service Providers if an unauthorized use or disclosure of that information would be likely to cause financial, physical, or reputational harm to an Individual.
   d. Privacy Statement shall state when the Individual can exercise control over the use and sharing of their PII and how to exercise that control
   e. Such mechanism shall be easy to use and offered at no cost to the Individual

4. Collection and Use of Third Party PII
   a. Participant shall use Third Party PII collected solely to facilitate the one-time completion of the transaction that is the Primary Purpose for which the information was collected by the Participant except as allowed in Section III.C.4.d regarding Search Services.
   b. Participant must obtain Express Consent from the Individual to whom such Third Party PII pertains before such Third Party PII may be used, disclosed, or distributed by the Participant for any purpose other than the Primary Purpose for which such information was collected by the Participant, except as allowed in Section III.C.4.d regarding Search Services.
      1. Participant may use Third Party PII to send a one-time email message to the Individual to solicit their Express Consent.
   c. Regarding Third Party PII the Privacy Statement shall state:
      1. The types of the entity(ies) collecting Third Party PII;
      2. What kind of Third Party PII is collected, either through active or passive means;
      3. How collected Third Party PII is used and/or disclosed;
      4. What types of additional Third Parties if any, including Service Providers, collected Third Party PII is shared with.
   d. Search Services

Complaint

EXHIBIT A

1. A Search Engine may provide search results containing Third Party PII, without the notice and choice requirements noted above, providing:
   a. The results were obtained from public or published sources on the Internet;
   b. The information is not used to create a persistent profile of the Individual outside the scope of enhancing Search Engine techniques;
   c. Participant shall have a mechanism for the Individual to request removal from displayed search results if the display of such results will:
      i. Cause physical harm to the Individual; or
      ii. Interfere with the safeguarding of important countervailing public interests, including national security, defense, or public security.
   d. Privacy statement shall state how Individual can request removal from displayed search results.
2. A Participant that compiles information about Individuals, who are neither customers of or registered users of, that Participant's services; and then sells access to that information to Third Parties may provide search results containing Third Party PII without the notice and choice requirements noted above, providing:
   a. Information obtained about the Individual is from public or published sources which have no prohibition around onward transfer or use associated with the information;
   b. The Participant shall provide the Individual a mechanism to stop having their information displayed in search results:
      i. Such mechanism shall be easily accessible to the Individual; and
      ii. Privacy Statement shall state how the Individual can stop having their information displayed in search results.
   c. This does not include situations where Participant disclosed Third Party PII back to an entity that has rights to such information.

5. Access
   a. Participant must implement reasonable and appropriate mechanisms to allow the Individual to correct or update inaccurate PII.
   b. Participant must implement reasonable mechanisms to allow the Individual to request deletion of PII or that collected PII no longer be used.
   c. Such mechanism should be consistent with how the Individual normally interacts or communicates with the Participant
   d. Such mechanism or process shall be clear, conspicuous, and easy to use
   e. Such mechanism or process shall confirm to the Individual inaccuracies have been corrected; and
   f. Participant's privacy statement shall state how access is provided.
   g. Participant is not required to permit Individual access to Personally Identifiable Information to the extent that:
      1. Such access would prejudice the confidentiality necessary to comply with regulatory requirements, or breach Participant's confidential information or the confidential information of others;
      2. The burden or cost of providing access would be disproportionate or the legitimate rights or interests of others would be violated. However, Participant may not deny access on the basis of cost if the Individual offers to pay the costs of access; or
      3. The requested PII is derived from public records or is Publicly Available Information and is not combined with non-public record or non-publicly available information.
   h. If Participant denies access to PII, Participant must provide the Individual with an explanation of why access was denied and contact information for further inquiries regarding the denial of access.

6. Promotional and Newsletter Email Communications
   a. All newsletters and promotional email messages that Participant sends to the Individual must include Participant's postal address and a functional unsubscribe mechanism.
   b. The location and instructions concerning the unsubscribe mechanism must be Clear and

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Conspicuous, and the mechanism itself must be functional for no fewer than thirty (30) days following the sending of the newsletter or promotional email message.

c. Participant must honor the Individual's request to unsubscribe from a newsletter or promotional email message beginning on the tenth (10) business day after the Participant receives the unsubscribe request, unless the Individual subsequently requests to receive newsletters or promotional email messages from Participant.

d. An unsubscribe mechanism is not required for administrative or customer service-related email messages (e.g. account management or provisioning of requested services, warranty or recall information, safety or security announcements).

7. Public Disclosure of PII
   a. A Participant may allow a user to post PII in an online forum, chat room, blog or other public forum, where the PII being displayed was placed there by a user who is also the Individual.
      1. If appropriate and commercially reasonable, provide a process or mechanism to allow the Individual to request timely removal of any publicly displayed PII where it has been legally and rightfully shared; and
      2. State in the Privacy Statement how the Individual can request removal of publicly displayed PII.
   b. The Privacy Statement shall state information posted by Individuals in online forums, chat rooms, blogs, or other public forum may be displayed publicly.
   c. The Privacy Statement shall accurately describe the extent to which an Individual's displayed PII is publicly available.
   d. If Participant provides a publicly accessible online directory or similar service, the Participant shall:
      1. Provide the Individual a reasonable and appropriate mechanism to request removal of their PII from the directory;
      2. Ensure the mechanism is consistent with how the Individual normally interacts or communicates with the Participant
      3. State in the Privacy Statement how the Individual can request removal; and
      4. Such mechanism to request removal of a listing where access to the online directory or similar service is limited to other registered Individuals may be contingent on the Individual no longer using that service.

8. Material Changes
   a. Participant must notify Individuals of any Material Changes to its PII collection, use, or disclosure practices prior to making the change.
   b. Participant must obtain prior approval from TRUSTe
      1. For any Material Change in its PII collection, use, or disclosure practices; and
      2. For method and notice to Individuals, such as email, "in product" messaging, etc.

D. Privacy Statement
   1. Participant shall maintain and abide by an accurate up-to-date Privacy Statement approved by TRUSTe in its sole discretion that states Participant's information practices and is in conformance with these Program Requirements including, but not limited to:
      a. What information is collected, either through active or passive means, type of entity(ies), excluding Service Providers, collecting the information, and how the collected information is used;
      b. What types of Third Parties if any, including Service Providers, collected information is shared with;
      c. Whether PII is appended with information obtained from third party sources;
      d. How and when the Individual can exercise choice as required in these Program Requirements;
      e. How the Individual can request access to their information as required in these Program Requirements;
      f. What types of security measures are in place to protect collected information as required in these Program Requirements;
      g. What tracking technologies are used by the Participant or Third Parties including Service Providers and the purpose for using those technologies;

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h. How the Individual can contact the Participant, including company name, email address or a link to an online form, and physical address;

i. How the Individual will be notified of any Material Changes in the Participant's privacy practices;

j. That collected information is subject to disclosure pursuant to judicial or other government subpoenas, warrants, orders, or if the Participant merges with or is acquired by a Third Party, or goes bankrupt;

k. Effective date of Privacy Statement;

l. If required, statement of participation in the TRUSTe program and define participation scope; and

m. Information on how to contact TRUSTe to express concerns regarding Participant's Privacy Statement or privacy practices.

2. At a minimum, Participant shall link to a Comprehensive Privacy Statement that discloses the Participant's information practices.

3. Access to the Privacy Statement shall be Clear and Conspicuous.

4. As commercially reasonable, Privacy statement must be available when the Individual engages with the Participant, such as through an application, Web site homepage or landing page.

5. Privacy statement must be available at the point where the Individual provides PII, or through a common footer.

6. Participant shall treat all collected information in accordance with the posted Privacy Statement in effect at the time of collection unless the Individual otherwise has given Express Consent.

7. Short Notice
   a. If Participant chooses, they may provide a Short Notice highlighting their information practices including but not limited to:
      1. Summarize what information is collected by the Participant and how the Participant collects that information, either through active or passive means;
      2. Summarize how Participant uses collected information;
      3. Whether Participant shares PII with third parties, excluding Service Providers;
      4. How the Individual can exercise choice and request access pursuant to these Program Requirements; and
      5. How to contact the Participant including company name, email address or link to online form, and postal address.
   b. Access to the Short Notice shall be Clear and Conspicuous.
   c. Short Notice shall link to Comprehensive Privacy Statement.
      1. Access to the Comprehensive Privacy Statement shall be Clear and Conspicuous.
   d. Any Short Notice shall be consistent with Comprehensive Privacy Statement.

8. Just in Time Notice
   a. If Participant chooses to provide Just in Time Notice, the Just in Time Notice shall be consistent with Comprehensive Privacy Statement.

9. Foreign Language Privacy Statement.
   a. If Participant seeks TRUSTe certification of a Privacy Statement in a language other than English, TRUSTe shall use commercially reasonable efforts to verify that Participant's Foreign Language Privacy Statement is an accurate translation of Participant's English language Privacy Statement.
   b. Participant shall ensure that its privacy practices are the same, and that the Foreign Language Privacy Statement provides materially the same description of Participant's privacy practices as Participant's English Language Privacy Statement.
   c. Participant must notify TRUSTe of any Material Changes to its Foreign Language Privacy Statement and submit changes to TRUSTe for review and approval.

E. Data Governance
   1. Participant shall implement controls and processes to manage and protect PII within its control including the ones listed in this Section III.E.
      a. Such controls and processes shall be
         1. Appropriate to the size of the Participant's business; and

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2. Appropriate to the level of sensitivity of the data collected and stored

2. Data Security
   a. Participant must implement commercially reasonable procedures to protect PII within its control from unauthorized access, use, alteration, disclosure, or distribution.
   b. Participant shall maintain and audit internal information technology systems within Participant's control such as:
      1. Regularly monitor and repair systems including servers and desktops for known vulnerabilities;
      2. Limit access and use of PII, or Third Party PII, to personnel with a legitimate business need where inappropriate access, use, or disclosure of such PII, or Third Party PII, could cause financial, physical, or reputational harm to the individual;
      3. Implement protection against phishing, spam, viruses, data loss, and malware; and
      4. Use reasonable encryption methods for transmission of information across wireless networks, and storage of information if the inappropriate use or disclosure of that information could cause financial, physical, or reputational harm to an individual.
   c. Participant shall utilize encryption such as Secure Socket Layer for the transmission of information if the inappropriate use or disclosure of that information could cause financial, physical, or reputational harm to an individual.
   d. Access to PII or Third Party PII retained by Participant must be at least restricted by username and password if the inappropriate use or disclosure of that information could cause financial, physical, or reputational harm to an individual.
   e. Privacy Statement shall state that security measures are in place to protect collected PII and/or Third Party PII.
3. Data Quality
   a. Participant shall take commercially reasonable steps when collecting, creating, maintaining, using, disclosing or distributing PII to assure that the information is sufficiently accurate, complete, relevant, and timely for the purposes for which such information is to be used.
   b. If any information collected by the Participant about an individual is disputed by that Individual and is found to be inaccurate, incomplete, or cannot be verified, Participant shall promptly delete or modify that item of information, as appropriate, based on the results of the investigation.
4. Data Retention
   a. If a Participant receives and retains PII or Third Party PII, the Participant must limit its retention to no longer than commercially useful to carry out its business purpose, or legally required; and must disclose in their Privacy Statement how long they will retain that information.
   b. Regardless of the time period of retention, so long as a Participant has PII or Third Party PII in its possession or control, the requirements included herein shall apply to such information.
5. Service Providers
   a. Participant must take commercially reasonable steps to ensure that it's Service Providers with whom it shares PII either:
      1. Abide by Participant's privacy policies as reflected in Participant's Privacy Statement; or
      2. Abide by privacy policies that are substantially equivalent to Participant's privacy policies as reflected in Participant's Privacy Statement; and
      3. Abide by the rights and obligations attached to the PII by the Participant regarding the security, confidentiality, integrity, use, and disclosure of the PII.
6. User Complaints and Feedback
   a. Participant shall provide users with reasonable, appropriate, simple and effective means to submit complaints, express concerns, or provide feedback regarding Participant's privacy practices.
   b. Participant shall also cooperate with TRUSTe's efforts to investigate and resolve non-frivolous privacy complaints, questions and concerns raised either by:
      1. Users through TRUSTe's dispute resolution process; or
      2. TRUSTe.
7. Data Breach

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a. Participant must notify an Individual of a data breach within 45-days of a known breach as required by law or if the unauthorized disclosure of PII can cause financial, physical, or reputational harm to the Individual unless otherwise required by law.

b. Unless otherwise required by law, notice to the Individual must disclose the following:
   1. That a breach occurred;
   2. What type of information was breached;
   3. When the breach happened;
   4. What steps Individuals can take to protect themselves;
   5. What the actions the Participant is taking regarding the breach (e.g. investigation); and
   6. What steps the Participant is taking to ensure the event does not happen again.

c. Participant must notify TRUSTe when it believes a data breach occurred. Participant must provide TRUSTe a copy of the notice to be sent or sent to affected Individual(s).

F. Behavioral Targeting
1. Participants engaging in Behavioral Targeting or Retargeting shall disclose the following regarding Participant's Behavioral Targeting and/or Retargeting Practices in its Privacy Statement:
   a. If information, collected either through active or passive means, is used by either the Participant or Third Party(ies) for the purpose of Behavioral Targeting or Retargeting;
   b. If PII collected by the Participant is linked to information collected through Web usage activity from sources, e.g. Web sites other than Participant's, for the purpose of Behavioral Targeting or Retargeting;
   c. Whether PII or Third Party PII is collected by, or shared with, additional Third Parties for the purposes of Behavioral Targeting or Retargeting; and
   d. How and when the Individual can exercise choice as required in this Section III.F.
2. Participant shall provide instructions or link to a mechanism that enables the Individual to withdraw consent for the use of their information for the purposes of behavioral advertising.
   a. At a minimum, such instructions or link shall be made available in the Participant's Privacy Statement.
3. Participant engaging in Behavioral Targeting or Retargeting shall offer choice to the Individual as follows:
   a. An Individual must be provided an opportunity to withdraw consent to having PII linked to information collected through web usage activity for the purpose of Behavioral Targeting or Retargeting;
   b. An Individual must be provided an opportunity to withdraw consent to having PII shared with Third Parties, other than Service Providers, for the purpose of Behavioral Targeting or Retargeting at the time such PII is collected; and
   c. Express Consent must be obtained prior to sharing PII with Third Parties, other than Service Providers, for the purposes of Behavioral Targeting or Retargeting, if the unauthorized use or disclosure of that information could cause financial, or physical harm to an Individual.

G. Social Networks
1. Participants that enable users to network with other users of a community need to comply with the following:
   a. Express Consent with confirmation is required for an Individual to establish a profile.
   b. Provide a reasonable and appropriate mechanism to allow the Individual to manage their privacy settings.
      1. Mechanism should be consistent with how the Individual normally interacts or communicates with the Participant
      2. Mechanism shall be clear, conspicuous, and easy to use
      3. Mechanism shall confirm to Individual that privacy settings have been set; and
      4. Privacy Statement shall state how the Individual can update their privacy settings.
   c. Provide a reasonable and appropriate mechanism to allow the Individual request deletion or deactivation of a profile.
      1. Mechanism should be consistent with how the Individual normally interacts or

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communicates with the Participant

2. Mechanism shall be clear, conspicuous, and easy to use
3. Mechanism shall confirm to Individual profile has been deleted or deactivated, and
4. Privacy Statement shall state how the Individual can request deletion or deactivation of their profile

d. Provide a reasonable and appropriate mechanism to allow the Individual to request removal of an unauthorized profile.
   1. Mechanism should be consistent with how the Individual normally interacts or communicates with the Participant
   2. Mechanism shall be clear, conspicuous, and easy to use
   3. Mechanism shall confirm to Individual the unauthorized profile has been removed; and
   4. Privacy Statement shall state how the Individual can request removal of an unauthorized profile.

e. Individuals between the ages 13-17 must provide Express Consent to the collection, use, disclosure of either:
   1. PII pertaining to that Individual; or
   2. Third Party PII pertaining to an Individual between the ages of 13-17.

f. If Participant enables users to import Third Party PII from another source to their profile, the Participant must do the following:
   1. Treat all collected information as if it is Third Party PII as outlined in Section III.C.4.
      a. Collected information cannot be used to create a publishable profile unless the Participant obtains the Express Consent of the Individual.
   2. Provide Clear and Conspicuous notice to the user as to why they are providing a password or other access to their email account; and

IV. US-EU and US-Swiss Safe Harbor Requirements

A. Participants want to self-certify with the Department of Commerce (DOC) for compliance with the U.S.-E.U. Safe Harbor or Swiss Safe Harbor Frameworks and list TRUSTe as its third party dispute resolution mechanism must comply with the Minimum Program Requirements and the following:
   1. Participant must provide an Individual with access to PII within thirty (30) calendar days of request.
      a. If Participant does not provide an Individual the requested access within thirty (30) calendar days of the Individual's request, Participant must provide the Individual with a timeline establishing when the requested access will be provided.
      b. Privacy Statement shall disclose the timeline establishing when the Individual can expect a response to their request for access.
   2. Privacy Statement shall include the following statement: "[Participant] complies with the [E.U.][Swiss] Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use and retention of personal information from [the European Union][Switzerland]."
      a. The statement must include the following link to the Department of Commerce's Web site: http://export.gov/safeharbor

V. Additional Email Requirements

A. Participants wanting to be certified for practices around the sending of commercial and promotional email must comply with the Minimum Program Requirements and the following:
   1. Participants must ensure that the following disclosures are accessible from the point of email address collection except where email address is used only to authenticate an Individual for purposes of accessing that Individual's account information:
      a. The nature of commercial or promotional email messages to be sent and the types of entities that will be providing content;
      b. Whether Participant sells, rents or otherwise shares Recipients' email address with Third Parties other than Service Providers; and
      c. If receiving commercial or promotional email messages is a requirement to receive a service, a disclosure of such requirement.

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2. Prior to sending commercial or promotional email messages the Recipient must be provided the opportunity to withdraw consent to having his/her email address added to a mailing list. Commercial or promotional email messages sent under this form of consent must include Clear and Conspicuous identification that the message is an advertisement or solicitation.
3. If Participant has not collected the Recipient's email address directly, the Participant must perform due diligence to ensure that Clear and Conspicuous notice was provided regarding the use and disclosure of the Recipient's email address, and that the Individual had the opportunity to withdraw consent.

B. Participant Accountability. Participant shall ensure that the mail infrastructure used to send email messages is well maintained and operated in a responsible manner:
1. Email address list maintenance systems must be employed to reliably receive and process bounces and other replies from receiving networks.
2. The Participant's IP address(es) for outgoing email must have valid reverse DNS entries. The IP address of the host name of the reverse DNS entry must match the IP address of the sending mail server.
3. Participant must create and maintain the standard role email accounts abuse@sender domain and postmaster@sender domain for all of its domains that send email in order to facilitate handling complaints and other issues.
4. Participant must comply with relevant internet standards such as the Network Working Group Request for Comment ("RFC") Nos. 2821 and 2822, which describe how Email Messages must be formatted in order to be processed properly by receiving networks.

C. Transparency. Participant shall ensure that email messages are truthful and accurately identify the source of the message.
1. The domain name or message headers must not be falsified or obscured in any way.
2. The subject line and content of every email message must not be false or misleading.

VI. Mobile Services

A. Participants wanting to be certified for collecting PII through an application on a Mobile Device or through a Web site optimized for a Mobile Device must comply with the Minimum Program Requirements and the following:

B. Mobile Short Notice
1. Participants will provide enhanced notice outside of the Privacy Statement by linking from a TRUSTe icon or text link to a TRUSTe-hosted Short Notice.
2. The following disclosures will appear within the TRUSTe-hosted Short Notice:
   a. Whether geo-location data is collected and how geo-location data is used;
   b. What types of information is collected and how it is used;
   c. Whether Participant shares PII with Third Parties, including Service Providers;
   d. How the Individual can exercise choice and request access pursuant to these Program Requirements;
   e. What tracking technologies are used by the Participant or Third Parties including Service Providers and the purpose for using those technologies;
   f. What security measures are in place to protect collected information as required in these Program Requirements; and
   g. How the Individual can contact the Participant, including company name, email address or a link to an online form, and physical address.

C. Geo-location Data
1. Participant must obtain Express Consent from the Individual the first time Geo-location Data is used by the Participant to provide services.
2. Participant may provide additional notifications through a Just in Time Notice or a persistent icon, to remind Individuals that their Geo-location Data is being used by the Participant to provide a service.
3. Participant must obtain Express Consent from the Individual prior to the sharing of Geo-location Data with Third Parties other than Service Providers.
4. Participant must obtain Express Consent from the Individual prior to any use of Geo-location Data for Secondary Purposes.

D. Privacy Statement shall state:

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1. What information is collected from an Individual's Mobile Device;
2. Whether information is shared with another application installed on the Individual's Mobile Device;
3. How Geo-location Data is used;
4. If Geo-location Data is used to create a profile about the Individual;
5. How long Geo-location Data is retained;
6. What type of Third Parties, including Service Providers is Geo-location Data is shared with and for what purpose;
7. How the Individual can restrict the disclosure of Geo-location data to Third Parties; and
8. How the Individual can revoke consent to the Participant's collection and use of Geo-Location Data.
   a. Such mechanism shall be easy to use.

DECISION AND ORDER

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

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

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

1. Respondent True Ultimate Standards Everywhere, Inc., also doing business as TRUSTe, Inc., is a privately-owned, Delaware corporation with its principal office or place of business at 835 Market Street, Suite 800, San Francisco, California 94103.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. "Seal" shall mean any trustmark, logo, seal of approval, emblem, shield, or other insignia Respondent has offered or provided for placement on a company's website, including, but not limited to TRUSTed Websites, COPPA/Children's Privacy, EU Safe Harbor, TRUSTed Cloud, TRUSTed Apps, and TRUSTed Data.

2. Unless otherwise specified, "Respondent" shall mean True Ultimate Standards Everywhere, Inc., and its successors and assigns.

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

4. "COPPA" shall mean the Federal Trade Commission's Children's Online Privacy Protection Rule, 16 C.F.R. Part 312.

5. "COPPA safe harbor program" shall mean any self-regulatory program [guidelines] established pursuant to 16 C.F.R. § 312.11 of the Federal Trade Commission's Children's Online Privacy Protection Rule and operated by Respondent.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, including franchisees, or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of seals or certifications, or any other substantially similar product, in or

affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The steps it takes to evaluate, certify, review, or recertify a company's privacy practices;

B. The frequency with which Respondent conducts any such evaluation, certification, review, or recertification of a company's privacy practices;

C. The corporate status of Respondent and its independence; and

D. The extent to which the person or entity is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy program sponsored by Respondent.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, including franchisees, or licensees, shall not provide to any person or entity the means and instrumentalities with which to make directly or by implication any misrepresentation prohibited by Part I of this order. For purposes of this Part, "means and instrumentalities" shall mean any information, including but not necessarily limited to, any required or model language, for use in any privacy policy or statement for display on a website or mobile application covered by any seal or certification provided by Respondent, or any other product or service covered under this order, in or affecting commerce.

III.

IT IS FURTHER ORDERED that Respondent for ten (10) years after the date of service of this order, as part of its annual report required to be submitted pursuant to 16 C.F.R. §312.11(d)(1) of the COPPA Rule, shall, in a sworn statement provide:

A. The total number of new seals awarded to participants in any COPPA safe harbor program in the preceding reporting period;

B. A detailed explanation of the mechanisms used by Respondent to assess the fitness of new applicants to any COPPA safe harbor program for membership in the program;

C. A detailed explanation of the mechanisms used by Respondent to assess the continuing fitness of an existing participant in any COPPA safe harbor program for membership in the program; and

D. Any additional steps Respondent undertook to comply with the requirements of 16 C.F.R. § 312.

Unless otherwise directed by a representative of the Commission, all statements required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of TRUSTe, Inc.*, FTC File No. 1323219. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of ten (10) years from the date of preparation:

A. A detailed explanation of assessments Respondent conducted during the preceding reporting period to determine the fitness of new applicants to any COPPA safe harbor program for membership in the program;

B. A detailed explanation, including the frequency, of assessments Respondent conducted during the

preceding reporting period to determine the continuing fitness of an existing participant in any COPPA safe harbor program for membership in the program;

C. Any documents related to consumer complaints, received in the preceding reporting period, alleging violations of any COPPA safe harbor program by Respondent or by participants in any COPPA safe harbor program;

D. Any documents related to records of disciplinary actions taken in the preceding reporting period against participants in any COPPA safe harbor program; and

E. Any documents related to approvals of COPPA safe harbor program participants' use of verifiable parental consent mechanism under 16 C.F.R. § 312.11(d)(1).

V.

IT IS FURTHER ORDERED that within five (5) days of the date of service of this order, Respondent shall pay $200,000 to the United States Treasury as disgorgement, as follows:

A. The payment shall be made by wire transfer to the Treasurer of the United States, in accordance with instructions provided by the Federal Trade Commission.

B. In the event of any default in payment, interest shall accrue, computed pursuant to 28 U.S.C. § 1961, from the date of default to the date of payment.

C. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.

VI.

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

A. all advertisements and promotional materials containing any representations covered by this order, with all materials used or relied upon in making or disseminating the representation;

B. consumer complaints (whether received directly, indirectly, or through any third party) that relate to Respondent's activities as alleged in the draft Complaint and Respondent's compliance with the provisions of this order; and any responses to such complaints;

C. copies of all subpoenas and other communications with law enforcement entities or personnel, if such documents bear in any respect on Respondent's activities as alleged in the Complaint and Respondent's compliance with the provisions of this order; and

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

VII.

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

days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part VIII, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this Part.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which Respondent learns fewer than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of True Ultimate Standards Everywhere, Inc.*, FTC File No. 1323219. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

IX.

IT IS FURTHER ORDERED that Respondent, within one hundred twenty (120) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of

written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

X.

This order will terminate on March 12, 2035, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing an order from True Ultimate Standards Everywhere, Inc. ("TRUSTe").

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 respondent's marketing and distribution of a variety of online privacy seals ("seals") for companies to display on their websites. The FTC complaint alleges that respondent violated Section 5(a) of the FTC Act by falsely representing to consumers the frequency with which it reviews and verifies the practices of companies displaying its website and mobile seals. Specifically, the complaint alleges that from June 1997 until January 2013, respondent failed to conduct annual recertifications for almost 1,000 companies holding respondent's TRUSTed Websites, COPPA/Children's Privacy, EU Safe Harbor, TRUSTed Cloud, TRUSTed Apps, TRUSTed Data, and TRUSTed Smart Grid seals. In addition, the complaint alleges that respondent provided to its sealholders the means and instrumentalities to misrepresent that respondent is a non-profit corporation. The FTC complaint describes, with specificity, that following respondent's transition to a for-profit corporation in July 2008, respondent recertified numerous clients whose privacy policies continued to describe TRUSTe as a non-profit entity.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from misrepresenting (1) the steps respondent takes to evaluate, certify, review, or recertify a company's privacy practices; (2) the frequency with which respondent evaluates, certifies, reviews, or recertifies a company's privacy practices; (3) the corporate status of respondent and its independence; and (4) the extent to which

any person or entity is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy program sponsored by respondent. Part II of the proposed order prohibits respondent from providing to any person or entity the means and instrumentalities (including any required or model language for use in any privacy policy or statement) to misrepresent any of the same items in Part I of the proposed order.

Parts III and IV of the proposed order contain additional reporting requirements with respect to respondent's COPPA/Children's Privacy seal. First, the proposed order expands respondent's COPPA recordkeeping and reporting requirements to ten years. Second, the proposed order requires respondent to report (1) the number of new seals it awards; (2) how it assesses the fitness of members; and (3) any additional steps it takes to monitor compliance with the safe harbor requirements. Third, the proposed order expands respondent's COPPA requirement to retain consumer complaints and descriptions of disciplinary actions to include consumer complaints related to respondent and its safe harbor program participants as well as all documents related to disciplinary actions taken by respondent. Fourth, the proposed order imposes additional COPPA recordkeeping requirements, such as a requirement that respondent retain detailed explanations of assessments of new and existing applicants in any COPPA safe harbor program.

Part V of the proposed order requires respondent to pay $200,000 to the United States Treasury as disgorgement.

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 order's terms.

Concurring Statement

STATEMENT OF CHAIRWOMAN RAMIREZ, COMMISSIONER BRILL, AND COMMISSIONER MCSWEENEY

We write to express our strong support for the complaint and consent order in this case.

The Commission unanimously supports Count I of the complaint in this matter, which is of paramount importance, in light of TRUSTe's unique role in increasing consumer trust in the global marketplace and ensuring the effectiveness of relevant self-regulatory frameworks. TRUSTe operates privacy-related self-regulatory and oversight programs for businesses and offers certified privacy seals for program participants, including (1) COPPA/Children's Privacy, which certifies compliance with the Children's Online Privacy Protection Act and implementing regulations; (2) EU Safe Harbor, which certifies compliance with the U.S.-EU Safe Harbor Framework; (3) TRUSTed Apps, which certifies the privacy practices of mobile applications; and (4) APEC Privacy, which certifies compliance with the Asia-Pacific Economic Cooperation Cross-Border Privacy Rules System.[1]

In Count I, the Commission alleges that TRUSTe promised consumers it would annually recertify its self-regulatory program participants for compliance with TRUSTe's privacy program requirements, but that, in many instances, it failed to do so. Annual recertification is a cornerstone of the service TRUSTe provides. It helps ensure that companies (1) continue to follow TRUSTe's program requirements, (2) do not make material changes to their practices or policies without appropriate consent, and (3) periodically consider the impact of technology and marketplace developments in their privacy practices. TRUSTe did not fulfill its obligations; today's order helps to ensure that TRUSTe will do so in the future. Consumers who see the TRUSTe seal on a website or mobile app should be confident that a trusted third party has kept its promise to review and vouch for the privacy practices of that website or mobile app. We also

[1] TRUSTe's APEC Privacy certification program was not the subject of the allegations in the complaint. TRUSTe became an "Accountability Agent" for the APEC Cross-Border Privacy Rules System in June 2013, and issued its first certification under that program in August 2013.

believe that Count II represents an appropriate use of "means and instrumentalities" liability. At the time TRUSTe provided model language for its clients' privacy policies stating that TRUSTe was a nonprofit entity, there is no question that the statement was true. However, after TRUSTe informed clients of its for-profit status in 2008, many clients neglected to update their policies and continued to represent that TRUSTe was a nonprofit entity. These ongoing representations by TRUSTe's clients clearly became deceptive once TRUSTe converted to a for-profit entity. Yet for five years, TRUSTe continued to recertify some companies that included this deceptive statement, that TRUSTe itself had disseminated, in their privacy policies. TRUSTe was well-positioned to rectify the misrepresentation about its own corporate status – it could have elected simply not to recertify the companies in question until the misrepresentation was cured. It failed to take this straightforward step and instead continued to bless the language at issue by giving the companies its seal of approval.

In *Shell Oil Company* and *FTC v. Magui Publishers, Inc.*, which Commissioner Ohlhausen cites in her statement, the Commission concluded that by providing customers with engage in deceptive acts or practices.[1] In this case, although TRUSTe disclosed to clients its change in status, it continued to recertify privacy policies using language TRUSTe had itself supplied about its corporate status that was no longer true. TRUSTe's recertification of these inaccurate privacy policies is the conduct we take aim at – it provided a stamp of approval of a false representation which TRUSTe's clients then passed along to consumers via their websites. As such, TRUSTe provided its clients with the means and instrumentalities to deceive others. The application of means and instrumentalities liability in this case is consistent with the principle underlying *Shell* and *Magui Publishers*, namely, that one who places the means of deception in the hands of another is also liable for the deception under Section 5.[2] The inclusion of this count is particularly appropriate

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[1] *In the Matter of Shell Oil Co.*, 128 F.T.C. 749 (1999); *FTC v. Magui Publishers, Inc.*, No. 89-3818RSWL(GX), 1991 WL 90895 (C.D. Cal. Mar. 28, 1991), *aff'd* 9 F.3d 1551 (9th Cir. 1993).

[2] Commissioner Ohlhausen suggests that the allegations underlying Count II would be more appropriately viewed through the lens of secondary "aiding

here, given TRUSTe's unique position in the privacy self-regulatory ecosystem. Companies that purport to hold their clients accountable to protect consumer privacy should themselves be held to an equally high standard.

PARTIAL DISSENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I support Count I of the complaint in this matter because of TRUSTe's unique position of consumer trust as a third party certifier. However, I do not support the use of "means and instrumentalities" liability in Count II of the complaint and dissent as to that Count.

TRUSTe was initially organized in 1997 as a non-profit. Before July 2008, TRUSTe required every certified client website to include in its privacy policy a description of TRUSTe stating in part, "TRUSTe is [a] non-profit organization." On July 3, 2008, TRUSTe changed its corporate form from non-profit to for-profit. The company announced the change to its clients and requested that all clients update the relevant privacy policy language on their websites. Some clients did not update their websites. When TRUSTe recertified such websites, TRUSTe would typically request, but not require, that the client update their privacy policy to reflect the change to for-profit status.

Count II of our complaint alleges that by recertifying websites containing privacy policies that inaccurately describe TRUSTe as a non-profit, TRUSTe provided the means and instrumentalities to its clients to misrepresent that TRUSTe was a non-profit corporation. Specifically, the majority's statement argues that "TRUSTe's recertification of these inaccurate privacy policies …

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and abetting" liability. Regardless of whether one could construct alternative theories of liability, our concern is with TRUSTe's own actions. As discussed above, the deception here was the result of TRUSTe's own actions.

provided its clients with the means and instrumentalities to deceive others."[3]

I disagree with this use of means and instrumentalities. To be liable of deception under means and instrumentalities requires that the party *itself* must make a misrepresentation, as the Commission detailed in *Shell Oil Company*.[4] According to the majority in that case, "[T]he means and instrumentalities doctrine is intended to apply in cases … where the originator of the unlawful material is not in privity with consumers" and "it is well settled law that the originator is liable if it passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result."[5] For example, in *FTC v. Magui Publishers, Inc.*, the court found the defendant directly liable for providing the means and instrumentalities to violate Section 5 when it sold Salvador Dali prints with forged signatures to retail customers, who then sold the prints to consumers.[6]

Unlike *Shell* and *Magui Publishers*, the statement that TRUSTe provided to its clients was indisputably truthful at the time. During the period in which TRUSTe required client privacy policies to state that TRUSTe was a non-profit, TRUSTe was, in

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[3] *In the Matter of True Ultimate Standards Everywhere, Inc.* ("TRUSTe"), FTC File No. 1323219, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny, at 2 (Nov. 17, 2014).

[4] *In the Matter of Shell Oil Co.*, 128 F.T.C. 749 (1999).

[5] *Id.* at *10 (Public Statement of Chairman Pitofsky, Commissioner Anthony and Commissioner Thompson) (emphasis added). Similarly, Commissioner Orson Swindle's dissent stated that under FTC precedent, "means and instrumentalities is a form of primary liability in which the respondent was using another party as the conduit for disseminating **the respondent's misrepresentations** to consumers." *Id.* at *14-15 (Dissenting Statement of Commissioner Orson Swindle) (emphasis added). Swindle's dissent likewise emphasized that a defendant "may not be held primarily liable unless it has actually made a misrepresentation." *Id.* (quoting *In re JWP Inc. Securities Lit.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996)). *See also FTC v. Magui Publishers, Inc.,* Civ. No. 89–3818RSWL(GX), 1991 WL 90895, at *14, (C.D. Cal. 1991), *aff'd,* 9 F.3d 1551 (9th Cir. 1993) ("One who places in the hands of another a means or instrumentality to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.").

[6] *Magui Publishers, Inc.,* 1991 WL 90895, at *17.

fact, a non-profit. Once TRUSTe changed to for-profit status, it no longer required clients to state its non-profit status and actively encouraged clients to correct their privacy policies. TRUSTe did not pass to clients any false or misleading representations regarding its for-profit status. Nor was TRUSTe's recertification of websites a misrepresentation of TRUSTe's non-profit status to its clients; during recertification TRUSTe again clearly communicated its for-profit status to clients by requesting that its clients update their privacy policies. Because TRUSTe accurately represented its non-profit status to its clients, TRUSTe cannot be primarily liable for deceiving consumers under a means and instrumentalities theory.

TRUSTe's alleged recertifications of untrue statements are more properly analyzed as secondary liability for aiding and abetting.[7] In *Magui Publishers* the court found that the defendant forgers were not only directly liable for their own misstatements, but also secondarily liable for the retailers' fraudulent misrepresentations to consumers because defendants "supplied their deceptive art work, certificates and promotional materials to their retail customers with full knowledge these customers would use the materials to deceive consumers."[8] The court explained that aiding and abetting has three components: "(1) the existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering it; and (3) substantial assistance in the commission of the wrong."[9]

It is not clear that TRUSTe's clients committed an independent primary wrong. However, TRUSTe certainly had

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[7] "[A] respondent who has provided assistance to another party that has made misrepresentations is at most secondarily liable -- in particular, for aiding and abetting another's misrepresentations." *Shell Oil Co.*, 128 F.T.C. 749, *15 (1999) (Swindle Dissent) (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 870 (1999); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("the critical element separating primary from aiding and abetting violations is the existence of a representation, made by the defendant.")).

[8] *Magui Publishers, Inc.*, 1991 WL 90895, at *15.

[9] *Id.* at *14.

knowledge of the misstatements in the privacy policies and of TRUSTe's role in facilitating those misstatements. And, arguably, its certifications may have provided substantial assistance in deceiving consumers. Regardless, because TRUSTe never misrepresented its corporate status, TRUSTe's actions regarding its corporate status at most comprise aiding and abetting its clients' actions.

Perhaps all this seems like legal hairsplitting, but it is not. Under the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*,[10] the FTC "may well be precluded from bringing Section 5 cases under an aiding and abetting theory."[11] By prosecuting activities more properly analyzed as aiding and abetting under the guise of means and instrumentalities liability, I am concerned that we are stepping beyond the limits the Supreme Court has established. I therefore dissent from Count II.

[10] *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994).

[11] *Shell Oil Co.*, 128 F.T.C. 749, *19 (Swindle Dissent).

Complaint

IN THE MATTER OF

MPHJ TECHNOLOGY INVESTMENTS, LLC, JAY MAC RUST, AND FARNEY DANIELS, P.C.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4513; File No.142 3003
Complaint, March 13, 2015 – Decision, March 13, 2015

This consent order concerns deceptive sales claims and phony legal threats mailed to thousands of small businesses across the United States in an attempt to sell licenses for certain U.S. patents. MPHJ Technology Investments, LLC and the subsidiaries that it controls (collectively "MPHJ") are patent assertion entities. Patent assertion entities purchase patent rights and seek to generate revenue by licensing to, or litigating against, those who are or may be using the patented technology. The complaint alleges that MPHJ bought patents relating to network computer scanning technology and then told thousands of small businesses that they were likely violating the patents and should purchase a license. MPHJ further sent letters that falsely represented that many other companies had already agreed to pay thousands of dollars for licenses. The complaint alleges that additional letters were sent in the name of MPHJ's law firm, Farney Daniels, P.C., falsely threatened the recipients with patent infringement lawsuits. The complaint alleges that these representations constitute deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. Under the consent order, MPHJ, Farney Daniels, P.C., and MPHJ's owner, Jay Mac Rust, are prohibited, when asserting patent rights, from making false or unsubstantiated representations that a patent has been licensed in substantial numbers or has been licensed at particular prices. The order also prohibits misrepresentations that a lawsuit will be initiated and misrepresentations about the imminence of such a lawsuit.

Participants

For the *Commission: Daniel O. Hanks* and *Michael Tankersley.*

For the *Respondents: Bryan Farney* and *Robert P. Taylor*, *Arnold & Porter*; and *Allen Denson* and *Joel Winston, Hudson Cook, LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that MPHJ Technology Investments, LLC, a

limited liability company; Jay Mac Rust, individually and as an officer of MPHJ Technology Investments, LLC; and Farney Daniels, P.C., a professional corporation (collectively, "Respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges as follows:

1. Respondent MPHJ Technology Investments, LLC, ("MPHJ") is a Delaware limited liability company with a registered agent at 1013 Centre Road, Suite 403S, Wilmington, Delaware, 19805. MPHJ has 101 subsidiaries, each of which is a Delaware limited liability company, and each of which has a registered agent at 1013 Centre Road, Suite 403S, Wilmington, Delaware, 19805.

2. Respondent Jay Mac Rust is the sole member and manager of MPHJ and the sole manager of each of MPHJ's 101 subsidiaries. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of MPHJ, including the acts and practices set forth in this Complaint. His principal place of business is 510 North Valley Mills Drive, Suite 505, Waco, Texas, 76710.

3. Respondent Farney Daniels, P.C., ("Farney Daniels") is a Texas professional corporation with its principal office or place of business at 800 South Austin Avenue, Suite 200, Georgetown, Texas, 78626.

4. The acts and practices of the Respondents as 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.

RESPONDENTS' BUSINESS ACTIVITIES

5. MPHJ and the subsidiaries that it controls are Patent Assertion Entities. Patent Assertion Entities purchase patent rights and seek to generate revenue by licensing to or litigating against those who are or may be using patented technology.

6. In September 2012, MPHJ purchased from another Patent Assertion Entity, Project Paperless, LLC, all right, title, and

interest to four U.S. patents and one pending U.S. patent application on the work of inventor Laurence C. Klein (the "Klein Patents"). The four patents, U.S. Patent Nos. 7,986,426; 6,771,381; 7,477,410; and 6,185,590; and Application No. 13/182,857 (issued as Patent No. 8,488,173 in 2013) generally pertain to networked scanning systems. More particularly, Respondents assert that the Klein Patents, individually or in combination, cover certain computer management systems capable of transmitting electronic images, graphics, and/or documents through a communications network from a network addressable scanner, digital copier, or other multifunction peripheral to external devices, files, and applications.

7. Beginning in September 2012 and continuing through June 2013, the Respondents conducted a campaign to promote and sell licenses for the Klein Patents through letters sent to thousands of small businesses located in all fifty states and the District of Columbia.

8. In September 2012, MPHJ entered into written "Exclusive License Agreements" with various of its subsidiaries. Each written license agreement assigned to a respective subsidiary a purportedly exclusive right to license the Klein Patents to entities within a specified "Commercial Field" and "Geographical Field."

9. Each of the various written "Exclusive License Agreements" between MPHJ and its subsidiaries, and each amendment to such agreements, was signed by Respondent Rust both on behalf of MPHJ and on behalf of each subsidiary.

10. In September 2012, MPHJ also entered into a written agreement with Farney Daniels. The terms of the agreement provided that Farney Daniels "will represent MPHJ in connection with legal services related to enforcement, monetization, assertion, licensing, and/or sale" of the Klein Patents. Under the agreement, Farney Daniels would not charge MPHJ hourly fees, and MPHJ gave the firm a 30–40% interest in all payments to MPHJ or its subsidiaries from any licensees, alleged infringers, or purchasers of the Klein Patents that had been contacted or identified by Farney Daniels. Specifically, the agreement entitles Farney Daniels to 40% of the gross amount paid by entities that Farney Daniels had sued or with which Farney Daniels was

"substantially engaged," and 30% of the gross amounts paid by all other entities.

11. The September 2012 written agreement between MPHJ and Farney Daniels was signed by Respondent Rust on behalf of MPHJ.

RESPONDENTS' THREE-STAGE CAMPAIGN TO PROMOTE AND SELL LICENSES

12. In September 2012, the Respondents began their nationwide campaign to promote and sell licenses for the Klein Patents to small businesses. The Respondents' campaign involved three stages of letters.

13. Respondents selected the recipients of their letters based on two pieces of information obtained from business directory databases: (a) an estimate of the number of the business's employees, and (b) the business's standard industrial classification ("SIC"). Specifically, Respondents sent their letters to businesses identified as having (a) between 20 and 99 employees; and (b) a primary line of business in one of 54 SIC codes selected by Respondents, including those for Veterinary Services, Lawn and Garden Services, Building Maintenance Services, and Medical Laboratories.

14. In the first stage of the campaign, Respondents sent a letter in the name of one of MPHJ's various subsidiaries on letterhead featuring the name of that subsidiary ("First Letter"). In each First Letter, Respondents stated that the entity identified as the sender is the licensing agent for the Klein Patents. Eighty-one different subsidiary names were used over the length of Respondents' campaign: AllLed, LLC; AbsMea, LLC; AccNum, LLC; AllOrd, LLC; AdzPro, LLC; ArdSan, LLC; ArdTec, LLC; AppVal, LLC; BavLin, LLC; BarMas, LLC; BetNam, LLC; BilOlt, LLC; BriPol, LLC; BruSed, LLC; BosTra, LLC; BunVic, LLC; CalLad, LLC; CapMat, LLC; CalNeb, LLC; CleOrv, LLC; ChaPac, LLC; CelSta, LLC; ComTim, LLC; CraVar, LLC; DelLog, LLC; DayMas, LLC; DesNot, LLC; DreOcc, LLC; DucPla, LLC; DriSud, LLC; DraTom, LLC; DolVol, LLC; EliLand, LLC; ElaMon, LLC; EntNil, LLC; EleOde, LLC; EliPut, LLC; EstSto, LLC; EtaTri, LLC; EquiVas, LLC; FasLan, LLC;

FraMor, LLC; FolNer, LLC; FenObe, LLC; FanPar, LLC; FreSta, LLC; FinTas, LLC; FloVis, LLC; GreLea, LLC; GraMet, LLC; GosNel, LLC; GanOrb, LLC; GanPan, LLC; GamSta, LLC; GenTro, LLC; GimVea, LLC; HunLos, LLC; HanMea, LLC; HarNol, LLC; HadOpp, LLC; HeaPle, LLC; HorSan, LLC; HurTom, LLC; HasVen, LLC; InnLost, LLC; IsaMai, LLC; InaNur, LLC; IndOrp, LLC; IntPar, LLC; InkSen, LLC; IntTen, LLC; IbiVen, LLC; JusLem, LLC; JonMor, LLC; JitNom, LLC; JanOrt, LLC; JudPar, LLC; JunSpe, LLC; JabTre, LLC; JamVor, LLC; and Networked Scanning Solutions, LLC.

15. Each First Letter states that the recipient is likely infringing the Klein Patents by using common office equipment, and that "we are contacting you to initiate discussions regarding your need for a license."

16. Over the course of the campaign, the Respondents used different versions of the First Letter that share a core text. One such First Letter, redacted to remove the name and address of the recipient, is attached as Exhibit A.

17. Beginning in September 2012 and continuing through May 2013, the Respondents sent First Letters to approximately 16,465 small businesses located in all fifty states and the District of Columbia.

18. In the second stage of their campaign, Respondents sent letters in the name of Farney Daniels on Farney Daniels letterhead ("Second Letter"). The signature block of each Second Letter contains the name of one of two Farney Daniels attorneys.

19. Each Second Letter references the First Letter and states that, because there has been no response to the First Letter, "our client reasonably assumes you have an infringing system and need a license" and has referred the matter to Farney Daniels. Each Second Letter identifies Farney Daniels's client by one of the eighty-one different subsidiary names that had been used in the First Letters. Each Second Letter states that "[w]hile our representation of [one of eighty-one different subsidiary names] can involve litigation, it is our client's preference here that we first make all reasonable efforts to reach agreement on a license.

To that end, we do need to hear from you within the next two weeks."

20. Over the course of the campaign, the Respondents used different versions of the Second Letter that share a core text. One such Second Letter, redacted to remove certain name and address information, is attached as Exhibit B.

21. Beginning in October 2012 and continuing through May 2013, Respondents sent Second Letters to approximately 10,265 of the small businesses located in all fifty states and the District of Columbia that had been sent the First Letter.

22. In the third stage of their campaign, Respondents sent a letter in the name of Farney Daniels on Farney Daniels letterhead ("Third Letter"). Like the Second Letter, the Third Letter identifies Farney Daniels's client by one of the eighty-one different subsidiary names that had been used in the First Letters. The signature block of each Third Letter contains the name of one of two Farney Daniels attorneys.

23. Each of the Third Letters references the First and Second Letters and states that, if the recipient does not respond within two weeks, it will be sued for patent infringement.

24. Each Third Letter was accompanied by a Complaint, typically nine pages in length, that alleges a cause of action for patent infringement against the small business to which the letter was addressed.

25. Over the course of the campaign, the Respondents used different versions of the Third Letter and Complaint that share a core text. One such Third Letter and Complaint, redacted to remove certain name and address information, is attached as Exhibit C.

26. Beginning in December 2012 and continuing through May 2013, Respondents sent Third Letters to approximately 4,870 small businesses located in all fifty states and the District of Columbia. On several dates during this period, Respondents sent versions of these Third Letters to hundreds of small businesses in a single day. For example, on April 1, 2013, Respondents sent approximately 1,718 Third Letters threatening to file a complaint

for patent infringement against small business recipients located in forty-nine states if Respondents did not hear from the recipient within two weeks of the date of the letter.

27. Respondents MPHJ, Farney Daniels, and Rust were aware of and approved or ratified the contents of all three letters used in Respondents' campaign.

28. Respondent Farney Daniels was aware of the contents of the First Letters and explicitly or implicitly referenced and incorporated the representations in those letters in Second and Third Letters sent in the name of Farney Daniels.

RESPONDENTS' REPRESENTATIONS CONCERNING SUBSTANTIAL SALES

29. In each of the First Letters sent to small businesses from September 2012 through February 2013, Respondents represented, among other things, that "we have had a positive response from the business community to our licensing program," that "most businesses, upon being informed that they are infringing someone's patent rights, are interested in operating lawfully and taking a license promptly," and that "[m]any companies have responded to this licensing program in such a manner."

30. The First Letters sent from September 2012 through February 2013 further state that the responses of "[m]any companies" had allowed the entity identified as the sender "to determine . . . a fair price for a license negotiated in good faith and without the need for court action." Some versions of those First Letters state that the price determined through the responses of "[m]any companies" was "a payment of $1,200 per employee." Other versions of those First Letters state that the price determined through the responses of "[m]any companies" was "a payment of $1,000 per employee."

31. From September 2012 through February 2013, the Respondents sent to small businesses located in all fifty states approximately 9,081 First Letters that contain the representations concerning substantial sales of licenses for the Klein Patents identified in Paragraphs 29–30.

32. When Respondents sent the first 7,366 of these First Letters, Respondents had not sold a single license for the Klein Patents through Respondents' nationwide campaign of letters.

33. When Respondents sent the next 1,077 of these First Letters, Respondents had sold a license for the Klein Patents to only one of the approximately 7,366 small businesses that Respondents had contacted in their licensing campaign.

34. When Respondents sent the final 638 of these First Letters, the Respondents had sold a license to the Klein Patents to only two of the 8,443 small businesses that Respondents had contacted in their licensing campaign.

35. Beginning in March 2013, Respondents sent First Letters that did not include the representations concerning substantial sales of licenses for the Klein Patents identified in Paragraphs 29–30.

RESPONDENTS' REPRESENTATIONS CONCERNING LEGAL ACTION

36. In each of the Third Letters sent to small businesses from December 2012 to May 2013, Respondents represented that patent licensing agent will initiate legal action for patent infringement against letter recipients that do not respond to the Respondents' letters, and that such legal action is imminent. Specifically, the Third Letters state, among other representations, that "[i]f we do not hear from you within two weeks from the date of this letter, our client will be forced to file a Complaint against you for patent infringement in Federal District Court where it will pursue all of the remedies and royalties to which it is entitled." The Third Letter further states that "we must hear from you within two weeks of the date of this letter" (emphasis in original) and that "litigation will ensue otherwise."

37. Each Third Letter was accompanied by a Complaint. The Complaints generally are captioned for the federal judicial district in which the recipient small business's mailing address is located. The signature block of most of the Complaints accompanying the Third Letters bears the name and signature of one of two Farney Daniels attorneys. Each Complaint alleges a cause of action for

patent infringement against the small business to which the letter was addressed, and claims that the small business is liable for damages and attorneys fees.

38. At the time Respondents sent the Third Letters and accompanying Complaints, Respondents were not prepared to initiate legal actions for infringement of the Klein Patents against the small businesses that did not respond to the Respondents' letters, and did not intend to promptly initiate such litigation.

39. To date, the Respondents have not initiated a single legal action for infringement against any of the small businesses that did not respond to the Third Letters and accompanying Complaints.

VIOLATIONS OF THE FTC ACT

COUNT I

40. In connection with the promotion, offering for sale, and sale of licenses relating to U.S. patents, the Respondents have represented, directly or indirectly, expressly or by implication, that substantial numbers of businesses who had received the Respondents' letters agreed to pay substantial compensation to license the Klein Patents.

41. The representations set forth in Paragraph 40 are false or misleading, or were not substantiated at the time the representations were made.

COUNT II

42. In connection with the promotion, offering for sale, and sale of licenses relating to U.S. patents, the Respondents have represented, directly or indirectly, expressly or by implication, that they will initiate legal action for patent infringement against small businesses that do not respond to the Respondents' letters, and that such legal action is imminent.

43. In fact, Respondents were not prepared to initiate legal action and did not intend to initiate legal action for patent infringement against small businesses that did not respond to the Respondents' letters, and were not prepared to initiate and did not

intend to initiate such legal action imminently. Therefore, the representations set forth in Paragraph 42 are false or misleading.

44. The acts or practices of the Respondents as alleged in this Complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this thirteenth day of March, 2015, has issued this complaint against Respondents.

By the Commission.

Complaint

EXHIBIT A

1B

DesNot, LLC
40 East Main Street, #19
Newark DE 19711
855-812-2117
licensing@desnot.org
November 29, 2012

[redacted]

Re: DesNot Patent Licensing Program – File No. 1015296

We are the licensing agent for certain U.S. patents listed below. We have identified your company as one that appears to be using the patented technology, and we are contacting you to initiate discussions regarding your need for a license. In this letter, we explain what the patents cover, how you likely have an infringing system, explain why a license is needed, and provide you the general terms for such a license. We also answer some frequently asked questions, as well as explain how you can determine whether you do have an infringing system that requires a license. We should note that we have written you with the understanding that you are the proper person to contact on behalf of [redacted]. If you are not the proper person to handle this matter on behalf of the company, please provide this letter to the proper person, and notify us so that we may update our records and contact them directly in the future.

To turn to the matter at hand, the patents for which we are the licensing agent are listed below. The list includes both issued U.S. patents, as well as a patent application which is expected to issue in the future as an additional U.S. patent.

1. U.S. Pat. No. 7,986,426 ("Distributed Computer Architecture And Process For Document Management");
2. U.S. Pat. No. 7,477,410 ("Distributed Computer Architecture And Process For Virtual Copying");
3. U.S. Pat. No. 6,771,381 ("Distributed Computer Architecture And Process For Virtual Copying");
4. U.S. Pat. No. 6,185,590 ("Process And Architecture For Use On Stand-Alone Machine And In Distributed Computer Architecture For Client Server And/Or Intranet And/Or Internet Operating Environments"); and
5. 13/182,857 filed July 14, 2011 ("Distributed Computer Architecture And Process For Document Management").

You can find and review each of the issued patents listed above at www.google.com/patents.

Complaint

EXHIBIT A

As you may know, a patent's scope is defined by its claims, and you will see that each of the above-listed patents have different claims. While those differences matter and mean each patent is distinct, the patents listed above do, as a group, generally relate to the same technology field, and cover what at the time was a groundbreaking distributed computer architecture and process for digital document management. An illustrative embodiment of the architecture of the patents is provided in Figure 28, which is reproduced here for your reference.

Fig. 28

A good example of an infringing system, and one your company likely uses, is an office local area network ("LAN") which is in communication with a server, employee computers having email software such as Outlook or Lotus, and a third-party scanner (or a multi-function printer with scanning functionality) which permits the scanning of a document directly to employee email address as a pdf attachment. Such a system would be a typical example of what infringes. There are other examples listed further below.

We note here that the scope of the patents is technically defined by the claims, and the language of the claims defines the legal scope of the patents. The more generalized examples provided in this letter are for your convenience and should not be considered exact substitutes for the more detailed claims. As such, you may find it useful to consider, as illustrative examples, claims 1-5 of the '426 Patent. Reviewing those you can see that the patent claims are directed to a system having a digital copier/scanner/multifunction device with an interface to office equipment (or to the web) and related software, for scanning or copying and transmitting images electronically to one or more destinations such as email, applications or other local files. Coverage of this type of system, and of the more generally worded example in the previous paragraph, is further reflected in claims 1, 8 and 15 of the '410 Patent, claims 12 and 15 of the '381 Patent, and claims 9 and 16 of the '590 Patent. Obviously each claim is separately drafted and you should consider the scope of each claim separately.

To assist you in confirming that you need a license, we provide illustrative examples of infringing systems below in the form of a brief set of fact checklists that you can use to determine if your system is one for which you should contact us about a license. If you can answer "YES" to each question under any of the scenarios A through C below, then you should contact us promptly.

Complaint

EXHIBIT A

A. Internetworking of Scanner/MFP and Email (SMTP, IMAP, POP3)

Yes	No	
☐	☐	1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
☐	☐	2. Does your company use Microsoft Exchange/Outlook, Lotus Domino/Notes or a comparable system for company email;
☐	☐	3. Are at least some of your employees' email addresses loaded into the scanner, so that you can select to whom you wish to send a scanned document by email; or, alternatively, can you manually input an employee's email address into the scanner to whom you wish a scanned document to be sent; and
☐	☐	4. Can you cause your scanner to transform your paper document to a .pdf file, and have it automatically transmitted to one or more of your employees by email. By automatically, we mean that pressing a "Start" or "Go" button instigates both the copying of the document and the automatic transmission of the document to its intended destination (such as a Microsoft Outlook email inbox).

B. Scanner/MFP and Sharepoint (HTTP and HTTPS)

☐	☐	1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
☐	☐	2. Does your company use Microsoft Sharepoint; and
☐	☐	3. Is your scanner equipment configured so that you can scan a document and automatically transmit it to a Sharepoint site address.

C. Scanner/MFP and FTP/SFTP Site

☐	☐	1. Does your company use document scanning equipment that is network addressable (*i.e.*, it has an IP address and can communicate on your network);
☐	☐	2. Does your company use File Transfer Protocol and/or Secure File Transfer Protocol; and
☐	☐	3. Is your scanner equipment configured so that you can scan a document and automatically transmit it to an FTP or SFTP site.

Our research, which includes review of several marketplace trends and surveys, including various IDC reports, Infotrends reports and market share analyses, as well as a recent survey of an IT service company about the internal network environments of its clients, has led us to the conclusion that an overwhelming majority of companies like yours utilize systems that are set up to practice at least one of scenarios A through C above. Indeed, such practices are now standard in many industries. As a common example, our investigation has shown that most businesses have migrated to the usage of corporate email servers running Exchange or Lotus Domino/Notes and have further incorporated digital scanning into their workflows.

Complaint

EXHIBIT A

As your organization almost certainly uses in its day-to-day operations digital copier/scanner/multifunction equipment which is interfaced to a separate central office computer (an office network), so that digital images may be scanned and transmitted to one or more destinations such as email accounts and other applications, you should enter into a license agreement with us at this time.

If you believe you are in the unusual position of not having a system that can practice any of scenarios A through C outlined above, or otherwise avoids the requirements of the patent claims, please contact us so we may discuss means for confirming that. Upon appropriate confirmation, we would agree you have no need of a license and would not intend to pursue the matter further unless circumstances changed in a way to warrant reopening a reasonable inquiry. The materials we likely would require could include copies of the user manuals for your office copying/scanning equipment, along with the IP addresses and 2012 daily activity logs for each of them, as well as the registry of each of the email servers and file servers used in your company. These would allow us to determine whether we agree with your assessment. Of course, we are willing to treat any information you provide us as confidential and we will sign a non-disclosure agreement to that effect if you so desire. We should note that the examples A through C above are not an exhaustive list of the systems which may infringe, and that it may be determined that your system nevertheless requires a license even if it does not exactly fit one of the more common examples we have provided in this letter. However, when you provide us with the above information, we will be able to make that determination and explain that situation to you, if it exists.

You should know also that we have had a positive response from the business community to our licensing program. As you can imagine, most businesses, upon being informed that they are infringing someone's patent rights, are interested in operating lawfully and taking a license promptly. Many companies have responded to this licensing program in such a manner. Their doing so has allowed us to determine that a fair price for a license negotiated in good faith and without the need for court action is a payment of $1,200 per employee. We trust that your organization will agree to conform your behavior to respect our patent rights by negotiating a license rather than continuing to accept the benefits of our patented technology without a license. Assuming this is the case, we are prepared to make this pricing available to you.

As part of our licensing program, we have received certain common inquiries that frequently are asked. In anticipation that you might have some of those same questions, and with an interest in addressing those sooner than later, we wish to provide some additional information as well.

One common question we have been asked is why we are not contacting the manufacturers of the scanning equipment or application software directly. The answer is our patent rights do not claim any scanning equipment, network file systems, FTP or Sharepoint sites, or email systems *alone*. Instead, our patent rights are addressed to end user enterprise systems which use network scanners or MFPs interoperably with other software/systems in order to practice the patented solution. As such, we would not, and do not, expect any manufacturer of a particular piece of equipment or software to accept any responsibility for the infringement created by the overall system, of which their product is only a part. Further, we expect that if you review your own agreements with these manufacturers, you will find that likewise they do not owe you any duty to indemnify you for situations where you combine a piece of equipment or software with other equipment or software to make a larger, more integrated (and useful) system.

Complaint

EXHIBIT A

Another common question is whether (or why) you have been singled out to receive this letter, as you may believe there are other companies like you that have not been contacted. Our response to that is to assure you that we have an ongoing vigorous licensing program that is being handled as promptly as possible, and that we fully expect to address the companies who are in need of a license. That said, your infringement of the patent rights is not justified by the infringement by others, as we are sure you understand.

We do invite you to consult with a patent attorney regarding this matter. Patents are exclusive property rights granted by law, and there can be serious consequences for infringement. Infringers who continue to infringe in the face of an objectively high risk of infringement of a valid patent can be forced to pay treble (triple) the actual damages, as well as the patent owner's litigation costs, including all attorney's fees.

Please let us hear from you within two weeks of the date of this letter, so that we may agree with you upon an appropriate license arrangement if one is needed. You may answer by contacting us by mail, phone, or email at the address provided at the start of this letter. We look forward to hearing from you.

Sincerely,

David Martin

Complaint

EXHIBIT B

FARNEY DANIELS PC

800 South Austin Ave., Suite 200
Georgetown, Texas 78626-5845

Silicon Valley *Delaware*

Dallas www.farneydaniels.com *Austin/Georgetown*

November 16, 2012

[redacted]

Re: DesNot, LLC Patent Licensing

We are writing on behalf of our client, DesNot, LLC ("DesNot"). Several weeks ago, they wrote you a letter regarding their licensing program with respect to certain U.S. patents. The patents related to systems that, among other things, can permit scanning a document and have it automatically sent over a local area network to an email account. These patents included U.S. Pat. Nos. 7,986,426; 7,477,410; 6,771,381; 6,185,590. In their letter, our client described these patents, the technology, and infringement. They then asked you either to respond by entering into discussions to take a license, or, if appropriate, to provide confirmation that your company does not have an infringing system. Having not heard from you, our client reasonably assumes you do have an infringing system and need a license. Accordingly, they have referred the matter to us to determine whether we may be able to work out a license with you, or whether additional steps might be required.

As background, our firm practices nationally and specializes solely in patent litigation and licensing. While our representation of DesNot can involve litigation, it is our client's preference here that we first make all reasonable efforts to reach agreement on a license. To that end, we do need to hear from you within the next two weeks.

We also wish to reiterate the position of our client in its first letter that they have no interest in seeking a license from someone who does not infringe. If your company does not use a system covered by the patents, or does not have a system that would perform any of the Scenarios A through C mentioned in the first letter, then we will discuss with you how your position can be confirmed so that we may discontinue further unnecessary correspondence. In the far more likely scenario that you do need a license, we are prepared to work with you to reach an agreement on reasonable terms.

We do encourage you to retain competent patent counsel to assist you in this matter, if you have not already done so. If you have already retained patent counsel, please forward this letter to them, and have them advise us of their representation (or you may so inform us directly) so that we may direct all future correspondence to them.

You may contact us at 512-508-8481.

Sincerely,

[redacted]

1010658
52464.77

FTC 000030

Complaint

EXHIBIT C

FARNEY DANIELS LLP

Silicon Valley
Dallas

800 South Austin Ave., Suite 200
Georgetown, Texas 78626-5845
www.faraceydaniels.com

Delaware
Austin/Georgetown

January 21, 2013

Via First Class Mail

[redacted]

Re: CalNeb, LLC Patent Licensing

We write with respect to the patent licensing efforts of our client, CalNeb, LLC. This is the third letter you have received on this topic. The first letter, sent to you some time ago, provided a detailed explanation of what our client's patents cover, how you likely have an infringing system and therefore require a license, and provided you with the general terms for such a license. We then wrote you several weeks ago, noting that our client had not received a response from you, and had turned the matter over to us in hopes that we would be able to work out a license agreement. Both letters advised you to seek patent counsel for assistance. As you have not contacted us to explain that you do not have an infringing system, we reasonably can only assume that the system you are using is covered by the patents. In that case, you do need a license.

Accordingly, if we do not hear from you within two weeks from the date of this letter, our client will be forced to file a Complaint against you for patent infringement in Federal District Court where it will pursue all of the remedies and royalties to which it is entitled. The Complaint is attached, so that you may review it and show it to your counsel. Please note that we reserve the right to modify the Complaint, including adding additional patents, before we file. While our client would like to avoid litigation, it takes its licensing responsibilities seriously, as well as its responsibilities to protect the interests of all the companies who have already taken the proper step of obtaining a license. As stated in both the first and second letters you received, our client has no interest in seeking a license from someone who does not infringe. To reiterate this point one last time, if your company does not use a system covered by the patents, we urge you to contact us to confirm non-infringement so that we may discontinue our correspondence with you and avoid the unnecessary expense associated with a lawsuit.

In the far more likely scenario that you do need a license, we are prepared to work with you to reach an agreement on reasonable terms, but we must hear from you within two weeks of the date of this letter. Given that litigation will ensue otherwise, we again encourage you to retain competent patent counsel to assist you in this matter. If you have already retained patent counsel, please forward this letter to them and inform us of your choice of counsel so that we may direct all future correspondence to them.

You may contact me at (512) 508-8481.

Sincerely,

[redacted]

1010777
52746-67

FTC 000042

Complaint

EXHIBIT C

3B

IN THE UNITED STATES DISTRICT COURT
Southern District of New York

CalNeb, LLC

Plaintiff,

v.

[redacted]

Defendant.

Civil Action No. _____

JURY TRIAL REQUESTED

COMPLAINT

Plaintiff CalNeb, LLC ("CalNeb" or "Plaintiff"), by way of Complaint against Defendant [redacted] or "Defendant"), hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. §§ 1, *et seq*.

THE PARTIES

2. Plaintiff CalNeb is a limited liability company organized under the laws of Delaware with its principal place of business at 40 East Main Street, #19, Newark, DE 19711.

3. Defendant [redacted] is a business with a principal place of operation at [redacted].

JURISDICTION AND VENUE

4. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1338(a). Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b&c) and 1400(b).

Complaint

EXHIBIT C

5. This Court has personal jurisdiction over Defendant for at least the following reasons: (i) [redacted] has, upon information and belief, knowingly and intentionally committed acts of patent infringement at least in this District and (ii) [redacted] regularly does business or solicits business, engages in other persistent courses of conduct, and/or derives substantial revenue from products and/or services provided to individuals in this District.

RELEVANT FACTS

6. This is a case where the Plaintiff owns valuable patent rights through a combination of issued patents and patents pending which cover the Defendant's ability to operate an information technology system within which its employees are able to scan a document into such things as (a) an email attachment, including transmittal of the attachment over a local area network or across the Internet; (b) a digital document file format, transmitted over a local area network or across the Internet, including storage of the document into its network files so that it can be accessed by Defendant's employees through one or more software applications; (c) a digital document, including transmittal of the document to a Sharepoint site or an FTP site. These patent rights are valuable because of the efficiencies they add to the workplace via the fast, reliable transmission of data without the added cost, delay and unreliability of paper-based systems of the prior art.

7. Defendant obtained this technology by integrating hardware, software and other equipment provided by various companies, none of which individually are accused of infringing the Plaintiff's patent rights. However, the Defendant has brought these diverse elements together into a data management system that infringes Plaintiff's patent rights.

8. Plaintiff has previously communicated in writing with Defendant about its patent rights, including setting forth its view that Defendant should take a license to one or more of its

Complaint

EXHIBIT C

patents. Defendant has not denied the use of the infringing technology, but has thus far been unwilling to share any of its own business information requested by Plaintiff, and has furthermore failed to cease its illegal theft of Plaintiff's patent rights.

9. Upon information and belief, Defendant has created and maintains a system for collecting, storing and accessing information.

10. Upon information and belief, Defendant utilizes a network addressable scanner and or a network addressable multifunction device (each of which is hereby described as an "IP scanner"). The IP scanner is capable of scanning paper into a digital form. Said IP scanner has its own IP address. It is configured so that various employee email addresses may be inputted into it in advance. Said IP scanner also includes a user interface which permits the user to input, *inter alia*, an intended recipient's email address, and then to press a button, which in turn triggers the scanning of paper into a digitally-formatted file that is automatically emailed to the intended recipient's email address. Upon information and belief, such IP scanner is configured to support similar related functionality such as scanning a document into a digital file that it transmitted to a Sharepoint site and/or to an FTP site, where it may be accessed by one or more of Defendant's employees. To be clear, Plaintiff is not alleging or contending that IP scanner equipment alone infringes any patent rights.

11. Upon information and belief, Defendant utilizes within its IT infrastructure an email system. Upon information and belief, Defendant utilizes Microsoft Exchange and Outlook, which runs on at least one server, in order to aid the process of communicating a digital image from an IP scanner to an intended email destination. Again, Plaintiff is not alleging or contending that these Microsoft products (or servers running them) by themselves infringe any patent rights.

Complaint

EXHIBIT C

12. Upon information and belief, Defendant utilizes an IP scanner capable of scanning paper into a digital form. Said IP scanner includes a user interface which permits the user of the IP scanner to input, *inter alia*, an intended network file destination, and to then press a button, which in turn triggers the scanning of paper into a digitally-formatted file that is automatically transmitted to and stored within the designated network file destination. To be clear, Plaintiff is not alleging or contending that the IP scanner equipment alone infringes any patent rights.

13. Upon information and belief, Defendant utilizes Microsoft Windows in a client server configuration, in order to aid the process of communicating a digital image from a scanner/copier to an intended file destination accessible to a file server. Again, Plaintiff is not alleging or contending that these Microsoft products (or server running Microsoft products) by themselves infringe any patent rights.

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 7,477,410

14. CalNeb repeats and re-alleges the allegations of all of the preceding paragraphs as if fully set forth herein.

15. On January 13, 2009, United States Patent No. 7,477,410 (hereinafter referred to as the "'410 Patent"), entitled DISTRIBUTED COMPUTER ARCHITECTURE AND PROCESS FOR VIRTUAL COPYING, was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '410 Patent is attached as Exhibit A to this Complaint.

16. CalNeb is the exclusive licensee for the field pertinent to the Defendant in and to the '410 Patent, with sufficient rights and interest in the '410 Patent as to have standing to

Complaint

EXHIBIT C

assert all causes of action arising under said patent and the right to any remedies for infringement of it with respect to [redacted].

17. Upon information and belief, Defendant has in the past and continues to directly infringe at least Claim 8 and other claims of the '410 Patent by making and using in this judicial district and elsewhere in the United States, a data management system possessing all of the elements of at least these claims.

18. Upon information and belief, Defendant uses at least one network addressable scanner, digital copier or other multifunction peripheral (collectively, "digital copying devices") capable of creating a digital copy of a physical document (*e.g.*, a paper document).

19. Upon information and belief, Defendant uses one or more central computer(s) or server(s) for sharing access to information (collectively, Defendant's "file server") among desktop computers and/or other computers used by Defendant's employees (collectively, "client computers") and/or mobile devices used by Defendant's employees such as Blackberry® devices and other smartphones.

20. Upon information and belief, Defendant uses one or more central computer(s) or server(s) running corporate electronic email software (collectively, Defendant's "email server").

21. Upon information and belief, Defendant's file server and its email server are each connected to data stored in an electronic storage medium ("Defendant's data storage") such that certain of Defendant's data located in Defendant's data storage is accessible to Defendant's file server and/or email server.

22. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's file server and at least one of the Defendant's digital copying devices.

Complaint

EXHIBIT C

23. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's file server and at least one of the Defendant's client computers.

24. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's email server and at least one of the Defendant's digital copying devices.

25. Upon information and belief, Defendant uses memory in its file server and/or email server which stores software permitting electronic communication between Defendant's email server and at least one of the Defendant's client computers.

26. Upon information and belief, Defendant uses software operated on or in conjunction with its file server and/or its email server and/or its data storage to replicate and transmit one or more digital copies of physical documents such as paper documents to one or more servers or client computers.

27. This replication and transmission occurs as a result of a user-command communicated through a graphical user interface (GUI), without any modification of any of Defendant's client computers, and without any modification of Defendant's software source code.

28. As a consequence of the infringement of the '410 Patent by the aforesaid Defendant, Plaintiff is entitled to recovery of past damages in the form of, at a minimum, a reasonable royalty.

29. Defendant's conduct since at least Defendant's receipt of the first communication from Plaintiff to Defendant regarding the '410 Patent also has induced infringement and/or contributed to infringement by others. For this indirect infringement, Plaintiff also is entitled to recover damages in the form of, at a minimum, a reasonable royalty.

Complaint

EXHIBIT C

30. Moreover, as a consequence of the prior communication of patent rights by Plaintiff to Defendant, combined with Defendant's failure to cease and desist from further infringement in the face of the objective risk of infringement, the infringement is willful, giving rise to Plaintiff's claims for trebling of the damages in this case, as well as to Plaintiff's claims that this is a case where Defendant should reimburse Plaintiff for its attorneys' fees and other costs of litigation pursuant to 35 U.S.C. Section 285.

COUNT II- INFRINGEMENT OF U.S. PATENT NO. 7,986,426

31. CalNeb reasserts and incorporates herein by reference the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

32. On July 26, 2011, U.S. Patent No. 7,986,426 (hereinafter referred to as the "'426 Patent"), entitled DISTRIBUTED COMPUTER ARCHITECTURE AND PROCESS FOR DOCUMENT MANAGEMENT, was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '426 Patent is attached as Exhibit B to this Complaint.

33. CalNeb is the exclusive licensee for the field pertinent to the Defendant in and to the '426 Patent, with sufficient rights and interest in the '426 Patent as to have standing to assert all causes of action arising under said patent and the right to any remedies for infringement of it with respect to [redacted].

34. As a result of the Defendant's scan-to-file and scan-to-email functionality described in the preceding paragraphs, which are incorporated herein in their entirety, the '426 patent is directly infringed by Defendant. The infringement includes infringement of Claim 1.

Complaint

EXHIBIT C

35. As a consequence of the infringement of the '426 Patent by the aforesaid Defendant, Plaintiff is entitled to recovery of past damages in the form of, at a minimum, a reasonable royalty.

36. Defendant's conduct since at least Defendant's receipt of the first communication from Plaintiff to Defendant regarding the '426 Patent also has induced infringement and/or contributed to infringement by others. For this indirect infringement, Plaintiff also is entitled to recover damages in the form of, at a minimum, a reasonable royalty.

37. Moreover, as a consequence of the prior communication of patent rights by Plaintiff to Defendant, combined with Defendant's failure to cease and desist from further infringement in the face of the objective risk of infringement, the infringement is willful, giving rise to Plaintiff's claims for trebling of the damages in this case, as well as to Plaintiff's claims that this is a case where Defendant should reimburse Plaintiff for its attorneys' fees and other costs of litigation pursuant to 35 U.S.C. Section 285.

JURY DEMAND

38. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, CalNeb demands a trial by jury on all issues triable as such.

PRAYER FOR RELIEF

WHEREFORE, CalNeb respectfully demands judgment for itself and against Defendant as follows:

A. An adjudication that Defendant has infringed the '410 Patent;

B. An adjudication that Defendant has infringed the '426 Patent;

C. An award of damages to be paid by Defendant adequate to compensate CalNeb for its past infringements of the '410 and '426 Patents and any continuing or future

Complaint

EXHIBIT C

infringement through the date such judgment is entered, including interest, costs, expenses and enhanced damages for any willful infringement as justified under 35 U.S.C. § 284 and an accounting of all infringing acts including, but not limited to, those acts not presented at trial;

D. A declaration that this case is exceptional under 35 U.S.C. § 285, and an award of Plaintiff's reasonable attorneys' fees; and

E. An award to CalNeb of such further relief at law or in equity as the Court deems just and proper.

Dated: January 21, 2013

Respectfully,

[redacted]

Farney Daniels LLP
800 S. Austin, Suite 200
Georgetown TX 78626-5845
(512) 582-2828
www.farneydaniels.com

ATTORNEYS FOR PLAINTIFF

DECISION AND ORDER

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

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by Respondents that they neither admit nor deny any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admit the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent MPHJ Technology Investments, LLC, ("MPHJ") is a Delaware limited liability company with a registered agent at 1013 Centre Road, Suite 403S, Wilmington, Delaware, 19805.

2. Respondent Jay Mac Rust is the sole member and manager of MPHJ, with his principal place of business

at 510 North Valley Mills Drive, Suite 505, Waco, Texas, 76710.

3. Respondent Farney Daniels, P.C., is a Texas professional corporation with its principal office or place of business at 800 South Austin Avenue, Suite 200, Georgetown, Texas, 78626.

4. Respondents neither admit nor deny any of the allegations in the draft complaint, except as specifically stated in this agreement. Only for purposes of this action, respondents admit the facts necessary to establish jurisdiction.

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

ORDER

DEFINITIONS

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

1. "Affiliate" means a person or entity with which a Respondent is associated, directly or indirectly, by a principal-agent relationship, by common control, or by a contract or business arrangement concerning a Patent that is the subject of a Patent Assertion Communication.

2. "Commerce" means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. "Lawsuit" means any form of judicial, administrative, or private proceeding to adjudicate a dispute.

4. "Patent" shall include a patent, a patent application (including a provisional patent application), a group or portfolio of patents or patent applications, and a group

or portfolio that includes one or more patents and one or more patent applications.

5. "Patent Assertion Communication" shall mean any communication in or affecting commerce, other than filings in a Lawsuit or correspondence between counsel in a Lawsuit, or communications between attorneys and clients or prospective clients for the purpose of providing or obtaining legal advice, where such communication represents, expressly or implicitly, that the intended recipient or anyone affiliated with the intended recipient is or may be infringing rights arising from a Patent, is or may be obligated to obtain a license because of a Patent, or owes or may owe compensation to another because of a Patent.

6. "Respondents" shall mean Respondent MPHJ, Respondent Rust, and Respondent Farney Daniels, individually, collectively, or in any combination.

   a. "Respondent MPHJ" shall mean MPHJ Technology Investments, LLC, a limited liability company, and its subsidiaries, successors, and assigns.

   b. "Respondent Rust" shall mean Jay Mac Rust, individually and as an officer of Respondent MPHJ.

   c. "Respondent Farney Daniels" shall mean Farney Daniels, P.C., a professional corporation, and its successors and assigns.

I.
Prohibited Misleading or Unsubstantiated Representations in Patent Assertion Communications

IT IS ORDERED that the Respondents, and their officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, shall not

A. Make any representation in a Patent Assertion Communication, expressly or by implication,

1. that a particular Patent has been licensed to a substantial number of licensees,

2. that a particular Patent has been licensed at particular prices or within particular price ranges, or

3. otherwise concerning the results of licensing, sales, settlement, or litigation of a particular Patent,

unless the representation is non-misleading and, at the time such representation is made, Respondents possess and rely upon competent and reliable evidence sufficient to substantiate that the representation is true;

B. Make any representation in a Patent Assertion Communication, expressly or by implication, about the licenses for a Patent or the responses of recipients of Patent Assertion Communications unless the representation is non-misleading, and, at the time the representation is made, Respondents possess and rely upon competent and reliable evidence that substantiates that the representation is true;

C. Make any representation in a Patent Assertion Communication, expressly or by implication, that Respondents or an Affiliate have taken any action with respect to the filing of a Lawsuit, including initiating a Lawsuit, unless the representation is true and non-misleading; or

D. Make any representation in a Patent Assertion Communication, expressly or by implication, that Respondents or an Affiliate will take any action with respect to the filing of a Lawsuit, including

1. that they will initiate a Lawsuit;

2. that they will initiate a Lawsuit if the recipient of a Patent Assertion Communication does not agree to

a license, pay compensation, or otherwise respond to the Patent Assertion Communication as requested;

3. that they will initiate a Lawsuit imminently or within a specified time; or

4. that they will initiate a Lawsuit imminently or within a specified period of time if the recipient of a Patent Assertion Communication does not agree to a license, pay compensation, or otherwise respond to the Patent Assertion Communication as requested;

unless at the time such representation is made, Respondents have decided to take such action and possess and rely upon competent and reliable evidence sufficient to substantiate that they are prepared to and able to take the action necessary to make the representation true. Evidence that an action was not taken because of a change in circumstances or information obtained subsequent to making a representation covered by this Subpart I.D, including a change in the decision by a client on whose behalf a representation was made on whether to initiate a lawsuit, shall be considered in determining whether a representation was substantiated at the time it was made.

Provided that, for purposes of Subpart I.D of this order, a statement made in a Patent Assertion Communication that Respondents

(1) believe the recipient of the letter is or may be infringing a patent;

(2) believe the recipient does or may need a license to a Patent; or

(3) reserve their rights under the Patent with respect to the recipient's conduct

shall not be considered, in and of itself, to be a representation that Respondents will initiate a Lawsuit.

II.
Recordkeeping Requirements

IT IS FURTHER ORDERED that each Respondent, shall, for five (5) years after the last date of dissemination of any written Patent Assertion Communication covered by Subsection II.A, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. A copy of each written Patent Assertion Communication that is authored, distributed, signed, or endorsed by Respondent or by a business that such Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly;

B. The names, addresses, and phone numbers of all intended recipients of each written Patent Assertion Communication;

C. Copies of all subpoenas and other communications with law enforcement agencies or personnel concerning Patent Assertion Communications;

D. Business records demonstrating such Respondent's compliance with the terms and provisions of this Order, including but not limited to tests, reports, studies, or other records that relate to the truth or falsity of representations about the sale of licenses for a Patent, or the responses of recipients of Patent Assertion Communications, except such Respondent need not make available records to the extent they are protected by the attorney-client privilege or the work product doctrine; and

E. All signed and dated statements acknowledging receipt of the Order secured pursuant to the Order Acknowledgements provision of this Order.

III.
Order Acknowledgments

IT IS FURTHER ORDERED that Respondents, for any business that sends Patent Assertion Communications and for which any Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, shall deliver a copy of this Order to their counsel, and all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having managerial responsibilities with respect to Patent Assertion Communications, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondents shall deliver this Order to current managerial personnel within thirty (30) days after the date of service of this Order, and to future managerial personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.
Corporate Respondents Compliance Notification

IT IS FURTHER ORDERED that Respondent MPHJ and Respondent Farney Daniels shall notify the Commission at least thirty (30) days prior to any change in its structure 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 entity name or address. *Provided, however*, that, with respect to any proposed change in structure about which Respondent MPHJ or Respondent Farney Daniels learns less than thirty (30) days prior to the date such action is to take place, that 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 e-mailed 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 MPHJ Technology Investments, LLC*.

V.
Individual Respondent Compliance Notification

IT IS FURTHER ORDERED that Respondent Rust, for a period of ten (10) years after the date of issuance of this Order, shall notify the Commission of the discontinuance any position with Respondent MPHJ, or of his affiliation with any new business or employment involving Patent Assertion Communications. The notice shall include Respondent Rust's new business address and telephone number and, for any new business or employment involving Patent Assertion Communications, a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be e-mailed 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 MPHJ Technology Investments, LLC*.

VI.
Compliance Reporting

IT IS FURTHER ORDERED that Respondents, within sixty (60) days after the date of service of this Order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VII.
Order Termination

This Order will terminate on March 13, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

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

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

B. This Order's application to any Respondent that is not named as a Respondent in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that 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 (the "Commission") has accepted, subject to approval, an agreement containing a consent order from MPHJ Technology Investments, LLC; Jay Mac Rust; and Farney Daniels, P.C. (the "Respondents").

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 allegedly deceptive representations that the Respondents made in a campaign of letters sent to thousands of small businesses across the United States in an attempt to sell licenses for certain U.S. patents.[1] The complaint alleges that the Respondents made false or unsubstantiated representations in their letters that many small businesses had already agreed to pay thousands of dollars for such licenses. The complaint also alleges that the Respondents' letters falsely represented that a patent infringement lawsuit would be filed against the recipient if it did not respond to the letter, and that this suit would be filed imminently. The complaint alleges that these representations constitute deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.

The proposed consent order contains provisions designed to prevent the Respondents from engaging in similar acts and practices in the future. Section I.A of the proposed order would prohibit false or unsubstantiated representations that a patent has been licensed in substantial numbers, at particular prices, or within particular price ranges. Section I.B of the proposed order would prohibit false or unsubstantiated representations about the licenses for a patent or the responses of recipients of patent assertion communications, or concerning the results of licensing,

[1] The complaint does not challenge the right of a patentholder to seek licensing fees through truthful representations or non-deceptive conduct.

sales, settlement, or litigation of a patent. Section I.C would prohibit misrepresentations that the Respondents or an affiliate of the Respondents has initiated a lawsuit. And Section I.D would prohibit representations that the Respondents or an affiliate of the Respondents will initiate a lawsuit unless they have decided to take such action and they possess competent and reliable evidence sufficient to substantiate that they are prepared and able to do so. In determining whether such a representation was substantiated at the time that it was made, evidence that an action was not taken because of a change in circumstances or information obtained subsequent to making the representation shall be considered.

These prohibitions in the proposed consent order apply to communications (other than filings in a lawsuit or correspondence between counsel in a lawsuit) that state that the intended recipient or anyone affiliated with the intended recipient is or may be infringing rights arising from a patent, is or may be obligated to obtain a license because of a patent, or owes or may owe compensation to another because of a patent.

The proposed consent order also contains reporting and compliance provisions. Section II requires the Respondents to maintain and upon request make available certain compliance-related records. Sections III through VI requires the Respondents to deliver a copy of the order to officers, employees, and representatives having managerial responsibilities with respect to the order's subject matter, notify the Commission of changes in corporate structure that might affect compliance obligations, and file compliance reports with the Commission.

Section VII of the proposed order provides that, with certain exceptions, the order will terminate in twenty years.

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

Complaint

IN THE MATTER OF

SUN PHARMACEUTICAL INDUSTRIES LTD., RANBAXY LABORATORIES LTD., AND DAIICHI SANKYO CO., LTD.

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

Docket No. C-4506; File No.141 0134
Complaint, January 30, 2015 – Decision, March 18, 2015

This consent order addresses the $4 billion acquisition by Sun Pharmaceutical Industries Ltd. ("Sun") of Ranbaxy Laboratories Ltd. ("Ranbaxy"). According to the FTC's complaint, the merger would likely harm future competition by reducing the number of suppliers in the U.S. markets for three dosage strengths (50 mg, 75 mg, and 100 mg) of generic minocycline tablets. Ranbaxy is currently one of three suppliers of the products, while Sun is one of only a limited number of firms likely to sell generic minocycline tablets in the United States in the near future. As Sun's entry likely would have resulted in significantly lower prices for these drugs, the complaint alleges that the acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act. Under the order, Sun is required to divest Ranbaxy's interests in generic minocycline tablets to India-based Torrent Pharmaceuticals Ltd., a global drug company that markets generic drugs in the United States. Sun must also sell Ranbaxy's generic minocycline capsules to Torrent to enable Torrent to obtain regulatory approval for its tablets as quickly as Ranbaxy would have absent the deal.

Participants

For the *Commission: Aylin M. Skroejer, David Von Nirschl,* and *Elyssa L. Wenzel.*

For the *Respondents: Ronan P. Harty, Lincoln P. Mayer,* and *Tina D. Wang, Davis Polk & Wardwell LLP*; *Stacey A. Mahoney, Thane D. Scott,* and *Darren S. Tucker, Morgan, Lewis & Bockius LLP*; *Jessica K. Delbaum, Elan DiMaio,* and *Timothy J. Haney, Shearman & Sterling 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 Sun Pharmaceutical Industries Ltd. ("Sun"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Ranbaxy Laboratories Ltd., ("Ranbaxy"), a subsidiary of Respondent Daiichi Sankyo Co., Ltd. ("Daiichi Sankyo"), both of which are corporations 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 Sun is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India, with its headquarters located at Acme Plaza, Andheri Kurla Road, East Andheri, Mumbai, 400 059, India. The headquarters for Sun's U.S. subsidiary, Sun Pharmaceutical Industries, Inc., is located at 270 Prospect Plains Road, Cranbury, New Jersey, 08512.

2. Respondent Ranbaxy is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its headquarters located at Plot No. 90, Sector 32, Gurgaon-122001 (Haryana), India. The headquarters for Ranbaxy's U.S. subsidiary, Ranbaxy Inc., is located at 600 College Road East, Suite 2100, Princeton, New Jersey, 08540.

3. Respondent Daiichi Sankyo is a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its headquarters located at 3-5-1, Nihonbashi-honcho, Chuo-ku, Tokyo, 103-8426, Japan. The headquarters for Daiichi Sankyo's U.S. subsidiary, Daiichi Sankyo, Inc., is located at Two Hilton Court, Parsippany, New Jersey, 07054.

4. 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

5. Pursuant to a Transaction Agreement and Scheme of Arrangement dated April 6, 2014, Sun proposes to acquire the voting securities of Ranbaxy in a transaction valued at approximately $4 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

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of generic minocycline hydrochloride 50 mg, 75 mg, and 100 mg tablets ("minocycline tablets").

7. 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

8. Minocycline tablets are used to treat bacterial infections including pneumonia and other respiratory tract infections, acne, and other skin, genital, and urinary tract infections. Ranbaxy, Dr. Reddy's Laboratories Ltd., and Par Pharmaceutical Companies, Inc. are currently the only U.S. suppliers of each dosage strength of minocycline tablets. Sun is one of a limited number of firms that has minocycline tablets in development and an ANDA under review by the U.S. Food and Drug Administration ("FDA"). Therefore, the Acquisition would likely increase concentration in the relevant markets substantially by reducing the number of future suppliers of minocycline tablets.

V. ENTRY CONDITIONS

9. Entry into the relevant markets described in Paragraphs 6 and 7 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be 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.

VI. EFFECTS OF THE ACQUISITION

10. The effects of the Acquisition, if consummated, may be to substantially lessen competition in the markets for minocycline tablets in the United States 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 eliminating future competition between Sun and Ranbaxy, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Sun's products in the markets; and (2) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from Sun's independent entry into the markets.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of January, 2015, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Sun Pharmaceutical Industries Ltd. ("Sun") of the voting securities of Respondent Ranbaxy Laboratories Ltd. ("Ranbaxy"), a subsidiary of Daiichi Sankyo Co., Ltd. ("Daiichi Sankyo"), collectively "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Sun is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India, with its headquarters located at

Acme Plaza, Andheri Kurla Road, East Andheri, Mumbai 400 059, India. The headquarters for Sun's U.S. subsidiary, Sun Pharmaceutical Industries, Inc., is located at 270 Prospect Plains Road, Cranbury, New Jersey, 08512, USA.

2. Respondent Ranbaxy is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its headquarters located at Plot No. 90, Sector 32, Gurgaon-122001 (Haryana), India. The headquarters for Ranbaxy's U.S. subsidiary, Ranbaxy Inc., is located at 600 College Road East, Suite 2100, Princeton, New Jersey, 08540, USA.

3. Respondent Daiichi Sankyo is a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its headquarters located at 3-5-1, Nihonbashi-honcho, Chuo-ku, Tokyo 103-8426, Japan. The headquarters for Daiichi Sankyo's U.S. subsidiary, Daiichi Sankyo, Inc., is located at Two Hilton Court, Parsippany, New Jersey, 07054, USA.

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

ORDER

I.

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

A. "Sun" means: Sun Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sun Pharmaceutical Industries Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of

each. After the Acquisition Date, Sun shall include Ranbaxy.

B. "Ranbaxy" means: Ranbaxy Laboratories Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Ranbaxy Laboratories Ltd. (including, without limitation, Ohm Laboratories, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Daiichi Sankyo" means: Daiichi Sankyo Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Daiichi Sankyo Co., Ltd, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Sun, Ranbaxy and Daiichi Sankyo, individually and collectively. After the Acquisition Date, Respondents means Sun and Ranbaxy, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or,

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

G. "Acquisition" means Respondent Sun's acquisition of the voting securities of Ranbaxy. Respondents Sun and Ranbaxy entered a *Transaction Agreement and Scheme of Arrangement* on April 6, 2014, to effect the Acquisition that was submitted to the Commission.

H. "Acquisition Date" means the date on which the Acquisition is consummated.

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 Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

J. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 *et seq*., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

K. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.

L. "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.

M. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

N. "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 Minocycline Product Assets to an Acquirer pursuant to this Order.

O. "Confidential Business Information" means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Minocycline Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to any Respondent's general business strategies or practices that does not discuss with particularity the Minocycline Products;

2. information specifically excluded from the Minocycline Product Assets conveyed to the Acquirer;

3. information that is contained in documents, records or books of any Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Minocycline Products or that is exclusively related to the Retained Products; and,

4. information that is protected by the attorney work

product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

P. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer;

2. to manufacture, or to cause to be manufactured, a Product that is the therapeutic equivalent (as that term is defined by the FDA) and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product on behalf of an Acquirer;

3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.

Q. "Contract Manufacture Product(s)" means the Minocycline Products; *provided, however*, that, with the consent of the Acquirer, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of the Minocycline Products in performance of that Respondent's agreement to Contract Manufacture.

R. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the

manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

S. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee; *provided, however,* that, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Minocycline Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Minocycline Product.

T. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

U. "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. The term "Domain Name" *excludes* any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

V. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

W. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

X. "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.

Y. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Minocycline Product in the United States of America from the Respondent was, or is projected to be, among the top twenty highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date; or (iv) the end of the last quarter following the Acquisition Date or the Closing Date.

Z. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

AA. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

BB. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Minocycline Product for the Acquirer.

CC. "Minocycline Products" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Ranbaxy pursuant to the following ANDAs:

1. ANDA No. A065156;

2. ANDA No. A065062; and,

3. any supplements, amendments, or revisions to

those Applications.

DD. "Minocycline Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Respondent Ranbaxy related to each of the Minocycline Products, to the extent legally transferable, including, without limitation, the following assets and rights of Respondent Ranbaxy, as such assets and rights are in existence as of the date the Respondents sign the Agreement Containing Consent Orders in this matter and as are required to be maintained by the Respondents in accordance with the Asset Maintenance Order until the Closing Date:

1. all rights to all of the Applications related to the Minocycline Products;

2. all Product Intellectual Property related to the Minocycline Products that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the Minocycline Products;

4. all Product Manufacturing Technology related to the Minocycline Products that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the Minocycline Products;

6. all Product Scientific and Regulatory Material related to the Minocycline Products;

7. all Website(s) owned, operated, or controlled by Respondent Ranbaxy related exclusively to the Minocycline Products;

8. the content related exclusively to the Minocycline Products that is displayed on any Website owned, operated, or controlled by Respondent Ranbaxy that is not dedicated exclusively to the Minocycline

Products;

9. a list of all of the NDC Numbers related to the Minocycline Products, and rights, to the extent permitted by Law:

   a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of the Minocycline Products *except* for returns, rebates, allowances, and adjustments for such Minocycline Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

   b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Minocycline Product sold prior to the Closing Date and *except* as may be required by applicable Law;

   c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondents of any such cross-referencing that is discovered by a Respondent);

   d. to seek cross-referencing from a customer of the Respondents' NDC Numbers related to such Minocycline Product with the Acquirer's NDC Numbers related to such Minocycline Product;

   e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of such Minocycline Product

except for returns, rebates, allowances, and adjustments for such Minocycline Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and,

f. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondents prior to such notification(s) being disseminated to the customer(s);

10. all Product Development Reports related to the Minocycline Products;

11. at the option of the Acquirer of the Minocycline Products, all Product Assumed Contracts related to the Minocycline Products (copies to be provided to the Acquirer on or before the Closing Date);

12. all patient registries related to the Minocycline Products, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the Minocycline Products (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. a list of all customers and targeted customers for the Minocycline Products and a listing of the net sales (in either units or dollars) of the Minocycline Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the

Minocycline Products on behalf of the High Volume Account and his or her business contact information;

14. for each Minocycline Product:

    a. a list of the inventory levels (weeks of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and,

    b. anticipated reorder dates for each customer as of the Closing Date;

15. at the option of the Acquirer of the Minocycline Products 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 related to the Minocycline Products;

16. copies of all unfilled customer purchase orders for the Minocycline Products as of the Closing Date, to be provided to the Acquirer of the Minocycline Products not later than five (5) days after the Closing Date;

17. at the option of the Acquirer of the Minocycline Products, all unfilled customer purchase orders for the Minocycline Products; and,

18. all of Respondent Ranbaxy's books, records, and files directly related to the foregoing;

provided, however, that the term "Minocycline Product Assets" *excludes*: (i) documents relating to any Respondent's general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with particularity the Minocycline Products; (ii) administrative, financial, and accounting records; (iii) quality control records that are

determined not to be material to the manufacture of the Minocycline Products by the Interim Monitor or the Acquirer of the Minocycline Products; (iv) information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, *however*, that, in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the Minocycline Products and to the Retained Products or Businesses of any Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Minocycline Products; 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 of the Minocycline Products, 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 the Retained Products.

EE. "Minocycline Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Minocycline Product.

FF. "Minocycline Product Divestiture Agreements" means the following:

1. *Asset Purchase Agreement* by and among, Ranbaxy Laboratories Limited, Sun Pharmaceutical Industries Limited and Torrent

Pharma Inc., dated as of [insert];

2. *Supply Agreement* between Ohm Laboratories Inc. and Torrent Pharma Inc. to be executed on or before the Closing Date;

3. *Quality Agreement* between Ohm Laboratories Inc. and Torrent Pharma Inc. to be executed on or before the Closing Date; and,

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Minocycline Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Minocycline Product Divestiture Agreements are contained in Non-Public Appendix I.

GG. "Minocycline 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 Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by Respondent Ranbaxy:

1. to research and Develop the Minocycline Products for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Minocycline Products within the Geographic Territory;

3. to import or export the Minocycline Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the Minocycline Products in the Geographic Territory; and,

4. to have the Minocycline Products made anywhere in the world for distribution or sale within, or import into the Geographic Territory;

provided, however, that, for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by Respondent Ranbaxy 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 Respondent Ranbaxy.

HH. "Minocycline Product Releasee(s)" means the following Persons:

1. the Acquirer for the assets related to a particular Minocycline Product;

2. any Person controlled by or under common control with the Acquirer; and,

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Minocycline Products.

II. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

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

KK. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

LL. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

MM. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention

registrations, in each case filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

NN. "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.

OO. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

PP. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of a Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

QQ. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to any Minocycline Product and pursuant to which any Third Party is

obligated to purchase, or has the option to purchase without further negotiation of terms, any Minocycline Product from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of any Minocycline Product;

3. relating to any Clinical Trials involving any Minocycline Product;

4. with universities or other research institutions for the use of any Minocycline Product in scientific research;

5. relating to the particularized marketing of any Minocycline Product or educational matters relating solely to any Minocycline Product(s);

6. pursuant to which a Third Party manufactures any Minocycline Product on behalf of the Respondent;

7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of any Minocycline Product on behalf of Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Minocycline Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the Minocycline Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the Minocycline Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Minocycline Product to the Respondent including, but not limited to, consultation arrangements; and/or,

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the Minocycline Product or the Business related to such Minocycline Product;

provided, however, that, where any such contract or agreement also relates to a Retained Product(s), the Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to the Minocycline Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

RR. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Minocycline Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Minocycline Product or of any materials used in the research, Development, manufacture, marketing or sale of that Minocycline Product, including all

copyrights in raw data relating to Clinical Trials of that Minocycline Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Minocycline Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law) in connection with the acquisition of that Minocycline Product; 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 or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

SS. "Product Development Reports" means:

1. Pharmacokinetic study reports related to any Minocycline Product;

2. Bioavailability study reports (including reference listed drug information) related to any Minocycline Product;

3. Bioequivalence study reports (including reference listed drug information) related to any Minocycline

Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to any Minocycline Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to any Minocycline Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to any Minocycline Product;

8. FDA approved patient circulars and information related to any Minocycline Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to any Minocycline Product;

10. summary of Product complaints from physicians related to any Minocycline Product;

11. summary of Product complaints from customers related to any Minocycline Product;

12. Product recall reports filed with the FDA related to any Minocycline Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in any Minocycline Product;

14. reports related to any Minocycline Product from any consultant or outside contractor engaged to

investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce any Minocycline Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of any Minocycline Product;

16. analytical methods development records related to any Minocycline Product;

17. manufacturing batch records related to any Minocycline Product;

18. stability testing records related to any Minocycline Product;

19. change in control history related to any Minocycline Product; and

20. executed validation and qualification protocols and reports related to any Minocycline Product.

TT. "Product Employee Information" means the following, for each Minocycline Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Minocycline Product Core Employee (including former employees who were employed by Respondent Ranbaxy within ninety (90) days of the execution date of any Remedial Agreement);

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

   a. the date of hire and effective service date;

b. job title or position held;

c. a specific description of the employee's responsibilities related to the Minocycline Product; *provided, however*, that, in lieu of this description, the Respondent Ranbaxy may provide the employee's most recent performance appraisal;

d. the base salary or current wages;

e. the most recent bonus paid, aggregate annual compensation for Respondent Ranbaxy's last fiscal year and current target or guaranteed bonus, if any;

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

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

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

UU. "Product Intellectual Property" means all of the following related to a Minocycline Product (other than Product Licensed Intellectual Property):

1. Patents;

2. Product Copyrights;

3. Product Trademarks;

4. Product Trade Dress;

5. trade secrets, know-how, techniques, data, inventions, practices, methods, and other

confidential or proprietary technical, business, research, Development and other information; and,

6. rights to obtain and file for patents, trademarks, and copyrights and registrations related to any of the foregoing 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.

The term "Product Intellectual Property" *excludes* the corporate names or corporate trade dress of "Sun," "Ranbaxy" or "Daiichi Sankyo" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by any Respondent or the related corporate logos thereof, or general registered images or symbols by which Sun, Ranbaxy, or Daiichi Sankyo can be identified or defined.

VV. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to a Minocycline Product that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued) NDA or ANDA 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 Minocycline Product and that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued) NDA or ANDA as of the Acquisition Date; and

3. for any Minocycline Product that is the subject of an ANDA, all Right(s) of Reference or Use that is either owned or controlled by, or has been granted or licensed to the Respondent that is related to the Drug Master File of an NDA of a Product that is the therapeutic equivalent (as that term is defined by the FDA) of any Minocycline Product.

WW. "Product Manufacturing Employees" means all salaried employees of a Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of any Minocycline Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

XX. "Product Manufacturing Technology" means all of the following related to a Minocycline Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in

the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture that Product.

YY. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of any Minocycline Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to any Minocycline Product.

ZZ. "Product Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or clinical studies of any Minocycline Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

AAA. "Product Scientific and Regulatory Material" means

all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

BBB. "Product Trade Dress" means the current trade dress of a Product, including, but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

CCC. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

DDD. "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.

EEE. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent(s) and a

Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Minocycline Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or,

4. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Minocycline 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.

FFF. "Retained Product" means any Product(s) other than a Minocycline Product.

GGG. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application or to defend an Application, including the ability to make

available the underlying raw data from the investigation for an FDA audit.

HHH. "Supply Cost" means a cost not to exceed the Respondent's (as that Respondent is identified in the definition of the respective Minocycline Product) average direct per unit cost in United States dollars of manufacturing any Minocycline Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that, in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Minocycline Product, the term "Supply Cost" means the cost as specified in such Remedial Agreement for that Minocycline Product.

III. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Minocycline Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to any Minocycline Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

   a. manufacture any Minocycline Product in the quality and quantities achieved by the Respondent Ranbaxy, or the manufacturer and/or developer of such Minocycline Product;

   b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell any Minocycline Product in commercial quantities and to meet all Agency-approved specifications for such Minocycline Product; and,

   c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to any Minocycline Product.

JJJ. "Third Party(ies)" means any non-governmental Person other than the following: the Respondents; or, the Acquirer of particular assets or rights pursuant to this Order.

KKK. "Torrent" means Torrent Pharma Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with a United States address located at 150 Allen Road, Suite 102, Basking Ridge, New Jersey 07920.

LLL. "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. The term "Website" *excludes* 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 Minocycline Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Minocycline Product Assets and grant the related Minocycline Product License, absolutely and in good faith, to Torrent pursuant to, and in accordance with, the Minocycline Product Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Torrent or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Minocycline Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that, if Respondents have divested the Minocycline Product Assets to Torrent 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 Torrent is not an acceptable purchaser of the Minocycline Product Assets, then Respondents shall immediately rescind the transaction with Torrent, in whole or in part, as directed by the Commission, and shall divest the Minocycline Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that

receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that, if Respondents have divested the Minocycline Product Assets to Torrent 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 Minocycline Product Assets to Torrent (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 secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to an Acquirer, and to permit the Acquirer to continue the Business related to the Minocycline Products;

provided, however, that Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. 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, upon reasonable written notice and request, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Minocycline Products 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 applicable 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 the Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information that is exclusively related to the marketing or sales of the Minocycline Products to the marketing or sales employees associated with the Business related to those Retained Products

that are the therapeutic equivalent (as that term is defined by the FDA) of the Minocycline Products.

D. Respondents shall provide, or cause to be provided to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Minocycline Products; and,

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to any Respondent related to the Minocycline Products.

Respondents shall obtain any consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Minocycline Products. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

E. Respondents shall:

1. upon reasonable written notice and request from the Acquirer to Respondents, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting

Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of 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 Sun and Respondent Ranbaxy, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) for the Minocycline Products from Persons other than Respondent Sun and Respondent Ranbaxy;

2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the supplying Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving that Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

   provided, however, that a Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with that Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondents to

be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that, in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Minocycline Product, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;

4. make representations and warranties to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

   provided, however, that, in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Minocycline Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of the Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

7. in the event Respondents become (i) unable to supply or produce a Contract Manufacture Product from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer and (ii) that Product is the subject of an ANDA, then Respondents shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from another of Respondents' facility or facilities in those instances where such facilities are being used or have previously been used, and are able to be used, by Respondents to manufacture such Product(s);

8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture;

9. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all Product Approvals to manufacture the Contract

Manufacture Products in the same quality achieved by, or on behalf of, the Respondent Ranbaxy and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent Sun and Respondent Ranbaxy and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

The foregoing provisions, II.E.1. – 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer of that Contract Manufacture Product (or the Manufacturing Designee(s) of the Acquirer), respectively, is approved by the FDA to manufacture and sell such Contract Manufacture Product in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Sun and Respondent Ranbaxy; (ii) the date the Acquirer of a particular Contract Manufacture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Contract Manufacture Product has abandoned its efforts to manufacture such Contract Manufacture Product, or (iv) the date five (5) years from the Closing Date.

F. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of the Minocycline Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the therapeutic equivalent (as that term is defined by

the FDA) of the Minocycline 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 as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

G. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information 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. 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 maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

H. Respondents shall:

1. for a period of six (6) months from the Closing Date or until the hiring of ten (10) Minocycline Product Core Employees by the Acquirer or its Manufacturing Designee, whichever occurs earlier, provide the Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Minocycline Product Core Employees. Each of these periods is

hereinafter referred to as the "Minocycline Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Minocycline Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Minocycline Product Core Employee within the time provided herein shall extend the Minocycline Product 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 to consider whether to provide or continue providing to Minocycline Product Core Employees the opportunity to enter into employment contracts during a Minocycline Product Core Employee Access Period and not for any other purpose whatsoever, (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, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

3. during the Minocycline Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Minocycline Product Core Employees, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the

Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Minocycline Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Minocycline Product Core Employee who has received a written offer of employment from the Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Minocycline Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Minocycline Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Minocycline Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Minocycline Products, and to ensure successful execution of the pre-Acquisition plans for the Minocycline Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Minocycline Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

   provided, however, that this Paragraph does not require nor shall be construed to require

Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Minocycline Product Core Employees in connection with the Acquisition; and,

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Minocycline Product ("Minocycline Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Minocycline Product Employee;

   provided, however, that Respondents may hire any former Minocycline Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, *however*, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Minocycline Product Employees; or (ii) hire a Minocycline Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

I. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Minocycline Product to the Acquirer,

1. Respondents shall take actions as are necessary to:

a. maintain the full economic viability and marketability of the Businesses related to that Minocycline 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 Minocycline Product;

d. ensure the assets related to each Minocycline Product are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business related to each Minocycline Product;

e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and,

2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses related to that Minocycline Product.

J. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Minocycline Product Releasee(s) of the Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof; and/or,

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the

Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Minocycline Products for the purposes of marketing, sale or offer for sale within the United States of America of such Minocycline Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Minocycline Products. Each Respondent shall also covenant to the Acquirer that, as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer or the related Minocycline Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Minocycline Products for the purposes of marketing, sale or offer for sale within the United States of America of such Minocycline Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Minocycline Products. 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.

K. 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 the Acquirer to defend against, respond to, or otherwise participate in any litigation

brought by a Third Party related to the Product Intellectual Property, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Minocycline Products for the purposes of marketing, sale or offer for sale within the United States of America of such Minocycline Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Minocycline Products.

L. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Minocycline Products for the purposes of marketing, sale or offer for sale within the United States of America of such Minocycline Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Minocycline Products, that Respondent shall:

1. cooperate with the 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 Minocycline Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Minocycline Product; and/or,

3. permit the transfer to the 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 Minocycline Product.

M. The purpose of the divestiture of the Minocycline Product Assets and the provision of the related Product Manufacturing Technology (for the Contract Manufacture Products) 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 related to each Minocycline Product within the Geographic Territory;

2. to create a viable and effective competitor that is independent of Respondent Sun and Respondent Ranbaxy in the Business related to each Minocycline Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents

have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Minocycline Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Minocycline Product, until the earliest of: (i)

the date the Acquirer (or the Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Minocycline Product and able to manufacture that Minocycline Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Sun and Respondent Ranbaxy; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Minocycline Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Minocycline Product;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have

authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however*, that, beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph VII.B., and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Minocycline Product and obtaining the ability to manufacture each Minocycline Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Sun and

Respondent Ranbaxy.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Minocycline Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign,

grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to 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 can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, that 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. 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 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*, that, 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.

   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.

5. 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.

6. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

7. 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.

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

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

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

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where redacted documents or 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 Minocycline Products or the assets and Businesses associated with those Minocycline Products;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however,* that, pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the 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 Minocycline Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. For each Minocycline Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Minocycline

Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Minocycline Product, as applicable, and to have any such manufacture to be independent of the Respondent Sun and Respondent Ranbaxy, all as soon as reasonably practicable.

E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Minocycline Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any 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 to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and (i) every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A., II.B., II.C.1. – II.C.3, II.D., II.G. II.H. and II.I., and (ii) every one hundred twenty (120) days thereafter until

Respondents have fully complied with Paragraph II.E., Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondents shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at 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 Respondents shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of a Respondent;

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

C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution

of subsidiaries, if such change might affect compliance obligations arising out of this Order.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on March 18, 2025.

By the Commission.

NON-PUBLIC APPENDIX I
AGREEMENTS RELATED TO THE DIVESTITURES

[Redacted from the Public Record, but Incorporated by Reference]

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Sun Pharmaceutical Industries Ltd. ("Sun") of the voting securities of Respondent Ranbaxy Laboratories Ltd. ("Ranbaxy"), a subsidiary of Daiichi Sankyo Co., Ltd. ("Daiichi Sankyo"), collectively "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Sun is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India, with its headquarters located at Acme Plaza, Andheri Kurla Road, East Andheri, Mumbai 400 059, India. The headquarters for Sun's U.S. subsidiary, Sun Pharmaceutical Industries, Inc., is

located at 270 Prospect Plains Road, Cranbury, New Jersey, 08512, USA.

2. Respondent Ranbaxy is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its headquarters located at Plot No. 90, Sector 32, Gurgaon-122001 (Haryana), India. The headquarters for Ranbaxy's U.S. subsidiary, Ranbaxy Inc., is located at 600 College Road East, Suite 2100, Princeton, New Jersey, 08540, USA.

3. Respondent Daiichi Sankyo is a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its headquarters located at 3-5-1, Nihonbashi-honcho, Chuo-ku, Tokyo 103-8426, Japan. The headquarters for Daiichi Sankyo's U.S. subsidiary, Daiichi Sankyo, Inc., is located at Two Hilton Court, Parsippany, New Jersey, 07054, USA.

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

ORDER

I.

IT IS ORDERED THAT, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and, when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Sun" means: Sun Pharmaceutical Industries Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sun Pharmaceutical Industries Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of

each. After the Acquisition Date, Sun shall include Ranbaxy.

B. "Ranbaxy" means: Ranbaxy Laboratories Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Ranbaxy Laboratories Ltd. (including, without limitation, Ohm Laboratories, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Daiichi Sankyo" means: Daiichi Sankyo Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Daiichi Sankyo Co., Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Sun, Ranbaxy and Daiichi Sankyo, individually and collectively. After the Acquisition Date, Respondents means Sun and Ranbaxy, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Decision and Order" means the:

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

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

G. "Minocycline Product Business(es)" means the Business of Respondents within the Geographic

Territory specified in the Decision and Order related to each of the Minocycline Products to the extent that such Business is owned, controlled, or managed by the Respondents and the Assets related to such Business to the extent such Assets are owned by, controlled by, managed by, or licensed to, the Respondents.

H. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

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

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

A. Until Respondents fully transfer and deliver the Minocycline Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Minocycline Product Businesses, to minimize any risk of loss of competitive potential for such Minocycline Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Minocycline Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Minocycline Product 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 related Minocycline Product Businesses.

B. Until Respondents fully transfer and deliver the Minocycline Product Assets to an Acquirer, Respondents shall maintain the operations of the related Minocycline 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 marketability, viability, and competitiveness of such Minocycline Product Businesses 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; employees; and others having business relations with each of the respective Minocycline Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Minocycline 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 Minocycline Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Minocycline Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Minocycline Products and/or to prevent any diminution in sales of each of the Minocycline Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Minocycline Product Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Minocycline Products that were

marketed or sold by Respondents prior to April 6, 2014, at the related High Volume Accounts;

5. making available for use by each of the respective Minocycline 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 Minocycline Product Business; and

6. providing such support services to each of the respective Minocycline Product Businesses as were being provided to such Minocycline Product Business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until Respondents fully transfer and deliver each of the respective Minocycline Product Assets 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 Minocycline Products for the relevant Minocycline Product's last fiscal year.

D. Respondents shall:

1. for a period of six (6) months from the Closing Date or until the hiring of ten (10) Minocycline Product Core Employees by the Acquirer or its Manufacturing Designee, whichever occurs earlier, provide the Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Minocycline Product Core Employees related to the Minocycline Products and assets acquired by the Acquirer. Each of these periods is hereinafter referred to as the "Minocycline Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the

Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Minocycline Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Minocycline Product Core Employee within the time provided herein shall extend the Minocycline Product 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 to consider whether to provide or continue providing to Minocycline Product Core Employees the opportunity to enter into employment contracts during a Minocycline Product Core Employee Access Period and not for any other purpose whatsoever, (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, and (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends;

3. during the Minocycline Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Minocycline Product Core Employees related to the Minocycline Products and assets acquired by the Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Minocycline Product

or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Minocycline Product Core Employee who has received a written offer of employment from the Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Minocycline Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

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

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Minocycline Product ("Minocycline Product Employee") to terminate his or her employment relationship with the

Acquirer or its Manufacturing Designee; or hire any Minocycline Product Employee;

provided, however, that Respondents may hire any former Minocycline Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Minocycline Product Core Employees in connection with the Acquisition;

provided further, however, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Minocycline Product Employees; or (ii) hire a Minocycline Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

E. Pending divestiture of the Minocycline Product Assets, Respondents shall:

1. not use, directly or indirectly, any 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;

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 such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information that is exclusively related to the marketing or sales of the Minocycline Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Minocycline 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 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 maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

H. Respondents 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.

I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Minocycline Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Minocycline Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Minocycline Product 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 ("Interim Monitor") to assure that Respondents expeditiously comply with all of their

obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

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

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Minocycline Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Minocycline Product, until the earliest of: (i) the date the Acquirer (or the Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Minocycline Product and able to manufacture that Minocycline Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Minocycline Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Minocycline Product;

provided, however, that, with respect to each Minocycline Product, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the

Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided, however,* that, beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and

Order, and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Minocycline Product and obtaining the ability to manufacture each Minocycline Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; 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 Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

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

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

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the

provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the divestiture of all of the Minocycline Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Sun Pharmaceutical Industries Ltd. ("Sun") that is designed to remedy the anticompetitive effects resulting from Sun's acquisition of Ranbaxy Laboratories Ltd. ("Ranbaxy") from Daiichi Sankyo Co., Ltd. ("Daiichi Sankyo"). Under the terms of the proposed Consent Agreement, the parties are required to divest all of Ranbaxy's rights and assets to generic minocycline hydrochloride 50 mg, 75 mg, and 100 mg tablets ("minocycline tablets") to Torrent Pharmaceuticals Ltd. ("Torrent").

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, to make a final decision as to whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order ("Order").

Pursuant to an agreement dated April 6, 2014, Sun plans to acquire Ranbaxy in an all-stock deal valued at approximately $4 billion (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening future competition in the markets for each dosage strength of generic minocycline tablets in the United States. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition.

I. The Product and Structure of the Markets

The Proposed Acquisition would reduce the number of future suppliers in the markets for generic minocycline tablets, which physicians prescribe to treat bacterial infections including

pneumonia and other respiratory tract infections, acne, and other skin, genital, and urinary tract infections. Pharmaceutical companies usually launch generic versions of drugs after a branded product loses its patent protection. When only one generic product is available, the price for the branded product acts as a ceiling above which the generic manufacturer cannot price its product. During this period, the branded product competes directly with the generic. Once multiple generic suppliers enter a market, the branded drug manufacturer usually ceases to provide any competitive constraint on the prices for generic versions of the drug. Rather, generic suppliers compete only against each other. In generic pharmaceutical product markets, price generally decreases as the number of generic competitors increases. The United States is the relevant geographic market for generic drugs because the U.S. Food and Drug Administration ("FDA") must approve them for sale within the United States.

There are currently only three suppliers of each dosage strength of generic minocycline tablets in the United States: Ranbaxy, Dr. Reddy's Laboratories Ltd., and Par Pharmaceutical Companies, Inc. Sun is one of only a limited number of firms likely to enter the generic minocycline tablets markets in the near future. Sun's acquisition of Ranbaxy would therefore deprive consumers of the increased competition and likely price reductions that would have occurred as a result of Sun's independent entry.

II. Entry

Entry into the markets for generic minocycline tablets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including approval by the FDA, is costly and lengthy.

III. Effects

The Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating future competition that would otherwise have occurred when Sun's generic minocycline tablets entered the markets. Market participants characterize generic minocycline tablets as commodities, and each market as one in which the number of generic suppliers has a direct impact on pricing. Customers and competitors have confirmed that the price of generic pharmaceutical products decreases with new entry even after several other suppliers have entered the market. Further, customers generally believe that having at least four suppliers in each generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.

The Proposed Acquisition would eliminate significant future competition between Sun and Ranbaxy. The evidence shows that anticompetitive effects are likely to result from the Proposed Acquisition due to the elimination of an additional independent competitor in the markets for generic minocycline tablets, which would have allowed customers to negotiate lower prices. Thus, absent a remedy, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for generic minocycline tablets.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets. Pursuant to the Consent Agreement and the Order, the parties are required to divest all of Ranbaxy's rights and assets to generic minocycline tablets to Torrent. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Proposed Acquisition is consummated.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Torrent is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the parties to unwind the sale of rights to Torrent and

then divest the products to a Commission-approved acquirer within six months of the date the Order becomes final. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

The proposed Consent Agreement and Order contain several provisions to help ensure that the divestitures are successful. The Order requires that Ranbaxy transfer to Torrent all confidential business information and requires that Sun and Ranbaxy take all actions that are necessary to maintain the full viability and marketing of the generic minocycline tablets until Torrent commences the distribution, marketing, and sale of the products.

The proposed Order also requires the parties to divest Ranbaxy's generic minocycline hydrochloride 50 mg, 75 mg, and 100 mg capsules ("minocycline capsules") to Torrent to ensure that Torrent achieves regulatory approval to qualify a new API supplier for its minocycline tablets as quickly as Ranbaxy would have. Torrent will be able to establish the current API supplier of the minocycline capsules as the API supplier for its minocycline tablets through a less time-intensive regulatory process if Torrent controls both products and uses the same API supplier for both. Moreover, the proposed Order requires Sun and Ranbaxy to manufacture and supply generic minocycline tablets and capsules to Torrent following the divestiture to allow Torrent to enter the markets while it validates its manufacturing process and seeks the necessary FDA approvals.

The Commission will appoint Frank Civille to act as an interim monitor to assure that Sun and Ranbaxy expeditiously comply with all of their obligations and perform all of their responsibilities pursuant to the Consent Agreement. In order to ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Sun and Ranbaxy to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

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

SONY COMPUTER ENTERTAINMENT AMERICA LLC

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

Docket No. C-4514; File No. 122 3252
Complaint, March 24, 2015 – Decision, March 24, 2015

This consent order addresses Sony's false advertising claims about the "game changing" technological features of its PlayStation Vita handheld gaming console during its U.S. launch campaign in late 2011 and early 2012. According to the complaint, Sony advertised several notable features of the PS Vita. First, it promoted the "remote play" feature of the PS Vita as a way that consumers could access games already residing on their PS3 consoles and play them remotely on the PS Vita anywhere with a Wi-Fi connection. Second, its advertisements represented that, with the "cross platform gaming" or "cross save" feature, consumers could begin playing a game on a PS3 console, save their progress at any point in the game, and then continue that game where they left off on the PS Vita. Third, with the "3G version" of the PS Vita, available for an extra $50 and monthly fees, Sony represented that consumers could access a 3G network to play games live with others. The complaint alleges that Sony's representations regarding these features were false or misleading and thus violated Section 5 of the FTC Act. Under the consent order, Sony is barred from making misleading advertising claims about the features or attributes of its handheld gaming consoles in the future. Sony must also provide consumers who bought a PS Vita gaming console before June 1, 2012, either a $25 cash or credit refund or a $50 merchandise voucher for select video games and/or services.

Participants

For the *Commission: Linda K. Badger* and *Matthew D. Gold.*

For the *Respondent: Stuart Friedel, C. Andrew Keisner,* and *Ronald Urbach, Davis & Gilbert LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sony Computer Entertainment America LLC, a limited liability company ("Respondent" or "SCEA"), 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:

Complaint

1. Respondent Sony Computer Entertainment America LLC is a limited liability company with its principal office or place of business at 2207 Bridgepoint Pkwy, San Mateo, California 94404.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the PlayStation Vita ("PS Vita"). The PS Vita is a game console that Respondent first offered for sale in the United States on February 22, 2012, for approximately $250. The PS Vita is part of Respondent's line of game consoles, including the PlayStation 3 video game console ("PS3") that allows consumers to play video games on their television sets. Unlike the PS3, the PS Vita is a handheld, portable game console that allows consumers to play games away from their television sets. In addition to selling game consoles, Respondent is one of the many game developers writing game titles for use on its PS3 and PS Vita game consoles. At the time the PS Vita was launched, "MLB 12: The Show," "Killzone 3," and "Unit 13" were popular SCEA titles for the PS3.

3. Respondent's advertisements promoted, among other things, three notable features of the PS Vita. First, it promoted the "remote play" feature as a way that consumers could access games already residing on their PS3 consoles and play them remotely on the PS Vita anywhere with a Wi-Fi connection. Second, advertisements represented that, with the "cross platform gaming" or "cross save" feature, consumers could begin playing a game on a PS3, save their progress at any point in the game, and then continue that game where they left off on the PS Vita. Third, with the "3G version" of the PS Vita, available for an extra $50 and monthly fees, advertisements represented that consumers could access a 3G network to play games live with others ("multiplayer gaming").

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

5. Respondent has disseminated or has caused to be disseminated advertisements for the PS Vita, including but not necessarily limited to the attached Exhibits A through H. These advertisements contain the following statements and depictions:

a. Internet Advertisement and Promotional Video (Exhibit A, transcript, and Exhibit B, DVD containing ad)

[*Voice Over*]: "With PlayStation's Cross Platform Play, you've got game, wherever you go." [Depiction of television set and PS3 console, with PS3 game running on the television screen]

[*Voice Over*]: "With Cross Platform Gaming, you can play your PS3 game, pause it, then pick up right where you left off on your Vita."

[Depiction of a PS3 game being played on a television set, with the words "CROSS PLATFORM GAME" appearing above it. An animated hand pushes a button to pause the game on a PS3 remote, and the PS3 remote morphs into a PS Vita. Then the hand pushes a button on the PS Vita, and the same PS3 game begins to play on the PS Vita screen]

. . .

[Depiction of a PS Vita console with game title, Killzone 3, playing on screen]

[*Voice Over*]: "And with Remote Play, your PS Vita can tap into your PlayStation 3, so PlayStation 3 games and content are easily accessible on the go." [Depiction of images from Killzone 3 game being played on a television in a living room setting. Also depicts Killzone 3 being played on the PS Vita, but handheld console moves away from the living room to a bakery or cafe setting]

[*On-screen Super*]: "**KILLZONE 3**"

[*On-screen Super*]: "**REMOTE PLAY**"

[*Voice Over*]: "The world is in play, with PlayStation Vita. PlayStation."

[*On-screen Super*]: "**NEVER STOP PLAYING**"

b. Television Commercial (Exhibit C, transcript, and Exhibit D, DVD containing ad)

[Depiction of a young man sitting on a couch, playing the PS3 game, "MLB 12: The Show"]

[*Voice Over*]: "It's a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn't ride you like a rented scooter."

[Depiction of the inside of a subway car]

[*On-screen Super*]: "Simulated screen visual"

[*Voice Over*]: "Who says you have to choose?**"**

[*On-screen Super*]: "**CROSS PLATFORM PLAY**"

[Depiction of the man pausing the PS3 game, picking up the PS Vita, viewing a download screen, and walking out the door, continuing to play the same game on his PS Vita while walking down the street]

[*Voice Over*]: "Your PS3 stays home, but the game goes with you."

[*On-screen Super*]: "**#GAMECHANGER**"

[*Voice Over*]: "Never stop playing."

[*On-screen Super*]: "**NEVER STOP PLAYING**"

[*Voice Over*]: "PlayStation Vita"

[*On-screen Super*]: "**PS VITA**"

c. In-Store Advertisement (Exhibit E)

"**NEVER STOP PLAYING.**

[Depiction of PS Vita]

ALWAYS COMPETITIVE WITH 3G. Game with your friends when you want and in more places.

. . .

Cross Platform Game Save

Play on your PS3 system and then continue your game on the go with PS Vita.

[Depictions of the game MLB 12: The Show, including a depiction of a PS3 and a PS Vita connected by arrows, displaying the same screen shot from a baseball game.] "

d. Internet Advertisement (Exhibit F)

"**PlayStation Vita System Features**

. . .

3G/AT&T

The new PS Vita 3G/Wi-Fi System, powered by AT&T's Mobile Broadband Network, will change the way you game with real-time scores and game ranking news feeds, competitive multiplayer game sessions, and cross-game text messaging with Party. Game at the speed of your mobile life style."

e. Television and Internet Commercial (Exhibit G, transcript, and Exhibit H, DVD containing ad)

[Depiction of a young man walking down the street, playing the shooting game, "Unit 13" on his PS Vita]

[*Voice Over*]: "Suddenly it doesn't feel so safe out there."

[*On-screen Super*]: "Simulated screen visual"

[*Voice Over*]: "People are lookin' at 'cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs."

[Depiction of the young man passing strangers on the street who also appear to be playing on a PS Vita. They look furtively at each other. A man passing by on a bus, who also appears to be playing a PS Vita, nods to the young man.]

[*Voice Over*]: Find a friend, find an enemy, find a game anywhere, anytime."

[*On-screen Super*]: "**3G GAMING**"

[*On-screen Super*]: "**#GAMECHANGER**"

[*Voice Over*]: "Never Stop Playing"

[*On-screen Super*]: "**NEVER STOP PLAYING**"

[*Voice Over*]: "PlayStation Vita"

[*On-screen Super*]: "**PS VITA**"

6. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

a. With remote play, PS Vita users can easily access their PS3 games on the PS Vita.

b. With remote play, PS Vita users can easily access Killzone 3 and other similar, data-rich PS3 games on the PS Vita.

c. PS Vita users are able to pause any PS3 game they are playing on their PS3 consoles at any point in the game, and continue to play that game where they left off on the PS Vita.

d. PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network.

7. In truth and in fact:

   a. With remote play, PS Vita users cannot easily access their PS3 games on the PS Vita. Most PS3 games are not remote playable on the PS Vita. Respondent did not specifically design the PS3 system to support remote play functionality.

   b. With remote play, PS Vita users cannot easily access Killzone 3 and other similar, data-rich PS3 games on the PS Vita. Respondent never enabled remote play on its Killzone 3 title, and very few, if any, other PS3 games of similar size and complexity are remote play compatible.

   c. PS Vita users are not able to pause any PS3 game they are playing on their PS3 consoles at any point in the game, and continue to play that game where they left off on the PS Vita. This cross platform gaming feature is only available for a limited number of PS3 game titles, and the pause and save feature varies significantly by game. For example, with respect to "MLB 12: The Show," consumers are only able to pause and save the game to the PS Vita after having finished the entire baseball game (all nine innings) on the PS3.

   d. PS Vita users who own the 3G version are not able to engage in live, multiplayer gaming through a 3G network. PS Vita users are restricted to asynchronous or "turn-based" multiplayer gaming with the 3G version of the PS Vita.

Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that consumers can play PS3 games, such as "MLB 12: The Show," on the PS3, pause the game, and continue that game on the PS Vita. Respondent has failed to disclose that to use this feature, consumers must own two versions of the same game for each

console (*e.g.,* two versions of "MLB 12: The Show"), one for the PS3 and one for the PS Vita. This fact would be material to consumers in their purchase and use of the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

9. 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-fourth day of March, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A

Transcription of Internet Advertisement and Promotional Video

Voice Over: "With PlayStation's Cross Platform Play, you've got game, wherever you go."
["PSVITA PlayStation Vita ↔ PS3 CROSS PLATFORM PLAY (PS3)" text appears on screen.]

Voice Over: "With Cross Platform Gaming, you can play your PS3 game,"
["CROSS PLATFORM GAME" text appears above TV and PS3 console]

Voice Over: "pause it,"
["GAME PAUSED" text appears on TV screen, and then on the screen of a PS Vita.]

Voice Over: "then pick up right where you left off on your Vita."

Voice Over: "PlayStation 3 and PS Vita players can also go head-to-head thanks to Cross Platform Game Play,"
["CROSS PLATFORM GAME PLAY" text appears at top; "WIPEOUT 2048" text appears in lower left corner]

Voice Over: "And with Remote Play your PS Vita can tap into your PlayStation 3,"
["KILLZONE 3" text appears in lower left corner.]

Voice Over: "so PlayStation 3 games and content are easily accessible on the go."
["REMOTE PLAY" text appears at top; "KILLZONE 3" text appears in lower left corner.]

Voice Over: "The world is in play with PlayStation Vita."
["KILLZONE 3" text appears in lower left corner. "REMOTE PLAY" text appears at top.]

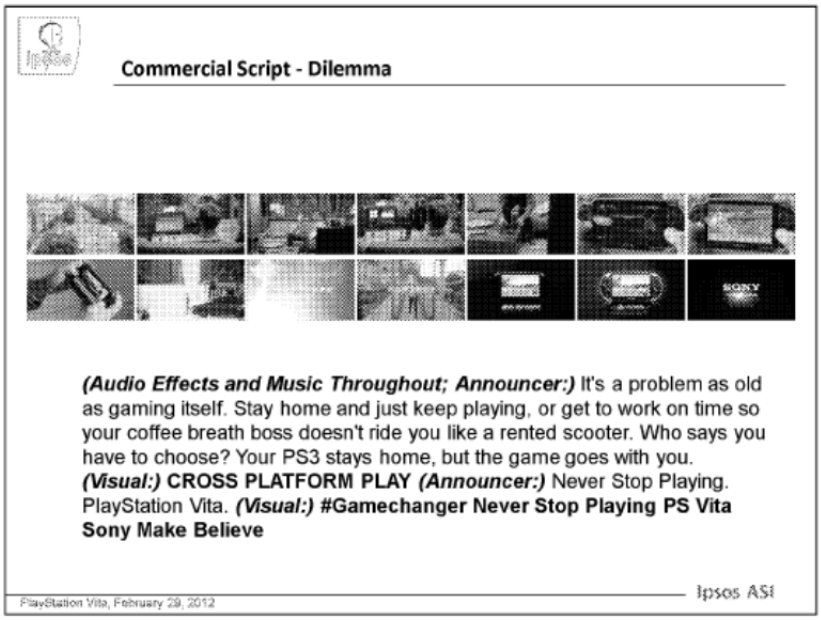
Voice Over: "PlayStation."
["NEVER STOP PLAYING" text appears on screen.]

EXHIBIT B

[Redacted from the Public Record, but Incorporated by Reference]

Complaint

EXHIBIT C



Commercial Script - Dilemma

(Audio Effects and Music Throughout; Announcer:) It's a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn't ride you like a rented scooter. Who says you have to choose? Your PS3 stays home, but the game goes with you. ***(Visual:)*** **CROSS PLATFORM PLAY** ***(Announcer:)*** Never Stop Playing. PlayStation Vita. ***(Visual:)*** **#Gamechanger Never Stop Playing PS Vita Sony Make Believe**

PlayStation Vita, February 29, 2012

Ipsos ASI

EXHIBIT D

[Redacted from the Public Record, but Incorporated by Reference]

Complaint

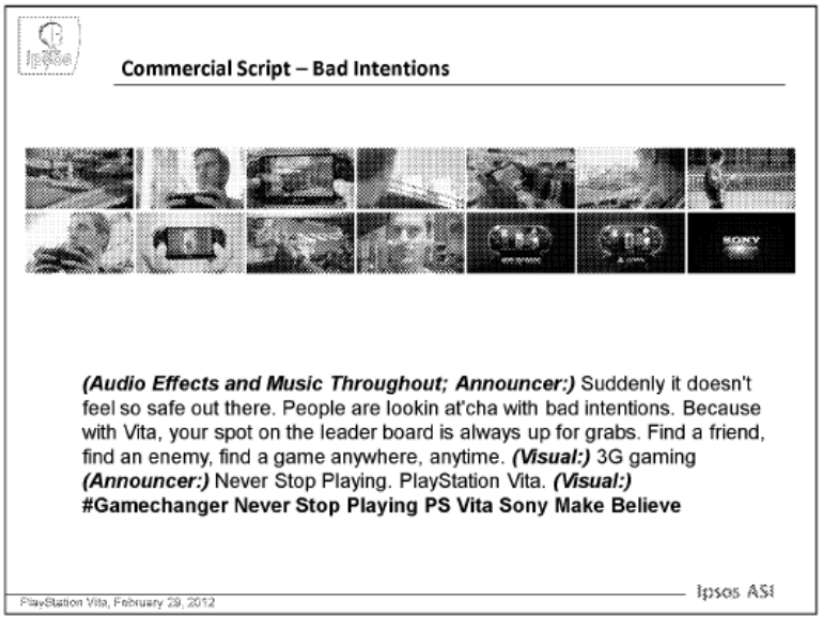
EXHIBIT E

Complaint

EXHIBIT F

Complaint

EXHIBIT G



Commercial Script – Bad Intentions

(Audio Effects and Music Throughout; Announcer:) Suddenly it doesn't feel so safe out there. People are lookin at'cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs. Find a friend, find an enemy, find a game anywhere, anytime. ***(Visual:)*** 3G gaming ***(Announcer:)*** Never Stop Playing. PlayStation Vita. ***(Visual:)*** **#Gamechanger Never Stop Playing PS Vita Sony Make Believe**

PlayStation Vita, February 29, 2012

Ipsos ASI

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

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

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

1. Respondent Sony Computer Entertainment America LLC is a Delaware limited liability company with its principal office or place of business at 2207 Bridgepoint Pkwy, San Mateo, California 94404. SCEA is a wholly-owned subsidiary of Sony Corporation of America, Inc., headquartered in New York, New York.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Sony Computer Entertainment America LLC, a limited liability company, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Clearly and prominently" shall mean as follows:

   a. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

   b. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the

communication. *Provided, however,* that, for communications disseminated through programming over which respondent does not have editorial control (*e.g.*, an endorser's appearance on a news program or talk show), the required disclosures may be made in a form consistent with subparagraph (b) of this definition;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

4. "Eligible Purchaser" means any consumer who purchased the PlayStation Vita before June 1, 2012 and did not return it for a full refund.

5. "Handheld Game Console Product" means any handheld portable electronic device designed for and primarily used for playing video games that has its own screen, speakers and controls in one unit, including the PlayStation Vita ("PS Vita") and the PlayStation Portable ("PSP").

6. "Home Game Console Product" means any electronic device designed for and primarily used for playing video games on a separate television screen, including the PlayStation 3 ("PS3") and the PlayStation 4 ("PS4").

7. The term "including" in this order means "without limitation."

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any material gaming feature or capability of such product when used as a standalone device to play video games.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of the Handheld Game Console Product or Home Game Console Product to interact with, or connect to, any other Handheld Game Console Product during gaming, unless at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of any Handheld Game Console Product to interact with, or connect

with, any Home Game Console Product during gaming, unless it discloses, clearly and prominently, and in close proximity to the representation, that consumers must purchase two versions of the same video game, one for the Handheld Game Console Product and one for the Home Game Console Product, if such is the case.

IV.

IT IS FURTHER ORDERED that respondent shall offer Eligible Purchasers a check or credit for twenty-five dollars ($25) or the alternative of a voucher (or entitlement) for merchandise, video games, and/or services with a retail value of fifty dollars ($50) or more. Respondent shall provide such redress to Eligible Purchasers as follows:

A. Within five (5) days after the date of service of this order, respondent shall provide a notice, via email, to each Eligible Purchaser whom it can reasonably identify. Respondent shall send the notice to the current or last known email address for each such Eligible Purchaser. The electronic notice shall be in the form set out in Appendix A. The subject line of the email required by this subpart shall read "Important: Sony Computer Entertainment America offering money back or merchandise to certain purchasers of PlayStation Vita." No additional information, other than that described in subpart IV.D. of this order, shall be included in or added to the notice (Appendix A) required by this subpart.

B. Within five (5) days after the date of service of this order, respondent shall post a notice on its website informing Eligible Purchasers who were not provided with the notice described in subpart IV.A. above, how they can obtain redress. A prominent link to this notice shall be posted on the first page of the PlayStation Vita section of its website, and shall read "Important: Sony Computer Entertainment America offering money back or merchandise to certain purchasers of PlayStation Vita." This notice shall include access, by way of a link or other means, to a form set out in Appendix B to this order, asking these

consumers to provide sufficient credible evidence that they qualify as Eligible Purchasers. No additional information, other than that described in subpart IV.D. of this order, shall be included in or added to Appendix B. Any consumer whom respondent does not notify under subpart IV.A. of this order, and who contacts respondent or the Commission in any manner regarding this Part, shall be directed to this notice. Respondent may decline a request for redress made under subparts IV.A. or IV.B. if it has a reasonable good faith belief based on the evidence that the request is not from an Eligible Purchaser or is fraudulent.

C. Respondent shall honor requests for redress from Eligible Purchasers who submit the appropriate forms, pursuant to subparts IV.A. or IV.B., within ninety (90) days after the date of service of this order ("Redress Period"). The period for fulfillment of redress requests is set forth in subpart IV.E. of this order.

D. In the notices required by subparts IV.A. and IV.B., respondent shall provide, clearly and prominently, all information necessary for Eligible Purchasers to evaluate this offer before making a decision between the cash payment and the alternative of a voucher (or entitlement) for merchandise, video games, and/or services, and all information necessary to redeem the offer.

E. Respondent shall send all twenty-five dollar ($25) checks promptly through the U.S. Postal Service or shall, at the discretion of the Eligible Purchaser, promptly provide a twenty-five dollar ($25) credit to the Eligible Purchaser's PSN account. Respondent shall promptly provide secure vouchers (or entitlements) for merchandise, video games, and/or services, redeemable through PSN accounts, to all Eligible Purchasers who choose this alternative. For the purposes of this order, "promptly" shall mean within sixty (60) days after the end of the Redress Period.

F. For a period of one hundred eighty (180) days after the date of service of this order, respondent shall provide, and adequately staff during ordinary business hours, a toll-free telephone number to answer questions about this program.

G. Within two hundred ten (210) days after the date of service of this order, respondent shall provide the Commission with a report, in writing, setting forth in detail the manner and form of its own compliance with this Part.

V.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

VI.

IT IS FURTHER ORDERED that respondent SCEA and its successors and assigns shall deliver a copy of this order to all current and, for the next five (5) years, all future Vice Presidents of Marketing and Directors of Marketing ("Personnel") having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent and its

successors and assigns shall deliver this order to current Personnel within thirty (30) days after the date of service of this order, and to future Personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent SCEA and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of Sony Computer Entertainment America LLC, FTC File Number 122-3252. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

VIII.

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

IX.

This order will terminate on March 24, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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.

APPENDIX A

CASH BACK OR MERCHANDISE OFFER FROM
SONY COMPUTER ENTERTAINMENT AMERICA LLC

Dear [NAME]

Our records show that you purchased a PlayStation Vita handheld game console prior to June 1, 2012. The Federal Trade Commission has alleged that some SCEA advertisements for the PlayStation Vita during this period were deceptive. Although SCEA neither admits nor denies liability in connection with this matter, SCEA has agreed to settle the dispute with the Federal Trade Commission by offering either cash back (or credit on your PSN account) or merchandise to customers who purchased a PlayStation Vita before June 1, 2012, and who have not returned the product for a full refund.

Accordingly, we are pleased to offer you the opportunity to receive a check for $25 (or a $25 credit on your PSN account). Alternatively, you are eligible to receive a merchandise voucher [or entitlement] that you can use to select from a list of merchandise, video games and/or services. The selection of merchandise, video games and/or services that are available through this offer has a retail value of $50 or more.

You are eligible to receive either a check for $25 (or a $25 credit on your PSN account) or a merchandise voucher [or entitlement], but not both. For details of each offer and to make your choice of the $25 check (or credit) or the merchandise voucher [or entitlement], please click here [link].

You MUST complete and submit the information requested in the above link by [Insert date equal to 90 days from service of this order] to be eligible to receive the $25 check (or $25 credit on your PSN account) or merchandise voucher [or entitlement] worth $50 or more. Please be assured that your acceptance of this offer does not obligate you to purchase anything.

For more information on our settlement with the Federal Trade Commission, please visit www.ftc.gov and search for "Sony Computer Entertainment America."

If you have any questions, please call Sony Computer Entertainment America claims administration at 1-800-xxx-xxxx.

[CLICK-THROUGH PAGE]

Use this form to choose between a check for $25 (or a $25 credit on your PSN account) or a merchandise voucher [or entitlement] worth $50 or more.

I certify that the information I am providing below is true and accurate, and agree to the provisions as set out below.

Check Next to Each of the Below If It Is True and Accurate:

I certify that I purchased a PlayStation Vita before June 1, 2012. _____

I certify that I have not returned my PlayStation Vita for a full refund. _____

I certify that I have neither already redeemed this offer, nor made any other consumer redress request for the PlayStation Vita from Sony Computer Entertainment America. _____

Required information:

My PSN ID is _____ (Your PSN ID is the email address where you received this notice.)

Optional Information:

The following information is not required, and will not affect your eligibility to receive either a check (or credit) or a merchandise voucher [or entitlement]. To help facilitate the administration of your request, please provide one of the following (both if you have them):

The SIRIS number _____ or SERIAL number _____ of the PlayStation Vita that you purchased before June 1, 2012. (The SIRIS number and the SERIAL number are found on the bottom edge of your PlayStation Vita product. The SIRIS number is left of the connector port and the SERIAL number is right of the

connector port. These numbers are also found on the side panel of the PlayStation Vita package.)

Selection of Consumer Redress Offer:

Please select ONE of the following three Consumer Redress Offers. Additional information describing each offer is available by clicking here [pop-up window or link].

1. _____ I select a $25 check. Please send the check to me at the following mailing address:

[Fields for entering mailing address]

OR

2. _____ Instead of the $25 check, I select a $25 credit to be applied to my PSN account. Additional information describing this offer is available by clicking here [pop-up window or link].

OR

3. _____ I select the Merchandise Voucher [or Entitlement] good for $50 or more in value of merchandise, video games and/or services. Additional information describing this offer is available by clicking here [pop-up window or link].

I understand that by submitting this request and accepting a refund of cash (or credit) or a merchandise voucher [or entitlement] issued through this program, I agree to waive any present or future claims I may have against Sony Computer Entertainment America LLC in connection with the advertising, labeling, promotion, offering for sale or sale of the PlayStation Vita for which I received consumer redress.

To Submit Your Request and Agree to the Above

CLICK HERE

APPENDIX B

CASH BACK OR MERCHANDISE OFFER FROM
SONY COMPUTER ENTERTAINMENT AMERICA LLC

Dear Customer:

If you purchased a PlayStation Vita handheld game console before June 1, 2012, you may be eligible to receive cash back (or credit on your PSN account) or merchandise worth $50 or more. The Federal Trade Commission has alleged that some SCEA advertisements for the PlayStation Vita during this period were deceptive. Although SCEA neither admits nor denies liability in connection with this matter, SCEA has agreed to settle the dispute with the Federal Trade Commission by offering either cash back (or credit on your PSN account) or merchandise to customers who purchased a PlayStation Vita before June 1, 2012, and who have not returned the product for a full refund.

Accordingly, if you qualify as an Eligible Purchaser and properly submit the required form and provide certain information and materials, you will be entitled to receive a check for $25 (or a $25 credit on your PSN account). Alternatively, you will be eligible to receive a merchandise voucher [or entitlement] that you can use to select from a list of merchandise, video games and/or services. The selection of merchandise, video games and/or services that are available through this offer has a retail value of $50 or more.

Please note that PlayStation Vita owners who purchased their Vitas before June 1, 2012, and who registered their Vitas, should be receiving emails to their PSN accounts with full details about this offer. If you have received such an email, please follow the instructions in the email to claim your $25 cash (or credit) or merchandise voucher [or entitlement].

Please also note that you may be eligible to receive either the merchandise voucher [or entitlement] or a check for $25 (or a $25 credit on your PSN account), but not both. For details on each offer and to make your choice of the $25 check (or credit) or the merchandise voucher [or entitlement], please complete and submit the form below.

You MUST complete, sign and return the below form, and provide the requested materials and information, by [Insert date equal to 90 days from service of this order] to be eligible to receive your $25 check (or $25 credit on your PSN account) or merchandise voucher [or entitlement] with a retail value of $50 or more. Please be assured that your acceptance of this offer does not obligate you to purchase anything.

For more information on our settlement with the Federal Trade Commission, please visit www.ftc.gov and search for "Sony Computer Entertainment America."

If you have any questions, please call Sony Computer Entertainment America claims administration at 1-800-xxx-xxxx.

COMPLETE, PRINT OUT, AND RETURN
THIS FORM WITH ALL REQUIRED MATERIALS

As part of the process to qualify the recipient of this form as an Eligible Purchaser of a PlayStation Vita purchased before June 1, 2012, I have read the below, certify that the information and accompanying materials are true and accurate, agree to the provisions, and confirm my selection of consumer redress.

Check next to each of the below if it is true and accurate:

I certify that I purchased a PlayStation Vita before June 1, 2012. _____
I certify that I have not returned my PlayStation Vita for a full refund. _____
I certify that I have neither already redeemed this offer, nor made any other consumer redress request for the PlayStation Vita from Sony Computer Entertainment America _____

Required information:

Name: _____
Home Address: _____

_____

To help facilitate the administration of your form, and ensure that Eligible Purchasers meet the qualifications, please provide EITHER the SIRIS number _____ OR the SERIAL number _____ of the PlayStation Vita that you purchased before June 1, 2012. (The SIRIS number and the SERIAL number are found on the bottom edge of your PlayStation Vita product. The SIRIS number is left of the connector port and the SERIAL number is right of the connector port. These numbers are also on the side panel of the PlayStation Vita package, which you may submit in lieu of writing them on this form.)

Required materials:

Please supply ONE of the following:

(i) a store receipt showing purchase of the PlayStation Vita before June 1, 2012;

OR

(ii) a side panel of the PlayStation Vita package that shows the UPC code, SERIAL or SIRIS numbers;

OR

(iii)other information and materials that reasonably prove that you are an Eligible Purchaser of the PlayStation Vita before June 1, 2012.

Optional Information:

My PSN ID is _____ (Your PSN ID is the email address that you used and provided when you opened a PSN account.)

Selection of Consumer Redress Offer:

Please select ONE of the following three Consumer Redress Offers by circling or checking ONLY ONE offer. Additional information describing each offer is available by clicking here [pop-up window or link].

1. _____ I select a $25 check. Please send the check to me at the mailing address noted on this form.

OR

2. _____ Instead of the $25 check, I select a $25 credit to be applied to my PSN account. Additional information describing this offer is available by clicking here [pop-up window or link].

OR

3. _____ I select the Merchandise Voucher [or Entitlement] good for $50 or more in value of merchandise, video games and/or services. Additional information describing this offer is available by clicking here [pop-up window or link].

I understand that by submitting the request and accepting a refund of cash (or credit) or merchandise voucher [or entitlement] issued through this program, I agree to waive any present or future claims I may have against Sony Computer Entertainment America LLC in connection with the advertising, labeling, promotion, offering for sale or sale of the PlayStation Vita for which I received consumer redress.

To Submit Your Request and Agree to the Above
COMPLETE, PRINT OUT, AND MAIL THIS FORM TO ADDRESS BELOW.
MAKE SURE YOU INCLUDE ALL REQUIRED MATERIALS:

Claims Administration
Sony Computer Entertainment America LLC
[address]

_____
(Print Name)

_____
(Signature)

_____
(Date)

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from Sony Computer Entertainment America LLC ("SCEA" or "respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves respondent's advertising of the PlayStation Vita ("PS Vita"), a gaming console. Respondent first offered the PS Vita for sale in the United States on February 22, 2012, for approximately $250. The PS Vita is part of respondent's line of game consoles, including the PlayStation 3 video game console ("PS3"), which allows consumers to play video games on their television sets. Unlike the PS3, the PS Vita is a handheld, portable game console that allows consumers to play games away from their television sets. In addition to selling game consoles, respondent is one of the many game developers writing game titles for use on its PS3 and PS Vita game consoles. At the time the PS Vita was launched, "MLB 12: The Show," and "Killzone 3," were popular SCEA game titles for the PS3.

According to the complaint, respondent advertised several notable features of the PS Vita. First, respondent promoted the "remote play" feature of the PS Vita as a way that consumers could access games already residing on their PS3 consoles and play them remotely on the PS Vita anywhere with a Wi-Fi connection. Second, advertisements represented that, with the "cross platform gaming" or "cross save" feature, consumers could begin playing a game on a PS3 console, save their progress at any point in the game, and then continue that game where they left off on the PS Vita. Third, with the "3G version" the PS Vita, available for an extra $50 and monthly fees, advertisements represented that consumers could access a 3G network to play games live with others ("multiplayer gaming"). The complaint

alleges that respondent's advertising of these features was false or misleading and thus violates the FTC Act.

With respect to the remote play feature, the FTC's complaint alleges that respondent misrepresented that, with this feature, PS Vita users can easily access their PS3 games on the PS Vita. According to the complaint, PS Vita users could not easily access their PS3 games on the PS Vita. Indeed, most PS3 games are not remote playable on the PS Vita, and respondent did not specifically design the PS3 system to support remote play functionality. In addition, the complaint alleges as false or misleading respondent's claim that PS Vita users can, with remote play, easily access Killzone 3 and other similar, data-rich PS3 games. Respondent never enabled remote play on its Killzone 3 title, and very few, if any, data-rich PS3 games of similar size and complexity to Killzone 3 were remote play compatible on the PS Vita.

The complaint also alleges that the respondent made false or misleading claims about the cross save feature of the PS Vita. Contrary to respondent's advertisements, PS Vita users are not able to pause any PS3 game they are playing on their PS3 consoles at any point in the game, and continue to play that game where they left off on the PS Vita. The complaint states that this feature is available only for a limited number of PS3 game titles, and that the pause and save feature varies significantly by game. For example, with respect to "MLB 12: The Show," consumers are able to pause and save the game to the PS Vita only after they have finished the entire baseball game (all nine innings) on the PS3. The complaint also alleges that with respect to this feature, respondent failed to disclose that, with games such as MLB 12: The Show, consumers would have to own two versions of the same game, one for the PS3 and one for the PS Vita, to use this feature.

Finally, the complaint addresses advertising claims made for features relating to the 3G version of the PS Vita. Specifically, the complaint alleges as false or misleading the representation that PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network. According to the complaint, PS Vita users are restricted to

asynchronous or "turn-based" multiplayer gaming with the 3G version of the PS Vita.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future, as well as a provision to redress certain consumers. Part I of the order prohibits respondent from misrepresenting any material gaming feature or capability of any Handheld Game Console Product, when used as a standalone device to play video games.

Part II of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld Game Console Product during gaming, unless at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Part III of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld or Home Game Console Product during gaming, unless it discloses, clearly and prominently, and in close proximity to the representation, that consumers must purchase two versions of the same video game, one for each console, if such is the case.

Part IV of the proposed order provides for consumer redress to "eligible purchasers" of the PS Vita. The proposed order defines "eligible purchasers" as consumers who purchased the PS Vita before June 1, 2012, and did not return it for a full refund. SCEA will offer these consumers $25 dollars in cash or credit or the alternative of a voucher (or other entitlement) for merchandise, video games, and/or services with a retail value of $50 or more.

Part V of the proposed order contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through III of the order.

Parts VI through VIII of the proposed order require the company to: deliver a copy of the order to certain personnel

having managerial responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part IX of the proposed order provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

DEUTSCH LA, INC.

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

Docket No. C-4515; File No. 122 3252
Complaint, March 24, 2015 – Decision, March 24, 2015

This consent order resolves concerns that respondent Deutsch LA, Inc. ("Respondent") falsely advertised certain capabilities of Sony's PlayStation "PS Vita." The PS Vita is part of Sony's line of game consoles, including the PlayStation 3 video console (PS3), which allows consumers the flexibility to play video games on, or away from, their television sets. The complaint alleges that Respondent, as Sony's advertising agency, falsely advertised that PS3 users could save their progress in a game and pick up where they left off on the PS Vita. Respondent also falsely represented that consumers could access a 3G network to play games live with others, for a monthly fee. The consent order order bars Respondent from engaging in similar acts or practices in the future.

Participants

For the *Commission: Linda K. Badger* and *Matthew D. Gold.*

For the *Respondent: Stuart Friederl, C. Andrew Keisner*, and *Ronald Urbach, Davis & Gilbert, LLP*; and *Jeffrey A. Greenbaum, Frankfurt Kurnit Klein & Selz, PC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Deutsch LA, 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 Deutsch LA, Inc., is a California corporation with its principal office or place of business at 5454 Beethoven Street, Los Angeles, CA 90066.

2. Respondent, at all times relevant to this complaint, was an advertising agency of Sony Computer Entertainment America LLC ("SCEA"), and prepared and disseminated advertisements to promote the sale of the PlayStation Vita ("PS Vita"). The PS Vita

is a game console that SCEA first offered for sale in the United States on February 22, 2012. The PS Vita is part of SCEA's line of game consoles, including the PlayStation 3 video game console ("PS3") that allows consumers to play video games on their television sets. Unlike the PS3, the PS Vita is a handheld, portable game console that allows consumers to play games away from their television sets. In addition to selling game consoles, SCEA is one of the many game developers writing game titles for use on its PS3 and PS Vita game consoles. At the time the PS Vita was launched, "MLB 12: The Show" and "Unit 13" were popular SCEA titles for the PS3.

3. Advertisements prepared by Respondent promoted, among other things, two notable features of the PS Vita. First, advertisements represented that, with the "cross platform gaming" or "cross save" feature, consumers could begin playing a game on a PS3, save their progress at a specific point in the game, and then continue that game where they left off on the PS Vita. Second, with the "3G version" of the PS Vita, available for an extra $50 and monthly fees, advertisements represented that consumers could access a 3G network to play games live with others ("multiplayer gaming").

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

5. Respondent has disseminated or has caused to be disseminated advertisements for the PS Vita, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

a. Television Commercial (Exhibit A, transcript, and Exhibit B, DVD containing ad)

[Depiction of a young man sitting on a couch, playing the PS3 game, "MLB 12: The Show"]

[*Voice Over*]: "It's a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn't ride you like a rented scooter."

[Depiction of the inside of a subway car]

[*On-screen Super*]: "Simulated screen visual"

[*Voice Over*]: "Who says you have to choose?"

[*On-screen Super*]: "**CROSS PLATFORM PLAY**"

[Depiction of the man pausing the PS3 game, picking up the PS Vita, viewing a download screen, and walking out the door, continuing to play the same game on his PS Vita while walking down the street]

[*Voice Over*]: "Your PS3 stays home, but the game goes with you."

[*On-screen Super*]: "**#GAMECHANGER**"

[*Voice Over*]: "Never stop playing."

[*On-screen Super*]: "**NEVER STOP PLAYING**"

[*Voice Over*]: "PlayStation Vita"

[*On-screen Super*]: "**PS VITA**"

b. Television and Internet Commercial (Exhibit C, transcript, and Exhibit D, DVD containing ad)

[Depiction of a young man walking down the street, playing the shooting game, "Unit 13" on his PS Vita]

[*Voice Over*]: "Suddenly it doesn't feel so safe out there."

[*On-screen Super*]: "Simulated screen visual"

[*Voice Over*]: "People are lookin' at 'cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs."

[Depiction of the young man passing strangers on the street who also appear to be playing on a PS Vita. They look furtively at each other. A man passing by on a bus, who also appears to be playing a PS Vita, nods to the young man.]

[*Voice Over*]: Find a friend, find an enemy, find a game anywhere, anytime."

[*On-screen Super*]: "**3G GAMING**"

[*On-screen Super*]: "**#GAMECHANGER**"

[*Voice Over*]: "Never Stop Playing"

[*On-screen Super*]: "**NEVER STOP PLAYING**"

[*Voice Over*]: "PlayStation Vita"

[*On-screen Super*]: "**PS VITA**"

6. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

a. PS Vita users are able to pause any PS3 game they are playing on their PS3 consoles at a specific point in the game, and continue to play that game where they left off on the PS Vita.

b. PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network.

7. In truth and in fact:

a. PS Vita users are not able to pause any PS3 game they are playing on their PS3 consoles at a specific point in the game, and continue to play that game where they left off on the PS Vita. This cross platform gaming feature is only available for a limited number of PS3 game titles, and the pause and save feature varies significantly by game. For example, with respect to "MLB 12: The Show," consumers are only able to pause and save the game to the PS Vita after having finished the entire baseball game (all nine innings) on the PS3.

b. PS Vita users who own the 3G version are not able to engage in live, multiplayer gaming through a 3G network. PS Vita users are restricted to asynchronous or "turn-based" multiplayer gaming with the 3G version of the PS Vita.

Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that consumers can play PS3 games, such as "MLB 12: The Show," on the PS3, pause the game, and continue that game on the PS Vita. Respondent has failed to disclose that, to use this feature, consumers must own two versions of the same game for each console (*e.g.,* two versions of "MLB 12: The Show"), one for the PS3 and one for the PS Vita. This fact would be material to consumers in their purchase and use of the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

9. Respondent knew or should have known that the representations set forth in paragraphs 6 and 8 were, and are, false or misleading.

10. Through the means described in Paragraph 5, Respondent included the term "#gamechanger" in advertisements for the PS Vita. This term directed consumers to online conversations about the PS Vita on Twitter.

11. Approximately one month before SCEA offered the PS Vita for sale to the public, one of Respondent's assistant account executives sent the following email message to all of Respondent's employees:

> "Fellow Deutschers –
>
> The PlayStation Team has been working hard on a campaign to launch Sony's all-new handheld gaming device, the PS Vita, and we want **YOU** to help us kick things off!
>
> The PS Vita's innovative features like 3G gaming, cross platform play and augmented reality will revolutionize the way people game. To generate buzz around the launch of the device, the PS Vita ad campaign will incorporate a #GAMECHANGER hashtag into nearly all creative executions. #GAMECHANGER will drive gamers to Twitter where they can learn more about the PS Vita and join in the conversation. **The campaign starts on February 13th, and to get the conversation started, we're asking YOU to Tweet about the PlayStation Vita using the #GAMECHANGER hashtag.** Easy, right? https://twitter.com/#!/search/%23gamechanger
>
> Want to know more about what makes the PS Vita a #GAMECHANGER? Check out the links below:
>
> http://us.playstation.com/psvita/
>
> http://www.youtube.com/watch?v=Q8C5quD0a_0
>
> Thanks for your help, and make sure to go get a PlayStation Vita on February 22nd!"

12. As a result of this email message, various Deutsch employees used their personal Twitter accounts to post positive comments about the PS Vita, including the following examples:

> "One thing can be said about PlayStation **Vita**...it's a #**gamechanger**"

"PS **Vita** [ruling] the world. Learn about it! us.playstation.com/psvita/**#GAMECHANGER**"

"Thumbs UP #**GAMECHANGER** - check out the new PlayStation **Vita"**

"This is sick. . . .See the new PS **Vita** in action. The gaming #**GameChanger**"

"Got the chance to get my hands on a PS **Vita** and I'm amazed how great the graphics are. It's definitely a #**gamechanger**!"

13. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that these comments about the PS Vita were independent comments reflecting the views of ordinary consumers who had used the PS Vita.

14. In truth and in fact, these comments about the PS Vita were not independent comments reflecting the views of ordinary consumers who had used the PS Vita. These comments were created by employees of Respondent, an advertising agency hired to promote the PS Vita. Therefore, the representation set forth in Paragraph 13 was, and is, false and misleading.

15. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that certain comments about the PS Vita reflected endorsements from persons who had used the PS Vita. Respondent failed to disclose that those comments were written by employees of Respondent, an advertising agency hired to promote the PS Vita. This fact would have been material to consumers in their purchasing decision regarding the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

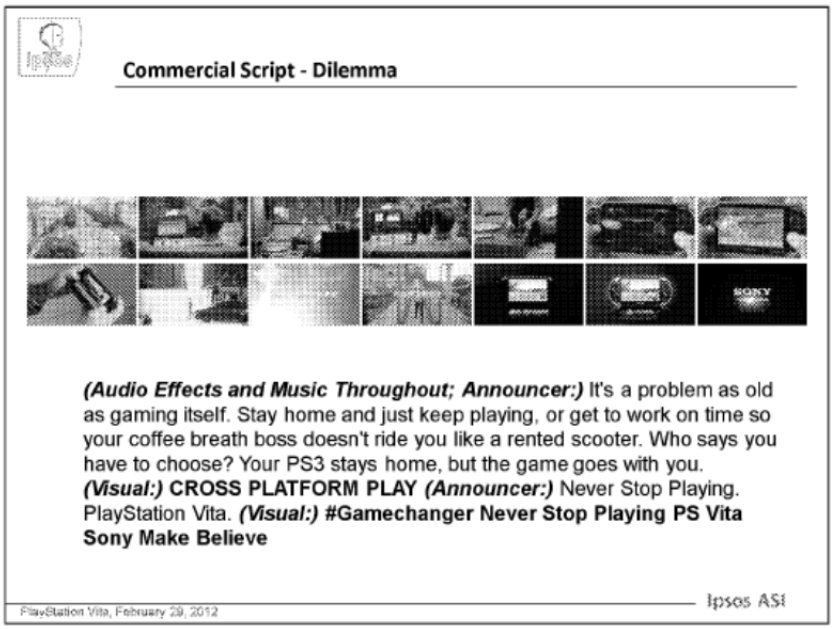
16. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-fourth day of March, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A



Commercial Script - Dilemma

(Audio Effects and Music Throughout; Announcer:) It's a problem as old as gaming itself. Stay home and just keep playing, or get to work on time so your coffee breath boss doesn't ride you like a rented scooter. Who says you have to choose? Your PS3 stays home, but the game goes with you. ***(Visual:)*** **CROSS PLATFORM PLAY** ***(Announcer:)*** Never Stop Playing. PlayStation Vita. ***(Visual:)*** **#Gamechanger Never Stop Playing PS Vita Sony Make Believe**

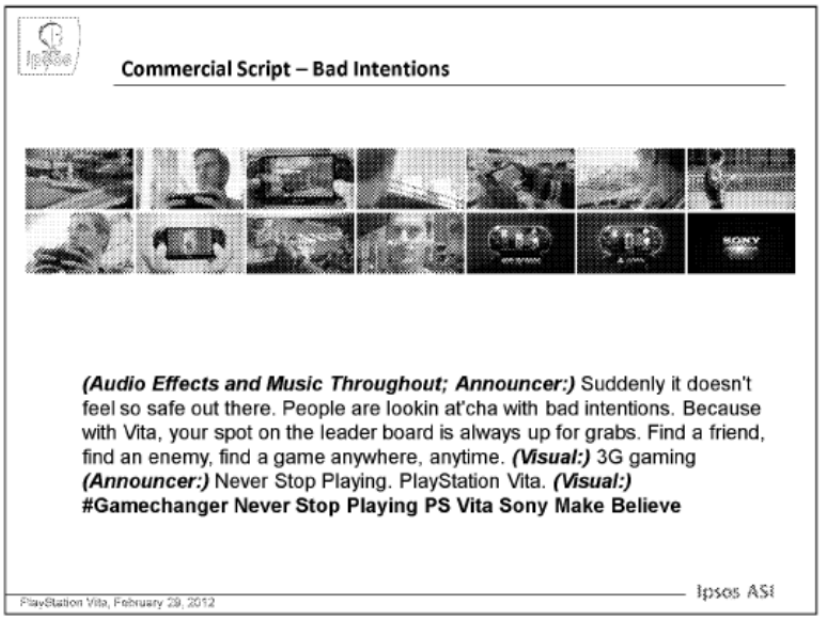
PlayStation Vita, February 29, 2012 Ipsos ASI

EXHIBIT B

[Redacted from Public Record, but Incorporated by Reference]

Complaint

EXHIBIT C



Commercial Script – Bad Intentions

(Audio Effects and Music Throughout; Announcer:) Suddenly it doesn't feel so safe out there. People are lookin at'cha with bad intentions. Because with Vita, your spot on the leader board is always up for grabs. Find a friend, find an enemy, find a game anywhere, anytime. ***(Visual:)*** 3G gaming ***(Announcer:)*** Never Stop Playing. PlayStation Vita. ***(Visual:)*** **#Gamechanger Never Stop Playing PS Vita Sony Make Believe**

PlayStation Vita, February 29, 2012

Ipsos ASI

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

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

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

1. Respondent Deutsch LA, Inc., is a California corporation with its principal office or place of business at 5454 Beethoven Street, Los Angeles, CA 90066.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Deutsch LA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

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

3. "Clearly and prominently" shall mean as follows:

   a. In textual communications (e.g., printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

   b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication. *Provided, however,* that, for communications disseminated through programming over which respondent does not have editorial control (e.g., an endorser's appearance on

a news program or talk show), the required disclosures may be made in a form consistent with subparagraph (b) of this definition;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

4. "Handheld Game Console Product" means any handheld portable electronic device designed for and primarily used for playing video games that has its own screen, speakers and controls in one unit, including the PlayStation Vita ("PS Vita") and the PlayStation Portable ("PSP").

5. "Home Game Console Product" means any electronic device designed for and primarily used for playing video games on a separate television screen, including the PlayStation 3 ("PS3") and the PlayStation 4 ("PS4").

6. "Endorsement" means as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §255.0.

7. "Endorser" means an individual or organization that provides an Endorsement.

8. "Material connection" means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

9. "Video Game Product" means any electronic game that is designed for and primarily used for playing on a Handheld Game Console Product or a Home Game Console Product.

10. The term "including" in this order means "without limitation."

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any material gaming feature or capability of such product when used as a standalone device to play video games.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that such feature or capability was misrepresented.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of the Handheld Game Console Product or Home Game Console Product to interact with, or connect to, any other Handheld Game Console Product during gaming, unless at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that such capability was not substantiated by competent and reliable evidence.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product or Home Game Console Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the material capability of any Handheld Game Console Product to interact with, or connect with, any Home Game Console Product during gaming, unless it discloses, clearly and prominently, and in close proximity to the representation, that consumers must purchase two versions of the same video game, one for the Handheld Game Console Product and one for the Home Game Console Product, if such is the case.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that consumers must purchase two versions of the same video game to use such capability.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, Home Game Console Product, or Video Game Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that an endorser of such product is an independent user or ordinary consumer of the product.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Handheld Game Console Product, Home Game Console Product, or Video Game Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any endorser of such product unless it discloses, clearly and prominently, a material connection, when one exists, between such endorser and the respondent or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling, or distributing such product.

VI.

IT IS FURTHER ORDERED that respondent shall, within seven (7) days of the date of service of this order, take all reasonable steps to remove any product review or endorsement, which is under the control of respondent Deutsch LA, Inc., currently viewable by the public that does not comply with Parts IV and V of this order.

VII.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the

representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

IT IS FURTHER ORDERED that respondent Deutsch LA, Inc., and its successors and assigns shall deliver a copy of this order to all current and, for the next five (5) years, all future account directors and creative directors having direct and supervisory or managerial responsibilities with respect to the subject matter of this order ("Personnel"), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent and its successors and assigns 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.

IX.

IT IS FURTHER ORDERED that respondent Deutsch LA, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of Deutsch LA, Inc., FTC File Number 122-3252. *Provided, however,* that, in lieu

of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

X.

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

XI.

This order will terminate on March 24, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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 consent order from Deutsch LA, 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 and take appropriate action or make final the agreement's proposed order.

Respondent is an advertising agency hired by Sony Computer Entertainment America LLC ("SCEA") to develop an advertising campaign for the PlayStation Vita ("PS Vita"). The PS Vita is a game console that SCEA first offered for sale in the United States on February 22, 2012. The PS Vita is part of SCEA's line of game consoles, including the PlayStation 3 video game console ("PS3"), which allows consumers to play video games on their television sets. Unlike the PS3, the PS Vita is a handheld, portable game console that allows consumers to play games away from their television sets. In addition to selling game consoles, SCEA is one of many game developers writing game titles for use on its PS3 and PS Vita game consoles. At the time the PS Vita was launched, "MLB 12: The Show" was a popular SCEA title for the PS3.

Analysis to Aid Public Comment

According to the complaint, advertisements developed by respondent promoted two notable features of the PS Vita. First, respondent's advertisements represented that, with the "cross platform gaming" or "cross save" feature of the PS Vita, consumers could begin playing a game on a PS3 console, save their progress at a specific point in the game, and then continue that game where they left off on the PS Vita. Second, respondent's advertisements represented that with the "3G version" the PS Vita, available for an extra $50 and monthly fees, consumers could access a 3G network to play games live with others ("multiplayer gaming"). The complaint alleges that advertisements respondent developed to promote these features were false or misleading and thus violate the FTC Act.

The FTC's complaint alleges that respondent made false or misleading claims about the cross save feature in advertisements it developed to promote the PS Vita. For example, the complaint alleges that respondent's advertisements represent that PS Vita users are able to pause any PS3 game they are playing on their PS3 consoles at a specific point in the game, and continue to play that game where they left off on the PS Vita. Contrary to this representation, this feature is available only for a limited number of PS3 game titles. Further, the pause and save feature described in the advertisements varies significantly by game. For example, with respect to the game depicted in the advertisement for this feature, "MLB 12: The Show," consumers are able to pause and save the game to the PS Vita only after they have finished the entire baseball game (all nine innings) on the PS3. The complaint also alleges that with respect to this feature, respondent failed to disclose the material fact that, with games such as MLB 12: The Show, consumers would have to own two versions of the same game, one for the PS3 and one for the PS Vita, in order to use this feature.

The complaint also addresses advertising claims made for features relating to the 3G version of the PS Vita. Specifically, the complaint alleges as false or misleading the representation that PS Vita users who own the 3G version are able to engage in live, multiplayer gaming through a 3G network. In fact, PS Vita users are restricted to asynchronous or "turn-based" multiplayer gaming with the 3G version of the PS Vita.

Analysis to Aid Public Comment

Additionally, the FTC's complaint includes allegations that the respondent misled consumers through deceptive product endorsements. Specifically, respondent included the term "#gamechanger" in its advertisements for the PS Vita to direct consumers to online conversations about the PS Vita on Twitter. According to the complaint, approximately one month before SCEA offered the PS Vita for sale to the public, one of respondent's assistant account executives sent an email message to all of respondent's employees asking them to help with the advertising campaign by posting comments about the PlayStation Vita on Twitter, using the #gamechanger hashtag. According to the complaint, as a result of this email message, various Deutsch employees used their personal Twitter accounts to post positive comments about the PS Vita. According to the complaint, these tweets about the PS Vita were false and misleading because they were not independent comments reflecting the views of ordinary consumers who had used the PS Vita. The complaint also alleges that these comments were deceptive because respondent failed to disclose the material fact that employees of an advertising agency hired to promote the PS Vita wrote them.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Part I of the proposed order prohibits respondent from misrepresenting any material gaming feature or capability of any Handheld Game Console Product when used as a standalone device to play video games. Because respondent is an advertising agency, however, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that such feature or capability was misrepresented.

Part II of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld Game Console Product during gaming, unless at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation. Again, because respondent is an advertising agency, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that such capability was not substantiated by competent and reliable evidence.

Part III of the proposed order prohibits respondent from making any representation about the material capability of any Handheld or Home Game Console Product to interact with, or connect to, any other Handheld or Home Game Console Product during gaming, unless it discloses, clearly and prominently, and in close proximity to the representation, that consumers must purchase two versions of the same video game, one for each console, if such is the case. Due to respondent's status as an advertising agency, the proposed order states that it shall be a defense that respondent neither knew nor had reason to know that consumers must purchase two versions of the same video game to use such capacity.

Parts IV through VI of the proposed order address respondent's use of deceptive product endorsements. Part IV prohibits respondent from misrepresenting that an endorser of any Handheld Game Console Product, Home Game Console Product or Video Game Product, is an independent user or ordinary consumer of the product.

Part V of the proposed order prohibits the respondent, in connection with the advertising of any Handheld Game Console Product, Home Game Console Product or Video Game Product, from making any representation about any endorser of such product, unless it discloses, clearly and prominently, a material connection, when one exists between such endorser and respondent or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling or distributing such product. The proposed order defines "material connection" as any relationship that materially affects the weight or credibility of any endorsement that would not be reasonably expected by consumers.

Part VI of the proposed order requires respondent to take all reasonable steps to remove, within seven days of the service of the order, any previously posted product review or endorsement under its control that does not comply with Parts IV and V of the order.

Analysis to Aid Public Comment

Part VII of the proposed order contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through VI of the order.

Parts VIII through X of the proposed order require the company to: deliver a copy of the order to certain personnel having managerial responsibilities with respect to the subject matter of the order; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission.

Part XI of the proposed order provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

HEALTH DISCOVERY CORPORATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECS. 5(A) AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4516; File No. 132 3211
Complaint, March 30, 2015 – Decision, March 30, 2015

This consent order addresses allegations that respondents Health Discovery Corporation, along with Kristi Kimball and her company, New Consumer Solutions LLC (collectively "Respondents"), deceived consumers concerning its mobile device software application. The complaint alleges that Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act by representing that its MelApp mobile device application accurately analyses moles and other skin lesions for melanoma and increases consumers' chances of detecting melanoma in early stages. According to the complaint, the MelApp application instructed users to photograph a mole with a smartphone camera and input other information. The application would then supposedly calculate the mole's melanoma risk as low, medium, or high. However, the Respondents lacked substantiation for these representations. The order bars the Respondents from making false representations regarding its products without scientific testing and substantiation. The order further requires the company to follow appropriate recordkeeping and compliance reporting requirements, as well as to preserve documents for human clinical studies that it conducts or sponsors.

Participants

For the *Commission: Mary Johnson* and *Karen Mandel.*

For the *Respondent: Timothy J. Fitzgibbon, Nelson Mullins Riley & Scarborough, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Health Discovery Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Health Discovery Corporation ("Respondent") is a Georgia corporation with its principal office or place of business at 4243 Dunwoody Club Drive, Atlanta, Georgia 30350.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including MelApp. MelApp is a consumer-directed software application that can be installed on mobile devices using the iOS or Android operating systems. MelApp purportedly can assess melanoma risk early by using mathematical algorithms and image-based pattern recognition technology to analyze specific characteristics (asymmetry, border, color, diameter, and evolution) of digital images of skin lesions captured by the device's camera.

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. MelApp is a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. First sold in 2011, MelApp is available for purchase and download over the Internet through the Apple App Store and the Google Play Store. The retail cost of MelApp is $1.99. U.S. sales of MelApp from January 2011 through July 2013 totaled more than $17,000.

6. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for MelApp, including but not necessarily limited to the attached Exhibits A through C. These materials contain the following statements and depictions, among others:

a. Screen excerpts from Apple App Store (Nov. 26, 2012)

(Exhibit A, pp. 1-2)

Whether sunning on the beach, cheering at the kids' outdoor sporting events or hitting the slopes, chances are you're being affected by damaging UV rays. MelApp for iPhone is an image-based risk assessment mobile app that assists in the early detection of melanoma. Melanoma is the fastest growing cancer worldwide, and the most deadly of all skin cancers, if not caught early.

However, melanoma can be successfully removed and monitored by regular skin screenings in its early stages. The disease is deadly in its most advanced stages as few treatment options exist. The median lifespan for patients with advanced melanoma is less than one year. Performing regular self-exams could save your life or that of a loved one.

Checking a mole or freckle is quick and easy:

(1) Use MelApp to take a picture of the skin lesions of concern with an iPhone's camera, enlarging it with the zoom feature to fit into the green box, then

(2) Pin point the mole size and its evolution by sliding the corresponding indicator bar and tap on "Check Risk." Within seconds MelApp will provide a risk analysis of the uploaded picture being a melanoma.

MelApp uses highly sophisticated patent protected state-of-the-art mathematical algorithms and image-based pattern recognition technology to analyze the uploaded image. The app was validated using an image database licensed from Johns Hopkins University Medical Center.

b. Screen excerpts from the Google Play Store (Jan. 31, 2014)

(Exhibit B, p. 1, bracketed punctuation supplied)

Whether sunning on the beach, cheering at the kids' outdoor sporting events or hitting the slopes, chances are you're being affected by damaging UV rays. MelApp for the Droid is an image-based risk assessment mobile app that assists in the early detection of melanoma.

Melanoma is the fastest growing cancer worldwide, and the most deadly of all skin cancers, if not caught early. However, melanoma can be successfully removed and monitored by regular skin screenings in its early stages. The disease is deadly in its most

advanced stages as few treatment options exist. The median lifespan for patients with advanced melanoma is less than one year. Performing regular self-exams could save your life or that of a loved one.

Checking a mole or freckle is quick and easy:

(1) Use MelApp to take a picture of the skin lesions of concern with the phone's camera, fit the mole in the green circle and square by enlarging it with the zoom feature and/or resizing the green circle[;]

(2) Pin point the mole size and its evolution by sliding the corresponding indicator bar and tap on "Check Risk." Within seconds MelApp will provide a risk analysis of the uploaded picture being a melanoma.

MelApp uses highly sophisticated patent protected state-of-the-art mathematical algorithms and image-based pattern recognition technology to analyze the uploaded image. The app was validated using DermAtlas, an open access, physician-edited database of over 10,000 high quality histological and clinical images of skin conditions.

c. Screen excerpts from Respondent's website, www.melapp.net

(Aug. 5, 2013) (Exhibit C, pp. 1-2)

Whether sunning on the beach, cheering at the kids' outdoor sporting events or hitting the slopes, chances are you're being affected by damaging UV rays. MelApp is an image-based risk assessment mobile app that assists in the early detection of melanoma.

Melanoma is the fastest growing cancer worldwide, and the most deadly of all skin cancers, if not caught early. Performing regular self-exams could save your life or that of a loved one.

Checking a mole or freckle is quick and easy:

1. Use MelApp to take a picture of the skin lesions of concern with a smartphone's camera, enlarging it with the zoom feature to fit into the green box, then

2. Pin point the mole size and its evolution by sliding the corresponding indicator bar and tap on "Check Risk." Within seconds MelApp will provide a risk analysis of the uploaded picture being a melanoma.

MelApp uses highly sophisticated patent protected state-of-the-art mathematical algorithms and image-based pattern recognition technology to analyze the uploaded image. The app was validated using DermAtlas, an open access, physician-edited database of over 10,000 high quality histological and clinical images of skin conditions.

COUNT I
FALSE OR UNSUBSTANTIATED MELANOMA DETECTION CLAIM

7. In connection with the advertising, promotion, offering for sale, or sale of MelApp, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. MelApp accurately analyzes moles and other skin lesions for melanoma or risk of melanoma; and

b. MelApp increases consumers' chances of detecting melanoma in early stages.

8. The representations set forth in Paragraph 7 are false or misleading, or were not substantiated at the time the representations were made.

COUNT II
FALSE ESTABLISHMENT CLAIM

9. In connection with the advertising, promotion, offering for sale, or sale of MelApp, Respondent has represented, directly or indirectly, expressly or by implication, that scientific testing proves that MelApp accurately detects melanoma or risk of melanoma.

10. In fact, scientific testing does not prove that MelApp accurately detects melanoma or risk of melanoma. Therefore, the representation set forth in Paragraph 9 is false or misleading.

VIOLATIONS OF SECTIONS 5 AND 12

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

THEREFORE, the Federal Trade Commission this thirtieth day of March, 2015, has issued this Complaint against Respondent.

By the Commission, Commissioner Ohlhausen dissenting.

DECISION AND ORDER

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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement") that includes: a statement that the agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other

than the jurisdictional facts, are true; and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Health Discovery Corporation ("Respondent") is a Georgia corporation with its principal office or place of business at 4243 Dunwoody Club Drive, Atlanta, Georgia 30350.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including MelApp. MelApp is a consumer-directed software application that can be installed on mobile devices using the iOS or Android operating systems. MelApp purportedly can assess melanoma risk early by using mathematical algorithms and image-based pattern recognition technology to analyze specific characteristics (asymmetry, border, color, diameter, and evolution) of digital images of skin lesions captured by the device's camera.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondent" shall mean Health Discovery Corporation, a corporation, its successors and assigns and its officers, agents, representatives, and employees.

2. "Advertising" and "promotion" shall mean any written or verbal statement, illustration, or depiction designed to effect a sale or create interest in the purchasing of products or services, regardless of the medium.

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

4. "Device" shall be construed as a "device" within the meaning of Sections 12 and 15 of the FTC Act, 15 U.S.C. §§ 52, 55 and shall mean an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is–

   a. Recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them,

   b. Intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or

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

5. "Reliably Reported," for a human clinical test or study ("test"), means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

6. The term "including" in this order means "including without limitation."

7. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other means, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Device including, but not limited to, MelApp, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a Device name, endorsement, depiction, or illustration, that the Device:

A. Detects or diagnoses melanoma or risk factors of melanoma, or

B. Increases users' chances of detecting melanoma in early stages,

unless the representation is non-misleading and, at the time of making such representation, Respondent possesses and relies upon competent and reliable scientific evidence to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence shall consist of human clinical testing of the Device that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant field, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing shall be blinded, conform to actual use conditions, and include a representative range of skin lesions; be conducted by researchers qualified by training and experience to conduct such testing; and all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of such testing as set forth in Part III must be available for inspection and production to the Commission.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other means, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Device in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a Device name, endorsement, depiction, or illustration, any representation, other than representations covered under Part I of this order, about the health benefits or health efficacy of such Device, unless the representation is non-misleading, and, at the time of making such representation, Respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies (A) that have been conducted and evaluated in an objective manner by qualified persons; (B) that are generally accepted in the profession to yield accurate and reliable results; and (C) when they are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in Part III are available for inspection and production to the Commission.

III.

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which Respondent relies to substantiate any claim covered by Parts I or II of this order, Respondent shall secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including, but not necessarily limited to:

A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the

test sponsor or any other person not employed by the research entity;

B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;

C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;

D. All documents referring or relating to any statistical analysis of any test data, including, but not limited to, any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

E. All documents referring or relating to the sponsorship of the test, including all contracts and communications between any sponsor and the test's researchers.

Provided, however, the preceding preservation requirement shall not apply to a Reliably Reported test, unless the test was conducted, controlled, or sponsored, in whole or in part (1) by Respondent, or by any person or entity affiliated with or acting on behalf of Respondent, including officers, agents, representatives, and employees, or by any other person or entity in active concert or participation with Respondent, or (2) by Respondent's programmers, manufacturers, or suppliers of any component of the Device.

For any test conducted, controlled, or sponsored, in whole or in part, by Respondent, Respondent must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures shall be documented in writing

and shall contain administrative, technical, and physical safeguards appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the personal information collected from or about the participants.

IV.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other means, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product or service name, endorsement, depiction, or illustration:

A. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or

B. That any benefits of such product or service are scientifically proven, including, but not limited to, that studies, research, testing, or trials prove that a product or service detects or diagnoses a disease or the risks of a disease,

unless the representation is true and non-misleading.

V.

IT IS FURTHER ORDERED that Respondent shall pay to the Federal Trade Commission the sum of Seventeen Thousand Six Hundred Ninety-three Dollars ($17,693.00). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than fifteen (15) days after the date that this order becomes final.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961(a), from the date of default to the date of payment, shall

immediately become due and payable to the Commission. Respondent agrees that, in such event, the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this order, including, but not limited to, a nondischargeability complaint in any subsequent bankruptcy proceeding.

C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to Respondent's practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices as alleged in the complaint. If the Commission determines, in its sole discretion, that such relief is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

D. Respondent shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy, Respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VI.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

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

D. All acknowledgements of receipt of this order obtained pursuant to Part VII.

VII.

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

VIII.

IT IS FURTHER ORDERED that Respondent Health Discovery Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,*

that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Health Discovery Corporation.

IX.

IT IS FURTHER ORDERED that Respondent Health Discovery Corporation and its successors and assigns shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form 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. Unless otherwise directed by a representative of the Commission in writing, these reports shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Health Discovery Corporation.

X.

This order will terminate on March 30, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission, Commissioner Ohlhausen dissenting.

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 as to Health Discovery Corporation (hereafter "the company").

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

Analysis to Aid Public Comment

This matter involves the company's advertising for the MelApp mobile device software application. The Commission's complaint alleges that the company violated Sections 5(a) and 12 of the Federal Trade Commission Act by representing that MelApp accurately analyses moles and other skin lesions for melanoma and increases consumers' chances of detecting melanoma in early stages, because such claims were false or misleading, or were not substantiated at the time the representations were made. The complaint also alleges that the company violated Sections 5(a) and 12 by making the false or misleading representation that scientific testing proves that MelApp accurately detects melanoma.

The proposed order includes injunctive relief that prohibits these alleged violations and fences in similar and related violations. The proposed order covers any Device, as the term is used within the meaning of Sections 12 and 15 of the FTC Act, 15 U.S.C. §§ 52, 55. As additional fencing-in relief, the proposed order requires the company to follow appropriate recordkeeping and compliance reporting requirements, as well as document preservation requirements for human clinical studies that it conducts or sponsors on the Device.

Part I prohibits any representation that a Device detects or diagnoses melanoma or risk factors of melanoma, or increases users' chances of detecting melanoma in early stages, unless it is non-misleading and supported by competent and reliable scientific evidence. Such evidence must consist of human clinical testing of the Device that is sufficient in quality and quantity, based on standards generally accepted by experts in the field, is blinded, conforms to actual use conditions, includes a representative range of skin lesions, and is conducted by researchers qualified by training and experience to conduct such testing. In addition, the company must maintain all underlying or supporting data that experts in the relevant field generally would accept as relevant to an assessment of such testing.

Part II prohibits any representation about the health benefits or health efficacy of a Device, unless it is non-misleading and supported by competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light

of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted by a qualified person in an objective manner and are generally accepted in the profession to yield accurate and reliable results. When that evidence consists of a human clinical trial, the company must maintain all underlying or supporting data and documents that experts in the relevant field generally would accept as relevant to an assessment of such testing.

Part III, triggered when the human clinical testing requirement in Parts I or II applies, requires the company to secure and preserve all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of the test, such as protocols, instructions, participant-specific data, statistical analyses, and contracts with the test's researchers. There is an exception for a "Reliably Reported" test, defined as a test that is published in a peer-reviewed journal and that was not conducted, controlled, or sponsored by any proposed respondent or supplier. Also, the published report must provide sufficient information about the test for experts in the relevant field to assess the reliability of the results.

Part IV prohibits the company from misrepresenting, including through the use of a product or service name, endorsement, depiction, or illustration, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or that any benefits of such product or service are scientifically proven, including, but not limited to, that studies, research, testing, or trials prove that a product or service detects or diagnoses a disease or the risks of a disease.

Part V provides the company will pay an equitable monetary payment of Seventeen Thousand Six Hundred Ninety-three Dollars ($17,693).

Part VI contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through III, as well as order receipts covered by Part VII.

Parts VII through IX require the company to deliver a copy of the order to officers, employees, and representatives having managerial responsibilities with respect to the order's subject matter, notify the Commission of changes in corporate structure that might affect compliance obligations, and file compliance reports with the Commission.

Part X provides that, with exceptions, the order will terminate in twenty years.

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

STATEMENT OF THE COMMISSION

Today the Commission is announcing actions in two matters challenging the advertising for the mobile apps MelApp and Mole Detective.[1] Both of these apps claimed to provide an automated analysis of moles and skin lesions for symptoms of melanoma and increase consumers' chances of detecting melanoma in its early stages.

[1] The Commission has voted to accept for public comment a consent agreement with the sole respondent in *In the Matter of Health Discovery Corporation* (addressing the MelApp mobile app). In *FTC v. Avrom Boris Lasarow, et al.* (addressing the Mole Detective mobile app), the Commission has authorized the filing of a federal court complaint against four defendants and approved a proposed settlement with two of those defendants, Kristi Zuhlke Kimball and New Consumer Solutions LLC.

Advertising for MelApp stated that it used "patent protected state-of-the-art mathematical algorithms and image-based pattern recognition technology to analyze the uploaded image [of a skin lesion]," to "provide a risk analysis of the uploaded picture being a melanoma" and "assist[] in the early detection of melanoma."[2] Advertising for Mole Detective stated that it "is the first and only app to calculate symptoms of melanoma right on the phone," and that it could "analyze[] your mole using the dermatologist ABCDE method and give[] you a risk factor based on the symptoms your mole may or may not be showing," "increase the chance of detecting skin cancer in early stages," and "save[] lives through the early detection of potentially fatal melanoma," using "shape recognition software."[3]

The claims that these apps would provide an accurate, automated analysis of skin lesions were the central selling points for both MelApp and Mole Detective, and these claims needed to be substantiated.[4] Although Commissioner Ohlhausen does not appear to disagree with this assessment, she believes the Commission's complaint needs to articulate a comparative reference point for any "accuracy" claim to set an appropriate level of substantiation in the accompanying orders. Absent extrinsic evidence, she believes it is reasonable to read the ads as claiming that the automated assessment is more accurate than unaided self-assessment, and that it is not reasonable to read the ads as claiming that the automated assessment is as accurate as a dermatologist.

We disagree. We think the powerful language of the advertising, such as that quoted above, is clear on its face, so no extrinsic evidence of consumer interpretation is needed to support the challenged representations that the apps accurately analyze

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[2] *See* MelApp Complaint ¶ 6(A).

[3] *See* Mole Detective Complaint ¶¶ 18(A)-(B), 18(D); Ex. A-2.

[4] *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)) ("[W]e reaffirm our commitment to the underlying legal requirement of advertising substantiation – that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated."), *aff'd*, 791 F.2d 189, 193 & 196 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

moles for symptoms of melanoma and increase the chance of detecting skin cancer in its early stages. Because the defendants and the respondent lacked substantiation for those claims, we have reason to believe they violated Section 5. Thus, it is not necessary to hypothesize about what implied claims, such as the accuracy relative to different types of assessments, consumers may have read into the advertising.

Commissioner Ohlhausen also suggests that the orders would, *de facto*, require any future app the advertisers market to be as accurate as a dermatologist or biopsy. Again, we respectfully disagree. The orders do not prescribe a particular level of accuracy the apps must achieve prior to being marketed; rather, they require scientific testing demonstrating accuracy at a level appropriate to the claims being made.[5] Thus, if scientific testing demonstrates that the app is accurate 60% of the time, the advertisers would be able to make a 60% accuracy claim. It would be incumbent upon these marketers to make sure that their advertising conveyed that level of accuracy and did not suggest a stronger level of science to reasonable consumers.

Technologies such as health-related mobile apps have the potential to provide tremendous conveniences and benefits to consumers. However, the same rules of the road apply to all media and technologies – advertisers must have substantiation to back up their claims. The Commission will continue to hold

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[5] Based on our application of the factors set out in *Pfizer*, 81 F.T.C. 23, 64 (1970), if these advertisers make future claims that any device detects or diagnoses melanoma, or increases a user's chances of detecting melanoma in its early stages, the orders would require that such claims be substantiated by human clinical testing. The orders specify that such testing must be blinded, conform to actual use conditions, include a representative range of skin lesions, and be conducted by researchers qualified by training and experience to conduct such testing. These conditions are designed to ensure the accuracy and reliability of testing used to support a narrow and clearly defined set of claims relating specifically to the detection and diagnosis of melanoma, a serious and progressively deadly disease.

If these advertisers make other claims about the health benefits or efficacy of any product or service, the orders require such claims to be non-misleading and supported by competent and reliable scientific evidence. The orders further describe what constitutes competent and reliable scientific evidence and make it quite clear that the evidence required is directly tied to the claim made, expressly or implicitly, by the advertiser.

advertisers accountable for the promises they make to consumers, especially when they pertain to diseases and other serious health conditions.

For the foregoing reasons, we have reason to believe that the complaint allegations and proposed relief reached by consent of the settling parties are appropriate.

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

These matters are another example of the Commission using an unduly expansive interpretation of advertising claims to justify imposing an inappropriately high substantiation requirement on a relatively safe product.[1] As I have previously stated, "We must keep in mind. . . that if we are too quick to find stronger claims than the ones reasonable consumers actually perceive, then we will inadvertently, but categorically, require an undue level of substantiation for those claims."[2] Because I fear this course of action will inhibit the development of beneficial products and chill the dissemination of useful health information to consumers, I dissent.

I do not dispute that companies must have adequate substantiation to support the claims that they make, and I thus would have supported complaints and substantiation requirements based on the app developers' claims that their apps automatically

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[1] *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting in Part and Concurring in Part In the Matter of GeneLink, Inc. and foru International Corp., (Jan. 7, 2014); Concurring Statement of Commissioner Maureen K. Ohlhausen, POM Wonderful, Docket No. 9344, at 3 (Jan. 10, 2013). These statements are available at http://www.ftc.gov/about-ftc/biographies/maureen-k-ohlhausen#speeches.

[2] Concurring Statement of Commissioner Maureen K. Ohlhausen, POM Wonderful, at 3.

assessed cancer risk more accurately than a consumer's unaided self-assessment using the ABCDE factors.[3]

However, the complaints and orders in these cases go further, demanding a high level of substantiation for a wide range of potential advertising claims. Specifically, the orders require rigorous, well-accepted, blinded, human clinical tests to substantiate any claim that the app increases consumers' chances of detecting skin cancer in the early stages.[4] Both orders also impose the same high substantiation standard on any claim that an app "detects or diagnoses melanoma or risk factors of melanoma."[5] The orders could thus be read to require the app developers to demonstrate that their apps assess cancer risk as well as dermatologists, even if their ads make much more limited claims.

Substantiation requirements must flow from the claims made by the advertiser. Under *Pfizer*, the Commission should require a high level of substantiation if the advertiser expressly claimed or implied that the apps provide dermatologist-level accuracy and efficacy, and a lower level of substantiation if the advertiser claims a lower level of capability.[6] The majority's statement appears to agree with that approach:

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[3] I agree with the majority that the companies claimed, without substantiation, that the apps' automated risk assessments were more accurate than a user's unaided self-assessment using the ABCDE factors, and I therefore would support complaints narrowly challenging this claim. Further, I would support orders prohibiting claims that an app "detects melanoma or risk factors of melanoma, thereby increasing, as compared to unaided self-assessment, users' chances of detecting melanoma in early stages," unless substantiated by competent and reliable scientific evidence.

[4] Mole Detective Order at 5. The MelApp Order includes a similar prohibition. *See* MelApp Order at 3.

[5] Mole Detective Order at 5; MelApp Order at 3.

[6] Under *Pfizer*, the Commission determines the level of evidence an advertiser must have to substantiate its product efficacy claims by examining six factors: (1) the type of product advertised; (2) the type of claim; (3) the benefits of a truthful claim; (4) the cost of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation that experts in the field would require. *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1970).

> "[I]f scientific testing demonstrates that the app is accurate 60% of the time, the advertisers would be able to make a 60% accuracy claim. It would be incumbent upon these marketers to make sure that their advertising conveyed that level of accuracy and did not suggest a stronger level of science to reasonable consumers."[7]

Yet, having acknowledged that the app developers need only ensure that their advertising conveys the appropriate level of accuracy, the majority still supports complaints that do not specify what claimed level of accuracy their advertisements conveyed to consumers. Instead, the complaints describe the allegedly unlawful advertising claims amorphously. The Mole Detective complaint, for example, characterizes the defendants' ads as claiming that the app "accurately analyzes moles for the ABCDE symptoms of melanoma; and/or increases consumers' chances of detecting skin cancer in early stages."[8]

This amorphous claim construction leaves two unresolved questions: "Accurate compared to what?" and "Increases chances compared to what?" We must know how reasonable consumers answered those questions – and thus establish what claims consumers likely took from the ads – before we can determine whether defendants provided the appropriate level of substantiation for those claims.[9]

There is little reason to think that consumers interpreted the ads to promise early detection as accurate and efficacious as a dermatologist. The ads never claim that the apps substitute for a dermatologist exam. In fact, the ads describe the apps as tools to enhance self-assessment in conjunction with visits to dermatologists, and both apps emphasize the importance of regular dermatologist visits. Without extrinsic evidence, I do not have reason to believe that a reasonable consumer would take

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[7] Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny at 2.

[8] Mole Detective Complaint ¶ 23. The MelApp complaint contains similar language. *See* MelApp Complaint at 4.

[9] Because the ads do not expressly quantify (in absolute terms or by comparison) the accuracy or efficacy of the apps, any purported claims by the ads about accuracy or efficacy must be implied, not express.

away the implied claim that using these apps would increase their chances of detecting skin cancer in the early stages as compared to an examination by a dermatologist.[10]

Thus, the orders impose a high level of substantiation despite lacking evidence that the marketing claims require such substantiation, and the complaints' vague claim construction obscures this flawed approach.[11] Despite the assurances in the majority's statement as to what the orders require, the complaints imply – and the majority appears to agree[12] – that reasonable consumers expected the apps to substitute for professional medical care. This disconnect raises the possibility that the Commission may use vague complaints to impose very high substantiation standards on health-related apps even if the advertising claims for those apps are more modest.

This approach concerns me. Health-related apps have enormous potential to improve access to health information for underserved populations and to enable individuals to monitor more effectively their own well-being, thereby improving health outcomes. Health-related apps need not be as accurate as professional care to provide significant value for many consumers. The Commission should not subject such apps to

[10] When the FTC cannot "conclude with confidence" that a specific implied claim is being made – for example, if the ad contains "conflicting messages" – the FTC "will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." *In re Thompson Med. Co.*, 104 F.T.C. 648, 788-89 (1984).

[11] These onerous substantiation requirements cannot be defended as "fencing-in." The FTC does not traditionally fence in companies by requiring a heightened level of substantiation. Instead, past FTC decisions fence in companies by extending the scope of a substantiation requirement beyond the specific product, parties, or type of conduct involved in the actual violation. *See Federal Trade Commission v. Springtech 77376, LLC, et al.* ("*Cedarcide Industries*"), Matter No. X120042, Dissenting Statement of Commissioner Maureen K. Ohlhausen at 3 (July 16, 2013). Requiring past violators to meet a higher burden of substantiation would not fence them in – it would only make it more difficult for them to make truthful claims that could be useful to consumers. *Id.*

[12] "Commissioner Ohlhausen… believes…that it is not reasonable to read the ads as claiming that the automated assessment is as accurate as a dermatologist. We disagree." Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny at 1.

overly stringent substantiation requirements, so long as developers adequately convey the limitations of their products. In particular, the Commission should be very wary of concluding that consumers interpret marketing for health-related apps as claiming that those apps substitute for professional medical care, unless we can point to express claims, clearly implied claims, or extrinsic evidence. If the Commission continues to adopt such conclusions without any evidence of consumers' actual interpretations, and thus requires a very high level of substantiation for health-related apps, we are likely to chill innovation in such apps, limit the potential benefits of this innovation, and ultimately make consumers worse off.[13]

I therefore respectfully dissent.

[13] *See, e.g.*, Scott Gottlieb and Coleen Klasmeier, "Why Your Phone Isn't as Smart as It Could Be," *Wall Street Journal* (Aug. 7, 2014) (blaming heavy regulation of consumer-directed health apps and devices for smartphones that are "purposely dumbed down" and "products that are never created because mobile-tech entrepreneurs choose to direct their talents elsewhere"), *available at* http://online.wsj.com/articles/scott-gottlieb-and-coleen-klasmeier-why-your-phone-isnt-as-smart-as-it-could-be-1407369163.

Complaint

IN THE MATTER OF

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY

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

Docket No. 9348; File No. 111 0067
Complaint, April 19, 2011 – Decision, March 31, 2015

In April 2011, the Commission issued an administrative complaint challenging Phoebe Putney Health System, Inc.'s ("Phoebe Putney") proposed acquisition of Palmyra Park Hospital, Inc. ("Palmyra") from Hospital Corporation of America in Albany, Georgia. The complaint alleged the acquisition would harm patients, employers, and employees in Albany, Georgia by allowing Phoebe/Palmyra to raise prices for general acute-care hospital services charged to commercial health plans. The complaint further alleged that Phoebe attempted to use the Hospital Authority of Albany-Dougherty County (the "Authority") to shield the acquisition from federal antitrust scrutiny under the "state action" doctrine. The administrative proceeding was then stayed pending the outcome of a parallel federal action challenging the transaction. After the Commission was successful on appeal in the federal action, the Commission lifted the stay on the administrative proceeding. Following discovery, the parties entered a settlement. Under the terms of the consent order, Phoebe and the Authority must notify the Commission in advance of acquiring any part of a hospital or a controlling interest in other healthcare providers in the Albany, Georgia area for the next decade. The order further bars the respondents from objecting to any certificate of need applications made by potential new hospital providers for the next five years.

Participants

For the *Commission: Thomas H. Brock, Peter C. Herrick, Janet J. Kim, Sara Razi, Matthew Reilly, Scott Reiter, Mark Seidman, Joshua Smith, W. Stephen Sockwell, Matthew Tabas, Priya Viswanath,* and *Goldie V. Walker.*

For the *Respondents: Brian Burke, John Fedele,* and *Jennifer Semko, Baker & McKenzie LLP*; *Robert Baudino, Baudino Law*

Group PLC; Emmet J. Bondurant, Michael A. Caplan, Ronan A. Doherty, and *Frank M. Lowery, Bondurant, Mixson & Elmore, LLP; Kevin J. Arquit, Jeffrey Coviello, Abram Ellis, Jennifer Rie,* and *Peter C. Thomas, Simpson Thacher & Bartlett LLP*; and *Vadim Brusser, James Egan, Jr., Katherine Funk, Teisha Johnson, Jonathan Sickler*, and *Lee Van Voorhis, Weil, Gotshal & Manges LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Respondents Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("PNI") (collectively, "Phoebe Putney"); Respondents HCA Inc. ("HCA") and Palmyra Park Hospital, Inc. ("Palmyra"); and Respondent Hospital Authority of Albany Dougherty County ("the Authority"), having entered into an agreement pursuant to which control of Palmyra shall be transferred to Phoebe Putney (the "Transaction"), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the 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 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), stating its charges as follows:

I.
NATURE OF THE CASE

1. The Transaction creates a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany, Georgia and its surrounding area. The Transaction will eliminate the robust competitive rivalry between Phoebe Putney and Palmyra – the only two hospitals in Albany and in Dougherty County – that has benefitted consumers for decades. The result will be significant increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, and the stifling of beneficial quality improvements.

2. Phoebe Putney and Palmyra knew that creating a virtual monopoly would not pass muster with the antitrust authorities; indeed, Palmyra conditioned the deal on [redacted]. So Phoebe Putney – without even informing the Authority that it was doing so – structured the Transaction in hopes of using the state action doctrine to shield the Transaction from potential antitrust challenges. The Transaction positions the Authority as a strawman to transfer control of Palmyra to Phoebe Putney in a three-step process: first, the Authority will purchase Palmyra's assets from HCA using PPHS's money; second, the Authority will immediately give control of Palmyra to Phoebe Putney under a management agreement; and third, Phoebe Putney will enter into a lease giving it control of the Palmyra assets for 40 years. In a nutshell, the Authority, using Phoebe Putney's money, would buy Palmyra, and then upon closing, immediately turn it over to Phoebe Putney.

3. Thus, the Authority is the acquirer of Palmyra on paper only. By using the Authority as a strawman, Phoebe Putney sought to shield this overtly anticompetitive Transaction from antitrust scrutiny. The Authority played no meaningful role in the Transaction. Phoebe Putney initiated and negotiated the deal. The Authority undertook no substantive analysis of the Transaction or its effect on the community and played no independent role in negotiating it. The parties included the Authority at the eleventh hour solely in an effort to avoid antitrust enforcement by having the Authority rubber-stamp this sale from one private party to another. Indeed, the entire Transaction is premised on the immediate handover of Palmyra's assets to Phoebe Putney; the Authority has considered no other options.

4. So certain was Phoebe Putney that the Authority would rubber-stamp the Transaction, that it [redacted] with Palmyra. Before the Transaction was even presented to the Authority, Phoebe Putney agreed with Palmyra that if the Authority failed to [redacted] Phoebe Putney would [redacted].

5. Phoebe Putney's confidence that the Authority would rubber-stamp the deal comes from years of operating without active supervision by the Authority under its long-term Lease and Management Agreement of the hospital's assets to Phoebe

Putney's subsidiary, PPMH ("the Lease"). As the [redacted] explained to a new Authority member and to Phoebe Putney's CEO, [redacted]. The [redacted] has similarly expressed that he did not consider hospital oversight a function of the Authority.

6. Phoebe Putney, a private hospital system determined to increase its already dominant market share, acted alone when it sought out the Transaction. And Phoebe Putney alone will benefit from it at the expense of area businesses and residents. There is no bona fide state action whatsoever associated with the Transaction. Even under a new prospective lease arrangement, the [redacted] expects it to be business as usual, as the Authority does not plan to engage in any meaningful additional oversight of the de facto monopoly, falling far short of the active state supervision required to satisfy the state action doctrine.

7. Following the Transaction, Phoebe Putney will control 100% of the licensed general acute care hospital beds in Dougherty County. Even in an expansive geographic market encompassing the six counties surrounding Albany, Phoebe Putney's pre-Transaction market share based on commercial patient discharges nears 75%. With the Transaction, this will jump to approximately 86%. The hospital with the next-largest share (of less than 4%) is located 40 miles from Albany. The Transaction dramatically increases concentration in an already highly concentrated market, giving rise to a presumption of unlawfulness by a wide margin under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

8. Phoebe Putney and Palmyra are each other's closest competitors, and they are regarded as closest substitutes for one another by both health plans and their members. The two hospitals have battled fiercely for inclusion in health-plan networks and have gone to great lengths to increase their appeal to health-plan members. While Palmyra has [redacted] relative to Phoebe Putney, the latter has for years offered its deepest commercial payor discounts to health plans that exclude Palmyra from their networks.

9. The Transaction will end that beneficial competition. The CEO of Phoebe Putney stated publicly that the Transaction

affords the opportunity to "get the rivalry behind us." A requirement of the Transaction is that Palmyra drop its pending monopolization lawsuit against Phoebe Putney.

10. Other southwest Georgia hospitals offer scant competition to Phoebe Putney and Palmyra. The nearest independent hospitals, located over 30 miles from Albany, are small and serve only their own local communities. Given health-plan members' unwillingness to travel significant distances for inpatient general acute care services, these hospitals are simply too distant to serve as practical substitutes for residents of the Albany area, even in the event of a small but significant price increase at the Albany hospitals. Health plans and local employers have testified that their networks must include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.

11. The Transaction greatly enhances Phoebe Putney's bargaining position in negotiations with health plans, giving it the unfettered ability to raise reimbursement rates without fear of losing customers. Without Palmyra or any other independent competitive alternative to PPMH, health plans will be forced either to accept the higher rates or to exit the local marketplace. Higher hospital rates are ultimately borne by the health plans' customers – local employers that pay their employees' healthcare claims directly or pay premiums to health plans on their employees' behalf – and by the individual health-plan members themselves. Those increased costs impact local employers' ability to compete, expand, and remain vibrant.

12. The vigorous price and non-price competition eliminated by the Transaction will not be replaced by other hospitals in the next several years, if ever. Significant barriers to entry and expansion, including Certificate of Need ("CON") and funding requirements, prevent other hospitals from extending their reach into the Albany area. Even Palmyra has struggled mightily to expand into new service lines, such as obstetrics, due to stringent CON requirements and fierce opposition from Phoebe Putney. Phoebe Putney has stated it would take many years to construct a new facility comparable to Palmyra. Any purported efficiencies associated with the Transaction are insufficient to offset the great anticompetitive harm almost certain to result from the Transaction.

II.
BACKGROUND

A. Respondents

13. All Phoebe Putney Respondents are not for profit corporations under Internal Revenue Code § 501(c)(3) and the Georgia Nonprofit Corporate Code, with their principal places of business at 417 Third Avenue, Albany, Georgia 31701. Respondent PPMH, directly or indirectly, is a Georgia corporation wholly owned or controlled by PPHS, a Georgia corporation. PPHS is responsible for the operation of all Phoebe Putney hospital facilities in Albany, Georgia as well as the hospital in Sylvester, Georgia (in the Albany Metropolitan Area), where Phoebe Worth Medical Center, Inc. is located. Respondent Phoebe North, Inc. is an entity that was created by PPHS in connection with the Transaction, to manage and operate Palmyra, under the control of PPHS and PPMH.

14. PPMH is a 443 bed hospital located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911 at its current site, the hospital offers a full range of general acute care hospital services, as well as emergency care services, tertiary care services, and outpatient services. PPMH serves its local community, but also draws tertiary-service referrals from a broader region.

15. Total annual patient revenues for Phoebe Putney for all services, at all facilities, are over $1.16 billion. Total discharges for all services are over 19,000. Phoebe Putney's annual net income or surplus is over $19 million. General acute care hospital services account for the majority of its services and revenues.

16. Phoebe Putney's reach extends beyond Dougherty County, operating, through its wholly owned subsidiary Phoebe Worth Medical Center, Inc., a 25 bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791, and Phoebe Sumter Medical Center, a 76-bed general acute care hospital located in Americus, Georgia.

17. Respondent HCA is a for-profit health system that owns or operates 164 hospitals in 20 states and Great Britain. Founded in

1968, HCA is one of the nation's largest health care service providers with almost 40,000 licensed beds. Total annual revenues for HCA for all services and facilities are over $30.68 billion. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

18. HCA owns and operates Respondent Palmyra Park Hospital, Inc., doing business as Palmyra Medical Center, a 248 bed acute care hospital incorporated in the State of Georgia, and located at 2000 Palmyra Road, Albany Georgia 31701. Palmyra was built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options available to residents of Dougherty County and the surrounding counties. Palmyra provides general acute care services, including but not limited to services in non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology.

19. Respondent Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31 7 70 *et seq*., a statute which governs 159 counties over the entire state, where at least 92 hospital authorities currently exist. The Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701, the same address as PPMH; it has no budget, no staff, and no employees. Phoebe Putney pays all the Authority's expenses. The Authority's nine unpaid/volunteer members are appointed to five-year terms by the Dougherty County Commission. The Authority holds title to the hospital's assets, but leased them in 1990 to PPMH for $1.00 per annum under the Lease, which has been extended several times and will expire in 2042. The Lease establishes certain contractual rights, duties, and responsibilities PPMH and the Authority owe with respect to one another. PPHS itself is not a party to the Lease and does not report to the Authority.

B. Jurisdiction

20. Respondents, and each of their relevant operating subsidiaries and parent entities are, and at all relevant times have been, engaged in activities in or 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.

21. The Transaction, including the Authority's acquisition of Palmyra and lease of Palmyra's assets to Phoebe Putney, constitutes an acquisition subject to Section 7 of the Clayton Act.

C. Phoebe Putney's Private Interests

22. Under the terms of the Lease, the relationship between the Authority and PPMH is defined as and limited to that of landlord and tenant. Section 10.18 reads in pertinent part that "no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor [sic] other than the relationship of landlord and tenant."

23. The Lease (and the attachments incorporated into the Lease as stipulated in Sections 4.02(h) and 4.15) provides that PPHS, through its Board of Directors, controls the assets and operations of PPMH. Under the terms of the December 3, 1990, Contract Between Dougherty County, Georgia and the Authority of Albany Dougherty County, an attachment to the Lease, the Authority and Dougherty County stipulate in paragraph no. 4, on page five, that PPMH "has the sole discretion to establish its rate structure."

24. Since the Lease took effect in 1990, the Authority has not and does not countermand, approve, modify, revise, or in other respects actively supervise Phoebe Putney's actions regarding competitively significant matters. It is Phoebe Putney's executives, not the Authority, who control Phoebe Putney's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. At no time, from the date the Authority and PPMH entered into the Lease, has the Authority exercised management, control, or active supervision over the affairs of PPMH. Indeed, during all those years, the Authority never asked once for lower prices at PPMH.

25. As if to illustrate its deference to Phoebe Putney, the Authority waived its right to acquire Palmyra or any other hospital in Albany as a term of the Lease. Section 4.21 of the Lease, at page 26, stipulates that "[d]uring the term of this Agreement, Transferor [Authority] shall not own, manage,

operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than the [Phoebe Putney Memorial] Hospital in Albany, Georgia . . . ." Once the Authority rubber-stamped the Transaction and the Management Agreement that would put Phoebe Putney in control of its only Dougherty County competitor, however, PPMH agreed to waive this condition.

D. The Transaction

26. In the Spring and Summer of 2010, two important events occurred: (1) in April, the Eleventh Circuit reinstated Palmyra's antitrust suit accusing Phoebe Putney of using its monopoly power in obstetrics, neonatal and cardiovascular care to foreclose competition; and (2) in July, Mr. Joel Wernick, PPHS's President and Chief Executive Officer, authorized Mr. Robert J. Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney.

27. Mr. Baudino played a number of roles in the Transaction. Through his Baudino Law Group, he provides legal counsel to PPHS with regard to the deal and other matters. He is also a member of the Sovereign Group which was engaged by PPHS to represent it in the Transaction in a non-legal capacity. The Sovereign Group is charging PPHS a fee of [redacted] percent of the $[redacted] million transaction value, plus expenses, the payment of which is contingent on closing the Transaction. More recently, Mr. Baudino has also claimed to represent the Authority as "special counsel" in the Transaction, although the Authority was unaware of his representation of PPHS or his nearly $[redacted] contingency fee.

28. Mr. Baudino and his Sovereign Group began negotiations on behalf of PPHS to acquire Palmyra in August 2010. At this point, Phoebe Putney had not notified the Authority that it was considering buying its rival. HCA, Palmyra's owner, did not intend to sell the hospital and informed Mr. Baudino that "[redacted]." Palmyra's business was improving, and HCA executives expected its financial performance to continue improving; they also expected to be successful in the battle with

Phoebe Putney in both the antitrust lawsuit and in obtaining Palmyra's obstetrics CON.

29. HCA was open to hearing an offer for Palmyra, but it expected "[redacted]," "[redacted]" and "[redacted]." PPHS set out to meet those requirements and to acquire Palmyra.

30. The [redacted] was the easiest condition. Although it is a non-profit, PPHS operates the very lucrative PPMH, leased from the Authority for $1 per year. Phoebe Putney has cash reserves of over a quarter of a billion dollars.

31. As the negotiations progressed, HCA made clear that an [redacted] offer would have to meet or exceed [redacted] times Palmyra's annual net revenue. HCA's expectations were shared with PPHS's bankers who analyzed similar transactions and found that HCA's demand far exceeded [redacted]. HCA's demand presented an obvious obstacle: it would be difficult to find an independent investment bank to issue a fairness opinion to PPHS opining that the price to be paid for Palmyra is fair, as is often done in significant transactions. But Mr. Baudino had a ready solution: structure the deal so that the Authority would acquire Palmyra, likely eliminating the need for a fairness opinion. Mr. Baudino was right. When Phoebe Putney finally presented the Transaction and the sale price to the Authority, the Authority neither sought a fairness opinion nor asked a single question about the price, despite never before having reviewed a transaction of this magnitude.

32. Mr. Baudino believed he had an easy answer to the antitrust risk as well. In a purportedly "[redacted]" method, Phoebe Putney would not buy Palmyra directly. Rather, it would structure the Transaction so that the Authority would acquire Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. Once the Authority obtained title, it would simply lease Palmyra to PPHS for $1.00 per year for 40 years on terms similar to the PPMH lease. Subsequently, in an effort to head-off an antitrust enforcement action by the Commission and the State of Georgia, the Authority approved a term sheet prepared by Mr. Baudino for implementing the new lease with ostensibly more oversight than had been exercised in the past two decades under the original

1990 Lease. But [redacted] admitted that the term sheet is a wish list, to which Phoebe Putney has not agreed, and that the Authority's role after the Transaction will not differ meaningfully from its current one – i.e., it will continue to let Phoebe Putney do "whatever it takes to make the wheels turn."

33. HCA's demand that there not be any [redacted] until the Transaction was signed also did not pose a problem. PPHS does not consider itself subject to Georgia's Open Meetings Act, and it strictly limited the knowledge of the Transaction to people with a "need to know." Although PPHS was negotiating an agreement that included the Authority as a key party, PPHS did not consider the Authority to be among those with a "need to know."

34. Unlike PPHS, the Authority must comply with Georgia's Open Meetings Act. But PPHS sidestepped that problem by not presenting the Transaction to the Authority until all of its terms were definitively determined and the vote was a "[redacted]." The Authority could then rubber-stamp the completed deal at an open meeting, thereby addressing all of HCA's antitrust and confidentiality concerns.

35. On October 7, 2010, PPHS's board approved management's recommendation that it make a formal offer to HCA for Palmyra.

36. PPHS's negotiations for Palmyra were well underway before PPHS even mentioned them to any of the Authority's nine members. On October 21, Mr. Wernick and Tommy Chambless, PPHS's General Counsel, held a 30-minute informational session with two of the Authority's members, Ralph Rosenberg and Charles Lingle. The Authority had neither delegated responsibility for the Transaction to them nor designated them to speak on its behalf. Mr. Wernick informed them that PPHS intended to acquire Palmyra, but gave them no documents explaining the acquisition or justifying the substantial premium PPHS was contemplating. Rosenberg and Lingle signed confidentiality agreements, which they understood prevented them from discussing the Transaction with other Authority members.

37. Two weeks later, on November 4, 2010, the Authority had its regularly scheduled quarterly meeting. There was no discussion of the Transaction at that meeting.

38. On November 10, 2010, Mr. Baudino, acting as "counsel to Phoebe Putney Health System Inc.," explained to HCA in a six-page letter how PPHS would structure the Transaction to eliminate antitrust risks. He believed that, under the state action doctrine, having the Authority make the acquisition would insulate the deal from notice to, or antitrust law enforcement by, the Commission and the United States Department of Justice. Mr. Baudino went on to explain that "the Authority would acquire Palmyra and, after the acquisition, lease Palmyra to a non-profit corporation controlled by PPHS. That lease would be on substantially the same terms as the Authority's existing lease of Phoebe Putney Memorial Hospital Inc."

39. On November 16, 2010, PPHS made a formal offer to HCA for Palmyra for [redacted] its net patient revenue for the prior 12 months. The Authority did not review or approve the offer.

40. On December 2, the PPHS Board approved the final terms of the deal between PPHS and HCA. PPHS and HCA concluded their negotiations shortly thereafter. The Transaction had still not been presented to, or vetted by, the Authority. PPHS agreed to guarantee a $195 million payment, which according to reports generated by PPHS's advisors, was [redacted]. The Authority played no role in negotiating that price, and the [redacted] prepared by PPHS's advisors was not shared with the Authority.

41. PPHS also agreed to pay a $[redacted] million break-up fee, representing nearly [redacted]% of the purchase price. In addition, under Section 10.1(a) of the Respondents' Asset Purchase Agreement, PPHS likewise agreed to pay HCA a $[redacted] million "rescission fee" if, after closing, there is a final court order rescinding the transaction. The Authority had no role in negotiating the break-up or rescission fees.

42. With the negotiations between PPHS and HCA concluded, it was time to present the Transaction to the Authority. But first, on December 20, 2010, the eve of the meeting at which it would

be presented to the Authority, PPHS [redacted] would approve the Transaction without any changes. [redacted]. If, once presented, the Authority failed to [redacted], PPHS would pay [redacted] within two business days' time. During the preceding week, Mr. Wernick had met in small groups with other Authority members without the knowledge of the Authority Chairman.

43. On December 21, 2010, at a special meeting, the Transaction was presented to the Authority for the first time. In a 94-minute meeting, PPHS's CEO and its advisor, Mr. Baudino (who appeared as special counsel to the Authority without addressing his work for Phoebe Putney or the Sovereign Group's financial interest in the Transaction), presented the terms of the Transaction and the related transactions using a PowerPoint presentation recycled from PPHS's December 2 Board meeting. [redacted] the Authority did just what PPHS expected it would do. The members did not seek to change a single term of the Transaction. Indeed, they asked no questions and sought no extra counsel or independent analysis. Having no reason to acquire Palmyra independent of PPHS's desire to do so, the Authority rubber-stamped the Asset Purchase Agreement exactly as PPHS had negotiated it.

44. At that meeting, the Authority also approved a 17-page Management Agreement that will give Phoebe Putney control over Palmyra's operations immediately upon closing the Transaction.

45. The Authority understood that the Transaction negotiated and entered into by PPHS was an integrated transaction which included the expected lease of Palmyra to Phoebe Putney.

46. On April 4, 2011, the Authority approved a lease term sheet prepared by Mr. Baudino that makes abundantly clear that the Authority's plan remains to lease Palmyra's and PPMH's assets to Phoebe Putney under a single lease. The term sheet is a wish list that has not even been presented to Phoebe Putney, let alone agreed upon. But even assuming Phoebe Putney were to agree to every single proposed term, [redacted] does not expect the Authority to make significant changes from its current activities, such as hiring staff to oversee Phoebe Putney's de facto monopoly or involving itself in Phoebe Putney's pricing or

arrangements with commercial health-plan providers. In other words, Phoebe Putney will have free rein, just as it has for the last 20 years, only now it will operate as a virtual monopolist.

III. THE RELEVANT SERVICE MARKET

47. The Transaction threatens substantial harm to competition in the relevant market for inpatient general acute care hospital services sold to commercial health plans.

48. Inpatient general acute care hospital services encompasses a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital stay. It is appropriate to evaluate the Transaction's likely effects across this cluster of services, rather than analyzing effects as to each service independently, because the group of services in the market is offered by Phoebe Putney and Palmyra under very similar competitive conditions. There are no practical alternatives to the cluster of inpatient general acute care hospital services.

49. The inpatient general acute care services market excludes outpatient services because health plans and patients cannot substitute them for inpatient care in response to a price increase. Similarly, the general acute care hospital services market does not include highly specialized tertiary or quaternary hospital services, such as those involving major surgeries and organ transplants, because they too are not practical substitutes for general acute care hospital services.

50. Phoebe Putney and Palmyra negotiate reimbursement-rate contracts with commercial health plans. These contracts set the reimbursement rates that the health plans (and their self-insured customers) will pay the hospital for the services provided to health-plan members.

IV. THE RELEVANT GEOGRAPHIC MARKET

51. The relevant geographic market in which to analyze the effects of the Transaction is no broader than the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia.

52. Health-plan members strongly prefer to obtain inpatient hospital services close to their homes. Members' physicians typically have admitting privileges at their local hospitals, but not more distant facilities. Close proximity provides convenience for patients and also their visiting family members. Members are generally unwilling to travel outside of their communities for inpatient general acute care services, unless a particular needed service is unavailable locally, or the quality offered by local facilities is perceived as insufficient.

53. The only hospitals available to health plans to serve residents of the Albany area are located in Dougherty County, in the City of Albany. Health plans must have either Phoebe Putney or Palmyra, or both, in their networks in order to offer commercially viable insurance products to residents of Albany and the six-county area.

54. The nearest independently owned hospitals located outside of Albany are Mitchell County Hospital (31 miles away), Crisp Regional Hospital (39 miles away), and Calhoun Memorial Hospital (39 miles away). Health plans and their members do not view these hospitals, given their distance and limited service offerings, as practical substitutes for Phoebe Putney or Palmyra.

55. Health plans could not steer their members to hospitals outside the six-county area in response to a small but significant rate increase at the hospitals within the area. It would therefore be profitable for a hypothetical monopolist controlling all hospitals in the relevant geographic market to increase commercial reimbursement rates by a significant amount.

56. As reflected by their ordinary-course documents and their actions, Phoebe Putney and Palmyra focus their competitive efforts and attention on one another, to the exclusion of any hospitals located outside the six-county area. Phoebe Putney's longstanding contracting strategy was to require health plans to exclude Palmyra, but no other hospitals, from their provider networks.

57. Hospitals outside the six-county area do not regard themselves as, and are not, meaningful competitors of Phoebe

Putney or Palmyra for inpatient general acute care services as defined herein.

V. MARKET STRUCTURE AND PRESUMPTIVE ILLEGALITY

58. The Transaction is for all practical purposes a merger to monopoly, by any measure.

59. In addition to Phoebe Putney and Palmyra, there is only one other independently owned hospital located within the expansive six-county region set forth above. That is 25-bed Mitchell County Hospital, a very small limited care facility about 31 miles away. In addition, there are two hospitals located outside the six-county area – Tift Regional Medical Center and John D. Archbold Medical Center – which account for a small but nontrivial share of discharges for health-plan members residing within the six-county area. The two other hospitals mentioned above, Crisp Regional and Calhoun Memorial, are also located outside the six-county area and account for an insignificant share of the relevant market.

60. Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS's post-Transaction market share, based on discharges for commercial patients residing in the six-county area, is approximately 86%. This extraordinarily high market share easily exceeds levels that the United States Supreme Court has found presumptively unlawful.

61. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is presumptively likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points.

62. The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction HHI will increase by 1,675 points to 7,453, as shown in the following table:

Hospital	**Discharges**	**Pre-Transaction Share of Discharges**	**Post-Transaction Share of Discharges**
PPHS	6,662	74.9%	86.1%
Palmyra	1,000	11.2%	
Tift Regional Medical Center	351	3.9%	3.9%
John D. Archbold Memorial Hospital	218	2.5%	2.5%
Others (each 1% or less)	659	7.4%	7.4%
Total	8,890		
Pre-Transaction HHI:			5,778
Delta:			1,675
Post-Transaction HHI:			7,453

VI. ANTICOMPETITIVE EFFECTS

A. The Transaction Eliminates a Unique Pricing Constraint Upon Phoebe Putney

63. By eliminating vigorous competition between Phoebe Putney and Palmyra, the Transaction enhances Phoebe Putney's ability and incentive to increase reimbursement rates for commercial health plans and their membership.

64. In its actions, documents, testimony, and public statements, Phoebe Putney has acknowledged the intense competition between it and Palmyra. For example, Phoebe Putney had a longstanding contracting strategy in which it offered substantially more attractive reimbursement rates to commercial health plans, including Blue Cross Blue Shield of Georgia, that were willing to enter into an exclusive in network relationship with Phoebe Putney but not Palmyra. In essence, Phoebe Putney recognized that its financial success depended on keeping health-plan members away from Palmyra, its only true competitor.

65. Cognizant of Palmyra's competitive threat, Phoebe Putney has repeatedly challenged Palmyra's efforts to obtain a CON for obstetrics. Palmyra was initially granted a CON to build an obstetrics department, after which Phoebe Putney appealed the decision twice, and lost. Phoebe Putney then sued in state court to block Palmyra from going forward with its plans and was successful. Palmyra's appeal of that decision is currently pending. Palmyra is also prosecuting an antitrust lawsuit against Phoebe Putney, alleging monopolization and illegal tying.

66. Palmyra has demonstrated the ability to capture market share from Phoebe Putney. [redacted] testified that Palmyra's market share has increased during the last two years, while Phoebe Putney's share has declined by an equal amount. And Mr. Wernick's December 21, 2010 presentation to the Authority states that one of the strategic consequences to Phoebe Putney were it not to buy Palmyra is "[redacted]."

67. In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21st:

> [redacted]

68. The overt competitive rivalry between Phoebe Putney and Palmyra has yielded price benefits to health plans and their members. While Phoebe Putney has [redacted], Palmyra's competitive strategy in the marketplace has been to [redacted] versus Phoebe Putney. As the two hospitals will operate as a single entity under one lease, the Transaction eliminates incentives for either hospital to discount its rates in an effort to gain business from health plans and their members.

69. Following the Transaction, the combined Phoebe Putney/Palmyra will become an absolute "must-have" hospital for health plans, which will have no available practical alternative hospitals to offer their members. This significant change in the negotiating dynamic will enhance Phoebe Putney's ability and incentive to obtain rate increases for its own services, as well as for Palmyra's services. Health plans anticipate that Palmyra's rates will increase significantly, and that Phoebe Putney's rates will rise incrementally as well, due to the elimination of its only significant competitor.

70. Rate increases resulting from the Transaction ultimately will be shouldered by local employers and their employees. A significant percentage of the commercial health-plan membership in the Albany area is self-insured. Self-insured employers rely on health plans to negotiate rates and provide administrative support, while directly paying the full cost of their employees' healthcare claims. As a result, self-insured employers and employees immediately and directly bear the full burden of higher rates, including higher premiums, co-pays, and out-of-pocket costs. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers through premium increases and administrative fees. To avoid having to pay the higher prices, some Albany-area employers may opt no longer to provide healthcare coverage for their employees, and some Albany area residents may be forced to forego or delay healthcare services because of the higher prices.

71. Non-profit hospitals such as Phoebe Putney are no less likely than their for-profit counterparts to negotiate aggressively with health plans over reimbursement rates and to exercise market power gained through acquisition of a competitor.

C. The Loss of Quality Competition

72. The Transaction will reduce the quality and breadth of services available in the Albany area.

73. Absent the Transaction, Phoebe Putney and Palmyra would continue to be close rivals with differentiated competitive offerings in the market for general acute care hospital services. Health plans perceive little quality difference between the two hospitals currently.

74. Competition between Phoebe Putney and Palmyra has spurred the two hospitals to offer additional services; it also has fostered other non price benefits for residents of the Albany area. For example, in response to Palmyra advertising its real-time emergency room wait times on its website and electronic billboards, Phoebe Putney executives sought to improve their own

services. After Palmyra was granted a CON for an obstetrics department, Phoebe Putney developed plans to increase the availability of private rooms to its obstetrics patients. If the Transaction moves forward, these benefits of competition will be lost.

VII. ENTRY BARRIERS

75. Entry by new hospitals will not deter or counteract the Transaction's likely harm to competition in the relevant service market. There is little chance that other firms would be able to enter to counter Phoebe Putney's anticompetitive practices.

76. The regulatory environment in which hospitals are permitted to operate prevents other institutions from entering. Under Georgia law, GA. Code Ann. §§ 31 6 42 (a)(3), only specially licensed facilities are permitted to offer general acute care hospital services, and before they may do so, the State must issue a CON before a new facility may be built.

77. Even if a CON were obtained, the construction of a new general acute care hospital comparable to Palmyra would cost millions of dollars and take well over two years – indeed, [redacted] years according to Phoebe Putney's counsel – from initial planning to opening doors to patients.

78. The construction of Palmyra in 1971 was the last example of new hospital entry in the Albany area. No other hospitals in southwest Georgia – the most likely candidates for new entry or expansion – have stated they will enter, or even are considering entering, the relevant geographic market.

VIII. ANTICIPATED AFFIRMATIVE DEFENSES

A. State Action

79. The Transaction was motivated and planned exclusively by Phoebe Putney, which acts in its independent, private, and pecuniary interests. Rather than acting in furtherance of the public interest, or even evaluating those interests, the Authority served only as a strawman to permit Phoebe Putney to attempt to

shield this overtly anticompetitive Transaction from antitrust scrutiny.

80. The Authority engaged in no independent analysis to determine whether the Transaction would be in the public's interest. Having no reasons for acquiring Palmyra other than those advanced by Phoebe Putney, it authorized a $195 million purchase of Palmyra – using Phoebe Putney's money – without even considering: (i) the adverse effect this virtual merger to monopoly would have on healthcare pricing in the community; (ii) the valuation of Palmyra; (iii) alternatives to leasing Palmyra's to Phoebe Putney; or (iv) who specifically from Phoebe Putney would run Palmyra immediately after the Transaction.

81. Just as it played no supervisory role in the Transaction, since at least 1990 when the Lease became effective, the Authority has not actively supervised Phoebe Putney in any sense, including with respect to strategic planning, pricing, and other competitively sensitive affairs. Rather, the Authority's oversight is limited to conducting quarterly breakfast meetings (the minimum required by statute) lasting approximately one hour. The [redacted] testified that he cannot remember an instance in which a vote was less than unanimous, and he had never seen a price list for the services provided by the hospital, despite serving on the Authority for over five years. The [redacted] believes pricing is a function of the hospital board, not the Authority. Consistent with that belief, the Authority made no effort to challenge, or even evaluate, PPMH's most recent price increases. The [redacted] testified that he was not aware of PPMH's price changes in the last several years or how much PPMH's prices have increased during his eight-plus years on the Authority. And, the Authority has no authority to oversee PPHS.

82. By contract, beginning immediately after the Transaction, Phoebe Putney will assume responsibility for setting prices for the services furnished at Phoebe North, the hiring and firing of Phoebe North employees, and other competitively significant decisions necessary for the operation of a hospital or hospital annex. The [redacted] does not expect any of that to change when it officially leases Palmyra's assets to Phoebe Putney.

83. In sum, there is no state action here. Rather, it is the private, self-interested Phoebe Putney that has agreed to purchase Palmyra and will exercise – unfettered and unchecked by the Authority or any hospital competitor – the extraordinary market power gained through the Transaction.

B. Efficiencies

84. Extraordinary efficiencies that cannot be achieved absent the merger are necessary to justify the Transaction in light of its vast potential to harm competition. Such efficiencies are lacking here.

IX. VIOLATION

85. The allegations of Paragraphs 1 through 84 above are incorporated by reference as though fully set forth.

86. The Transaction constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

87. The Transaction, if consummated, would substantially 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.

NOTICE

Notice is hereby given to the Respondents that the 19th day of September, 2011, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 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 not later than ten (10) days after the answer is filed by the last answering respondent. 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 answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving a respondent's answer, 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 7 of the Clayton Act, as amended, and Section 5 of the FTC 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 merger is consummated, (a) rescission of the Asset Purchase Agreement and/or (b) divestiture of Palmyra, and associated assets, in a manner that restores Palmyra as a viable, independent competitor in the relevant market, with the ability to offer such services as Palmyra was offering and planning to offer prior to the Transaction. Any ordered divestiture may be to, among other entities, Respondents HCA and/or Palmyra.

2. A ban, for a period of time, on any transaction involving Phoebe Putney, the Authority, or Palmyra through which Phoebe Putney would acquire, manage, or control the operations of Palmyra or which would combine Phoebe Putney's and Palmyra's businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Phoebe Putney provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its hospital or other health facilities in the relevant market with other hospitals or health facilities in the relevant market.

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 ensure the creation of one or more viable, competitive independent entities to compete against Phoebe Putney and Palmyra in the relevant market.

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 19th day of April, 2011.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its Complaint charging Respondent Phoebe Putney Health System, Inc. ("PPHS"), Respondent Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Respondent Phoebe North, Inc. ("PNI"), (hereinafter collectively referred to as "Respondent Phoebe Putney"), Respondent HCA Inc. ("HCA"), Respondent Palmyra Park Hospital, Inc. ("Palmyra"), and Respondent Hospital Authority of Albany-Dougherty County ("Hospital Authority"), with a violation of 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 Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief and having filed their answers denying said charges; 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 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and the Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional and factual findings and enters the following Order:

1. Respondent PPHS is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its headquarters address located at 417 Third Avenue, Albany, Georgia 31701.

2. Respondent PPMH is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, and is a 691-bed general acute care hospital located at 417 Third Avenue, Albany, Georgia 31701.

3. Respondent PNI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, and was created for the purpose of managing the Palmyra assets during the interim period after Respondent Hospital Authority acquired Respondent Palmyra Hospital, with its headquarters address located at 417 Third Avenue, Albany, Georgia 31701.

4. Respondent Hospital Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq*., a statute that governs 159 counties over the entire state of Georgia, where at least 92 hospital authorities currently exist. Respondent Hospital Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701.

5. Respondent HCA is a for-profit health system that owns or operates 167 hospitals in 20 states and Great Britain. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

6. Respondent Palmyra was a corporation named Palmyra Park Hospital, Inc., and was, prior to the acquisition by Respondent Hospital Authority, a 248-bed general acute care hospital owned by Respondent HCA, incorporated in the State of Georgia, and was located at 2000 Palmyra Road, Albany, Georgia 31701.

7. Respondent Hospital Authority proposed to acquire nearly all of the assets of Respondent Palmyra from Respondent HCA (the "Transaction").

8. Respondents admit all of the jurisdictional facts set forth in the Complaint.

9. For the sole purpose of this proceeding and achieving compromise through the Consent Agreement, Respondent Phoebe Putney and Respondent Hospital Authority have stipulated that the effect of the consummated Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Complaint.

ORDER

I.

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

A. "PPHS" or "Respondent PPHS" means Phoebe Putney Health System, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Phoebe Putney Health System Inc., and the respective directors, officers, employees,

agents, representatives, successors, and assigns of each.

B. "PPMH" or "Respondent PPMH" means Phoebe Putney Memorial Hospital, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Phoebe Putney Memorial Hospital, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "PNI" or "Respondent PNI" means Phoebe North, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Phoebe North, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondent Phoebe Putney" means, collectively, Respondent PPHS, Respondent PPMH, and Respondent PNI.

E. "HCA" or "Respondent HCA" means HCA Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at One Park Plaza, Nashville, Tennessee 37203.

F. "Palmyra" or "Respondent Palmyra" means Palmyra Park Hospital, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its headquarters address located at 2000 Palmyra Road, Albany Georgia 31701.

G. "Hospital Authority" or "Respondent Hospital Authority" means Hospital Authority of Albany-Dougherty County, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and

affiliates controlled by Hospital Authority of Albany-Dougherty County, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

H. "Commission" means The Federal Trade Commission.

I. "CON" means a certificate of need issued by the Georgia Department of Community Health as provided by O.C.G.A. §§ 31-6-1 to 31-6-70.

J. "General Acute Care Hospital" means an inpatient general acute care hospital that provides a broad cluster of basic medical and surgical diagnostic and treatment services that include overnight hospital stay, as described in Paragraph 48 of the Complaint.

K. "Physician" means a doctor of medicine ("MD") or a doctor of osteopathic medicine ("DO").

L. "Physician Group Practice" means a bona fide, integrated firm in which five (5) or more Physicians practice medicine together as partners, shareholders, owners, members, or employees.

M. "Six-County Region" means the six-county region of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia, as described in Paragraph 51 of the Complaint.

II.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final Respondent Phoebe Putney and Respondent Hospital Authority shall not, without providing advance written notification to the Commission in the manner described in this Paragraph II., directly or indirectly, acquire:

A. All or any part of a General Acute Care Hospital in the Six-County Region;

B. All or a controlling interest in any inpatient or outpatient clinic or facility in the Six-County Region that (1) may not be part of a General Acute Care Hospital but provides any of the services provided by Respondent Phoebe Putney or Respondent Hospital Authority in the Six-County Region, and (2) may or may not require a CON; and

C. All or a controlling interest in a Physician Group Practice in the Six-County Region.

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 Respondent Phoebe Putney and Respondent Hospital Authority and not from any other party to the transaction. Respondent Phoebe Putney and Respondent Hospital Authority shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Phoebe Putney and Respondent Hospital Authority 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 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.

Provided further, however, that prior notification shall not be required by this Paragraph II. for an acquisition, if (1) Respondent Phoebe Putney or Respondent Hospital Authority will hold, following the acquisition, no more than one percent of the outstanding securities or other equity interest in an entity described in this Paragraph II., or (2) Respondent Phoebe Putney or Respondent Hospital Authority acquires any additional ownership interest in an entity that it already controls.

III.

IT IS FURTHER ORDERED that until the earlier of five (5) years from the date this Order becomes final or the issuance of a CON for a General Acute Care Hospital in the Six-County Region, Respondent Phoebe Putney and Respondent Hospital Authority shall not file, formally or informally, directly or indirectly, with the Georgia Department of Community Health, its members, the Attorney General or any person in the Georgia Attorney General's office, objections to or negative comments about, an application by any person or entity for a CON filed with the Georgia Department of Community Health – or any successor department or organization – or any appeals therefrom, for a General Acute Care Hospital in the Six-County Region.

Provided, however, that nothing in Part III. of this Order shall prohibit Respondent Phoebe Putney and Respondent Hospital Authority from providing information in response to a formal request from the Georgia Department of Community Health.

Provided further, however, that Respondent Phoebe Putney and Respondent Hospital Authority shall submit to the Commission (i) the request for comments from the Georgia Department of Community Health within ten (10) days of its receipt, and (ii) a copy of the response to such request, within five (5) days of its submission to the Georgia Department of Community Health.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years from the date this Order becomes final, if Respondent Phoebe Putney or Respondent Hospital Authority file objections to an application by any person or entity for a CON filed with the Georgia Department of Community Health – or any successor department or organization – or any appeals therefrom, for an inpatient or outpatient clinic, facility or service in the Six-County Region, that may or may not be part of a General Acute Care Hospital, but provides any of the services provided by Respondent Phoebe Putney or Respondent Hospital Authority in the Six-County Region, such Respondent shall submit such objection to the Commission within five (5) days of its submission.

V.

IT IS FURTHER ORDERED that 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 nine (9) years, Respondent Phoebe Putney and Respondent Hospital Authority each shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied, are complying, and will comply with this Order. Respondent Phoebe Putney and Respondent Hospital Authority each shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this Order. Additionally, Respondent Phoebe Putney and Respondent Hospital Authority each shall include in their compliance reports whether or not they made any acquisitions pursuant to Paragraph II, including acquisitions subject to the final proviso to Paragraph II, and shall include a description of such acquisitions.

VI.

IT IS FURTHER ORDERED that Respondent Phoebe Putney and Respondent Hospital Authority each shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of such 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.

VII.

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 Phoebe Putney and Respondent Hospital Authority, Respondent Phoebe Putney and Respondent Hospital Authority shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

A. access, during business office hours of Respondent Phoebe Putney or Respondent Hospital Authority 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 Phoebe Putney and Respondent Hospital Authority relating to compliance with this Order, which copying services shall be provided by Respondent Phoebe Putney and Respondent Hospital Authority at its expense; and

B. to interview officers, directors, or employees of Respondent Phoebe Putney and Respondent Hospital Authority, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on March 31, 2025.

IX.

IT IS FURTHER ORDERED that the Complaint is dismissed as to Respondent HCA and Respondent Palmyra.

By the Commission, Commissioner Wright and Commissioner McSweeny not participating.

STATEMENT OF THE COMMISSION

Our challenge to this anticompetitive hospital acquisition resulted in an important Commission victory at the Supreme Court regarding the application of state action immunity. By reaffirming that state action immunity from the antitrust laws only applies where states have clearly intended to restrain competition, the Court's decision will benefit competition and consumers throughout the economy in the future. Regrettably, however, that victory did not alleviate the significant concerns we have about the anticompetitive effects of this merger on the citizens of Albany, Georgia.

Today we finalize a consent agreement with the Respondents[1] to settle the administrative litigation challenging the Hospital Authority's acquisition of Palmyra from HCA and subsequent transfer of all management control of Palmyra to Phoebe Putney under a long-term lease arrangement (the "Transaction") that closely mirrors the consent agreement the Commission accepted for public comment in this matter in 2013. Notably, this final order, like the originally proposed version, does not require a divestiture. While it would have been the most appropriate and

[1] Respondents include Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital ("PPMH"), Phoebe North, Inc. ("Phoebe North") (collectively "Phoebe Putney"), HCA Inc. ("HCA"), Palmyra Park Hospital, Inc. ("Palmyra"), and the Hospital Authority of Albany-Dougherty County ("Hospital Authority").

effective remedy to restore the lost competition in Albany and the surrounding six-county area from this merger to monopoly, Georgia's certificate of need ("CON") laws and regulations unfortunately render a divestiture in this case virtually impossible, leading us to accept this less-than-ideal remedy.

The Commission first challenged this Transaction in April 2011, alleging that the combination of Phoebe Putney with Palmyra, its only rival in Albany, would create a monopoly in the provision of inpatient general acute-care hospital services sold to commercial health plans in Albany and its surrounding six-county area, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In addition to issuing an administrative complaint, the Commission authorized staff to file a complaint for temporary and preliminary relief in federal district court. In June 2011, the district court granted the defendants' motion to dismiss, holding that the state action doctrine immunized the Transaction from federal antitrust scrutiny.[2]

On appeal by the Commission, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal on state action grounds, but agreed that "on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly."[3] Following its ruling, the Eleventh Circuit dissolved the injunction pending appeal that had prevented the parties from merging, and the parties consummated the Transaction in December 2011. The Commission filed a petition for certiorari, which the Supreme Court granted in June 2012.

In defending the challenged transaction, Respondents argued that the manner in which it was structured—whereby the Hospital Authority took title to Palmyra and then turned operational control over to PPHS—rendered it immune from the federal antitrust laws under the state action doctrine. Respondents contended that since the legislature gave hospital authorities broad general corporate

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[2] *FTC v. Phoebe Putney Health Sys. Inc.*, 793 F. Supp. 2d 1356, 1381 (M.D. Ga. 2011).

[3] *FTC v. Phoebe Putney Health Sys. Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

powers, including the power to acquire hospitals, the challenged conduct was a foreseeable result of the law.

In February 2013, a unanimous Supreme Court ruled in favor of the Commission and reversed the dismissal of the complaint, holding that the state action doctrine did not bar the Commission from taking action.[4] Notably, the Court found that Respondents' interpretation of the state action doctrine was overbroad and inconsistent with the principle that "state-action immunity is disfavored."[5] We thereafter determined to proceed with the administrative action that had been stayed pending the collateral federal court appeals.

In August 2013, although we still had reason to believe the transaction created an unlawful monopoly, the Commission accepted for public comment a proposed non-structural remedy in light of the apparent unavailability of a practical and meaningful structural remedy. In particular, we provisionally accepted the consent based on an understanding that Georgia's CON laws likely would have prevented a divestiture of hospital assets, even assuming a finding of liability following a full merits trial and appeal.

In September 2014, we withdrew our provisional acceptance of the 2013 consent agreement in response to new information received, including through public comments, suggesting that the CON laws might not bar a structural remedy. Additionally, in March 2014, North Albany Medical Center, LLC ("North Albany"), a then newly formed health care entity, expressed an interest in acquiring Palmyra and operating it as a competing general acute-care hospital, believing it could do so consistent

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[4] *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1011 (2013).

[5] *Id.* at 1010 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). The Supreme Court reiterated this principle in its recent *North Carolina Dental* decision, in which the Court affirmed the Commission's ruling that state regulatory boards comprised of individuals participating in the market they are regulating must demonstrate active supervision by the state to enjoy state action immunity. *See N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534, slip op. at 7 (U.S. Feb. 25, 2015) ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'") (citations omitted).

with Georgia's CON laws. Seeking clarification on whether those laws would impede such an acquisition, North Albany filed a "request for determination" with the Georgia Department of Community Health ("DCH") on the issue. DCH staff issued an initial determination in June 2014 finding, among other things, that "returning Phoebe North to its status as a separately licensed . . . hospital for divestiture would not require a prior CON review and approval."[6] The initial DCH staff determination was on appeal when we withdrew acceptance of the consent agreement. We believed that allowing the administrative and DCH proceedings to continue in parallel would avoid further delay in restoring competition to Albany if the Commission found liability on the merits and DCH determined that Georgia CON laws would not bar divestiture.

Unfortunately, developments occurring since we returned this matter to administrative litigation now appear to preclude structural relief. In October 2014, following review of the June DCH staff determination, a DCH Hearing Officer issued a written finding that the CON laws would apply to the proposed sale of Phoebe North. Shortly after this ruling, DCH Commissioner Clyde L. Reese III, who would have decided any appeal from the Hearing Officer's ruling, stated publicly that he was "in full support of and in agreement with the Hearing Officer decision."[7] Neither North Albany nor DCH staff chose to appeal the decision, rendering the Hearing Officer's ruling final.

While we continue to have reason to believe that Phoebe Putney's acquisition of Palmyra violated Section 7 of the Clayton Act and Section 5 of the FTC Act, any relief attempting to restore the competition lost as a result of the merger is precluded by Georgia's strict CON requirements. Specifically, the fact that the

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[6] *See* Letter from Matthew Jarrad, Deputy Division Chief/Health Planning Dir., Healthcare Facility Regulation Div., Ga. Dep't of Cmty. Health, to G. Edward Alexander, President and CEO, North Albany Medical Ctr. 4 (June 3, 2014).

[7] *See* Complaint Counsel's Memorandum Relating to Respondent's Unopposed Motion for Temporary Stay, Ex. 1, *Georgia Health Commissioner Agrees Certificate Needed For Phoebe Putney Breakup*, MLEX MARKET INSIGHT, Oct. 8, 2014, *In re Phoebe Putney Health System, Inc.*, Docket No. 9348.

Albany region is deemed "over-bedded" makes it unlikely that any divestiture buyer could obtain the necessary CON approval to operate an independent hospital. Indeed, the Hearing Officer's ruling effectively ensures any prospective buyer intending to operate a competing hospital would have to endure a lengthy legal battle with, at best, an uncertain outcome. Thus, divestiture—the Commission's preferred remedy to restore competition—is simply unavailable.

In light of these developments, we believe it is unlikely that continuing with the administrative proceeding, even after a finding of liability, would yield a substantially different outcome than is available through this consent. For this reason, we now make final the consent agreement settling the administrative litigation in this matter.

Under the final consent agreement, Phoebe Putney and the Hospital Authority will be required to give the FTC prior notice of certain future transactions and will be barred from opposing certain applications by potential competitors seeking state certification to enter local health care markets. The order also includes a stipulation by Phoebe Putney and the Hospital Authority that the Transaction was anticompetitive.

The outcome in this case underscores the importance of obtaining preliminary injunctive relief prior to the consummation of a transaction. By maintaining the status quo, injunctive relief prevents the possibility of competitive harm—sometimes, as in this case, irremediable harm—from occurring during the Commission's administrative proceedings and any appeals. Moreover, this case also illustrates how state CON laws, despite their original and laudable goal of reducing health care facility costs, often act as a barrier to entry to the detriment of competition and healthcare consumers.[8]

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[8] The Commission has long advocated that states consider the costs that CON laws may impose on consumers. *See, e.g.*, Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform 1-2 (Sept. 15, 2008), *available at* https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/09/ftc-and-department-justice-written-testimony-illinois ("The Agencies' experience and expertise has taught us that Certificate-of-Need laws impede the efficient performance of health care

As noted above, notwithstanding the unsatisfactory remedial outcome in this case, the Commission nevertheless achieved a significant victory in the Supreme Court with respect to the state action doctrine. By ensuring that state action immunity remains true to its doctrinal foundation of protecting the *deliberate* policy choices of sovereign states and is applied in a manner that promotes competition and enhances consumer welfare, this important win will unquestionably benefit competition and consumers going forward.

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markets. . . . Together, we support the repeal of such laws, as well as steps that reduce their scope.")**;** FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION Ch. 8, p. 6 (July 2004), *available at* https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice ("[T]he Agencies urge states with CON programs to reconsider whether they are best serving their citizens' health care needs by allowing those programs to continue.").

Complaint

IN THE MATTER OF

NOVARTIS AG AND GLAXOSMITHKLINE, PLC

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

Docket No. C-4510; File No. 141 0141
Complaint, February 20, 2015 – Decision, April 7, 2015

This consent order resolves concerns regarding the $16 billion acquisition by Novartis AG ("Novartis") of GlaxoSmithKline's ("GSK") portfolio of cancer-treatment drugs. Novartis and GSK manufacture BRAF and MEK inhibitors, orally administered products used to treat metastatic, late-stage melanoma.. The complaint alleges Novartis and GSK are two of a small number of companies with either inhibitor on the market or in development. Further, Novartis and GSK are two of only three companies marketing or developing a BRAF/MEK combination product to treat melanoma. If consummated, the acquisition was likely to delay or terminate Novartis' development of both its BRAF and MEK inhibitors, as well as the combination product, ultimately raising prices for consumers and depriving them of potentially superior products. Under the consent order, Novartis is required to divest all rights and assets related to its BRAF and MEK inhibitors to Array BioPharma. Further, Novartis is required to provide transitional services to Array BioPharma to ensure that development of the BRAF and MEK inhibitors continues uninterrupted and that competition in BRAF and MEK inhibitor markets is not reduced.

Participants

For the *Commission: Stephanie Bovee, Peter Colwell, Ben Lorigo, Amy Posner, Mark Silvia,* and *David Von Nirschl.*

For the *Respondents: Kathleen Bradish* and *George Cary, Cleary Gottlieb Steen & Hamilton;* and *Jeffrey Schmidt, Linklaters 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 Novartis AG ("Novartis"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire oncology assets from Respondent GlaxoSmithKline, PLC

("GSK"), 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 ("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 Novartis is a corporation organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters located at Lichtstrasse 35, Basel, Switzerland CH 4056 and the address of its U.S. subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, NY 10169.

2. Respondent GSK is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters located at 980 Great West Road, Brentford Middlesex, TW8 9GS, England. GSK's U.S. headquarters are located at Philadelphia Navy Yard, 5 Crescent Drive, Philadelphia, PA, 19112.

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 TRANSACTION

4. Pursuant to an agreement executed on April 22, 2014 (the "Agreement"), Novartis intends to acquire GSK's marketed oncology products and two pipeline products for approximately $16 billion (the "Transaction"). The Transaction 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 Transaction are:

a. the development and sale of BRAF inhibitors used to treat cancer ("BRAF inhibitors"); and

b. development and sale of MEK inhibitors used to treat cancer ("MEK inhibitors").

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

IV. THE STRUCTURE OF THE MARKETS

7. There are currently only two BRAF-inhibitors approved by the U.S. Food and Drug Administration ("FDA") and sold in the United States: (1) Zelboraf®, sold by F. Hoffman-La Roche Ltd. ("Roche"); and (2) Tafinlar®, sold by GSK. Novartis is the only other firm likely to begin competing with a BRAF inhibitor in the near future.

8. GSK currently sells the only FDA-approved MEK inhibitor, Mekinist®. Roche and Novartis are two of only a small number of companies with MEK inhibitors in late-stage clinical development.

9. The near-term application of BRAF and MEK inhibitors is primarily as a combination product to treat melanoma. GSK sells the only FDA-approved BRAF/MEK combination, which consists of Tafinlar and Mekinist. Roche and Novartis have BRAF/MEK combinations in clinical development and likely will be the only other firms to compete against GSK's combination in the near future.

V. ENTRY CONDITIONS

10. Entry into the relevant lines of commerce described in Paragraphs 5 and 6 would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Transaction.

Development of a BRAF inhibitor and MEK-inhibitor by a new entrant would be difficult, expensive, and time-consuming, in large part because new oncology medicines must complete clinical trials and receive FDA approval before they can be sold in the United States. No firms have products in development which are likely to enter the relevant markets and prevent the competitive harm from the transaction.

VI. EFFECTS OF THE TRANSACTION

11. The effects of the Transaction, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant lines of commerce, 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. Eliminating substantial future competition between GSK and Novartis in the development and sale of BRAF-inhibitors; and

b. Eliminating substantial future competition between GSK and Novartis in the development and sale of MEK-inhibitors.

VII. VIOLATIONS CHARGED

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

13. The Transaction 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 twentieth day of February, 2015, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Novartis AG ("Novartis" or "Respondent") of certain assets related to certain oncology products of GlaxoSmithKline plc, 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 Orders ("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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtrasse 35, Basel, Switzerland,

V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York.

2. GlaxoSmithKline plc is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9FS, United Kingdom.

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

ORDER

I.

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

A. "Novartis" or "Respondent" means the following: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Glaxo" means the following: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Glaxo SmithKline plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that the 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 the Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

E. "Acquisition" means Novartis' acquisition of certain assets of Glaxo as described in the Acquisition Agreement.

F. "Acquisition Agreement" means the Sale and Purchase Agreement dated as of April 22, 2014, and the Deed of Amendment and Restatement dated as of May 29, 2014, between GlaxoSmithKline plc and Novartis AG that were submitted to the Commission. The Acquisition Agreement is contained in Non-Public Appendix II to this Order.

G. "Acquisition Date" means the date on which the Acquisition is consummated.

H. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA") and the European Medicines Agency ("EMA").

I. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New

Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 *et seq*., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term "Application" also includes any submissions or applications to the EMA that are similar in content or purpose to the above-described applications to the FDA.

J. "Array" means Array BioPharma Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters address located at 3200 Walnut Street, Boulder, Colorado 80301.

K. "Array License Agreement" means the License Agreement by and between Novartis International Pharmaceutical Ltd. and Array BioPharma Inc. dated as of April 19, 2010. The Array License Agreement is contained in Non-Public Appendix II to this Order.

L. "B-Raf Inhibitor Product(s)" means Novartis's proprietary compound known as LGX 818 (an inhibitor of mutated B-Raf protein within cells).

M. "B-Raf Inhibitor Product Assets" means all assets and rights of the Respondent related to the Business of the B-Raf Inhibitor Products, wherever located throughout the world, as such assets and rights are in existence as of the date the Respondent signs the

Agreement Containing Consent Orders in this matter (and as are required to be maintained by the Respondent in accordance with the Asset Maintenance Order until the Closing Date) including, without limitation, the Categorized Assets related to the B-Raf Inhibitor Products.

N. "Business" means the research, Development, and manufacture of a Product throughout the world for the purposes of the commercialization, distribution, marketing, importation, advertisement and sale of such Product within the Geographic Territory.

O. "Categorized Assets" means all rights, title and interest in and to the following:

1. all rights to all of the Applications related to the specified Oncology Product(s);

2. all rights to all of the Clinical Trials related to the specified Oncology Product(s);

3. all Product Intellectual Property related to the specified Oncology Product(s) that is not Product Licensed Intellectual Property;

4. all Product Approvals specifically related to the specified Oncology Product(s);

5. all Product Manufacturing Technology related to the specified Oncology Product(s) that is not Product Licensed Intellectual Property;

6. all Product Marketing Materials related to the specified Oncology Product(s);

7. all Product Scientific and Regulatory Material related to the specified Oncology Product(s);

8. all Website(s) owned, operated, or controlled by the Respondent related exclusively to the specified Oncology Product(s);

9. the content related exclusively to the specified Oncology Product(s) that is displayed on any Website owned, operated, or controlled by the Respondent that is not dedicated exclusively to the specified Oncology Product(s);

10. all Product Development Reports specifically related to the specified Oncology Product(s);

11. all Product Contracts related to the specified Oncology Product(s);

12. all patient registries specifically related to the specified Oncology Product(s), and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects specifically related to the specified Oncology Product(s);

13. a list of all targeted customers specifically related to the specified Oncology Product(s) and a listing of the projected sales (in either units or dollars) of the Oncology Product(s) to such customers on either an annual, quarterly, or monthly basis;

14. all of the Respondent's books, records, and files directly related to the foregoing;

provided, however, that the term "Categorized Assets" excludes: (i) documents relating to the Respondent's general business strategies or practices relating to the conduct of its Business of pharmaceutical Products, where such documents do not discuss with particularity the specified Oncology Product(s); (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the Oncology Product(s) by the Interim Monitor or the particular Acquirer of such Oncology Product(s); (iv) rights that are exclusively related to a Retained Product; (v) any

real estate and the buildings and other permanent structures located on such real estate; (vi) all Product Licensed Intellectual Property, and (vii) rights that are exclusively related to Products distributed, marketed or sold outside the Geographic Territory;

provided further, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Oncology Product(s) and to the Retained Products or Businesses of the Respondent or Oncology Product(s) being acquired by a different Acquirer and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Oncology Product(s) being acquired by the particular Acquirer; or (ii) for which the Respondent has a legal obligation to retain the original copies, the Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Oncology Product(s), 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 each Acquirer with the above-described information (as applicable) without requiring the Respondent completely to divest itself of information that, in content, also relates to the Retained Products or is a part of a divestiture to a different Acquirer.

P. "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.

Q. "Clinical Plan" means a written clinical plan setting forth the protocol for the conduct of a Clinical Trial, preparation and filing of each Regulatory Package related to such Clinical Trial, and the activities to be conducted by each Person that is a party to conducting

such Clinical Trial in support of such Clinical Trial, including the timelines for such Clinical Trial.

R. "Clinical Research Organization Designee(s)" means any Person other than the Respondent that has been designated by an Acquirer to conduct a Clinical Trial related to an Oncology Product for that Acquirer.

S. "Clinical Trial(s)" means a controlled study in humans of the safety and/or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

T. "Closing Date" means, as to the particular Divestiture Product Assets being divested, the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey such Divestiture Product Assets to an Acquirer pursuant to this Order.

U. "Confidential Business Information" means all information owned by, or in the possession or control of, the Respondent that is not in the public domain and that is directly related to the conduct of the Business related to an Oncology Product(s), including, without limitation, the Clinical Trials related to an Oncology Product. The term "Confidential Business Information" includes, without limitation, the following information related to the Clinical Trials of each of the Oncology Products: efficacy results (e.g. incidence of response, response rate, duration of therapy, progression free survival, overall survival); safety results (e.g., type of adverse events observed, rate of adverse events observed, grade of adverse events observed); dosing (e.g., maximum tolerated dose of combination regimen, incidence of dose reduction, dose interruption, causes of both); protocol specifics (e.g., dosing schedule, specific secondary endpoints included, biomarkers included, any other

protocol-related items not included on clinicaltrials.gov posting); site information (e.g., names of investigators, details regarding each site); and collaborators (e.g., involvement of cooperative groups, government organizations, third-party organizations, and contract research organizations). The term "Confidential Business Information" excludes the following:

1. information relating to the Respondent's general business strategies or practices that does not discuss with particularity the Oncology Products;

2. information specifically excluded from the definition of the assets required to be divested to a particular Acquirer pursuant to this Order;

3. information that is contained in documents, records or books of the Respondent that is provided to an Acquirer by the Respondent that is unrelated to the Oncology Product(s) acquired by that Acquirer;

4. information that is exclusively related to the Retained Products;

5. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition; and,

6. information that is exclusively related to the particular discussions or negotiations of a potential divestiture of the Divestiture Assets to a Person or Persons other than the Acquirer.

V. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (including, without limitation, for the purposes of Clinical Trials and/or commercial sales); and,

2. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.

W. "Contract Manufacture Product(s)" means:

1. the Oncology Products; and

2. any ingredient, material, or component held exclusively for the use for the manufacture of the foregoing Products including the active pharmaceutical ingredient, excipients or packaging materials.

X. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product Approval(s) and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

Y. "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,* that, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached

to this Order, and (ii) such agreement becomes a Remedial Agreement for an Oncology Product, the term "Direct Cost" means such cost as is provided in such Remedial Agreement for that Oncology Product.

Z. "Divestiture Product Assets" means the B-Raf Inhibitor Product Assets and the MEK Inhibitor Product Assets, individually and collectively.

AA. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

BB. "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. The term "Domain Name" excludes any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

CC. "EEA Commitment Agreements" means the following agreements related to certain rights to seek regulatory approvals and to commercialize the Oncology Products within the European Economic Area that were submitted to the Commission:

1. The Divestiture Commitment Agreement by and between Novartis Pharma AG and Array BioPharma Inc., dated as of January 19, 2015; and

2. The EEA Remedy Conditional License Agreement.

DD. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

EE. "Good Clinical Practices" means then-current standards, practices and promulgated or endorsed by (i) International Conference on Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use; (ii) the FDA; and

(iii) any applicable Laws for the country(ies) within which Clinical Trial is being conducted.

FF. "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.

GG. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

HH. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

II. "Manufacturing Designee(s)" means any Person other than the Respondent that has been designated by an Acquirer to manufacture an Oncology Product for that Acquirer.

JJ. "MEK Inhibitor Product(s)" means the Product in Development known as binimetinib (MEK 162), an MEK modulator, that is, a compound that directly binds to MEK (mitogen-activated ERK kinase) and inhibits the activity of MEK (i.e., inhibits the phosphorylation of ERK) and any improvements thereto. This compound is referred to in the Array License Agreement as "ARRY-162" or the "Lead Compound".

KK. "MEK Inhibitor Product Assets" means all assets and rights of the Respondent related to the Business of the MEK Inhibitor Products, wherever located throughout the world, as such assets and rights are in existence as of the date the Respondent signs the Termination and Asset Transfer Agreement and as are required to be maintained by the Respondent in accordance with the Asset Maintenance Order including, without limitation, the Categorized Assets related to the MEK Inhibitor Products.

LL. "Oncology Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each specific Oncology Product.

MM. "Oncology Product Divestiture Agreements" means the following:

1. The Termination and Asset Transfer Agreement by and among Novartis Pharma AG, Novartis International Pharmaceutical Ltd. and Array BioPharma Inc., dated as of November 26, 2014 (related to Binimetinib, i.e., MEK 162);

2. The First Amendment to the Termination and Asset Transfer Agreement by and among Novartis Pharma AG, Novartis International Pharmaceutical Ltd. and Array BioPharma Inc., dated as of January 19, 2015 (related to Binimetinib, i.e., MEK 162);

3. The Cross License Agreement by and between Novartis AG and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

4. The Patent Assignment Agreement by and between Novartis AG and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

5. The Other Clinical Trial Agreement by and between Array BioPharma Inc. and Novartis Pharma AG, to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

6. The Standalone Clinical Trial Agreement by and between Array BioPharma Inc. and Novartis

Pharma AG, to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

7. The Supply Agreement by and between Novartis Pharma AG, and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

8. The Transition Agreement by and between Novartis Pharma AG, and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the Termination and Asset Transfer Agreement) (related to Binimetinib, i.e., MEK 162);

9. The LGX818 Asset Transfer Agreement by and between Novartis Pharma AG and Array BioPharma Inc., dated as of January 19, 2015;

10. The Cross License Agreement by and between Novartis AG and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

11. The Patent Assignment Agreement by and between Novartis AG and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

12. The Other Clinical Trial Agreement by and between Array BioPharma Inc., and Novartis Pharma AG to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

13. The Standalone Clinical Trial Agreement by and between Array BioPharma Inc., and Novartis Pharma AG to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

14. The Supply Agreement by and between Novartis Pharma AG and Array BioPharma Inc., to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

15. The Transition Agreement by and between Novartis Pharma AG and Array BioPharma to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818);

16. The Amended and Restated Three-Way Clinical Trial Agreement by and between Array BioPharma Inc., and Novartis Pharma AG to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818 and to Binimetinib, i.e., MEK 162);

17. The Amended and Restated Columbus Trial Agreement by and between Novartis Pharma AG and Array Biopharma Inc., to be executed as of the Effective Date (as that term is defined in the LGX818 Asset Transfer Agreement) (related to Encorafenib, i.e., LGX818 and to Binimetinib, i.e., MEK 162); and, all amendments, exhibits, attachments, agreements, and schedules to the above-referenced agreements, related to the Divestiture Product Assets that have been approved by the Commission to accomplish the requirements of this Order. Such agreements are also subject to the EEA Commitment Agreements. The Oncology Product Divestiture Agreements are contained in Non-Public Appendix I.

NN. "Oncology Product License" means a perpetual, non-exclusive, fully paid-up, transferable license with rights to sublicense under all Product Licensed Intellectual Property and all Product Manufacturing Technology (to the extent any Product Manufacturing Technology is not either licensed or assigned to the Acquirer under another license or assignment pursuant to this Order) related to general manufacturing know-how that was owned, licensed, or controlled by the Respondent:

1. to research and Develop the Oncology Product(s) being acquired by a particular Acquirer for the purposes of the marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the such Oncology Product(s) within the Geographic Territory;

3. to import or export the applicable Oncology Product(s) within the Geographic Territory; and

4. to have the applicable Oncology Product(s) made anywhere in the world;

provided, however, that, for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by the 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 the Respondent.

OO. "Oncology Product Releasee(s)" means the following Persons:

1. the Acquirer for the assets related to a particular Oncology Product;

2. any Person controlled by or under common control with that Acquirer; and

3. any Manufacturing Designee(s), Clinical Trial Research Organization Designee(s), licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Oncology Product(s) being acquired by that Acquirer.

PP. "Oncology Product(s)" means the B-Raf Inhibitor Products, and the MEK Inhibitor Products, individually and collectively.

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

RR. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

SS. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

TT. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (except where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

UU. "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.

VV. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

WW. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of a Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

XX. "Product Contracts" means all of the following contracts or agreements, each to the extent directly related to the Oncology Products being Acquired by the particular Acquirer:

1. that make specific reference to such Oncology Product(s) and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, that Oncology Product(s) from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or had planned to purchase the active pharmaceutical ingredient(s) from any Third Party for use in connection with the manufacture of such Oncology Product(s);

3. pursuant to which the Respondent had or has as of the Closing Date the ability to independently

purchase necessary ingredients or components other than the active pharmaceutical ingredient(s) or had planned to purchase such necessary ingredients or components from any Third Party for use in connection with the manufacture of such Oncology Product(s) other than such ingredients or components as are widely available for purchase and use in pharmaceutical preparations;

4. relating to any Clinical Trials involving such Oncology Product(s);

5. with universities or other research institutions for the use of such Oncology Product(s) in scientific research;

6. relating to the particularized marketing of such Oncology Product(s) or educational matters relating solely to that Oncology Product(s);

7. pursuant to which a Third Party manufactures such Oncology Product(s) on behalf of the Respondent;

8. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of such Oncology Product(s) on behalf of the Respondent;

9. pursuant to which a Third Party provides the Product Manufacturing Technology related to such Oncology Product(s) to the Respondent;

10. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology related to such Oncology Product(s);

11. constituting confidentiality agreements involving such Oncology Product(s);

12. involving any royalty, licensing, covenant not to sue, or similar arrangement involving such Oncology Product(s);

13. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of such Oncology Product(s) to the Respondent including, but not limited to, consultation arrangements; and/or

14. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of such Oncology Product(s) or the Business related to that Oncology Product(s);

provided, however, that, where any such contract or agreement also relates to a Retained Product(s), the Respondent shall (i) provide to that Acquirer the benefits of use of such contract or agreement (ii) partially assign to that Acquirer or otherwise divide such contract or agreement into one contract or agreement for Acquirer and one contract or agreement for Respondent, and/or (iii) enable that Acquirer to obtain alternative benefits independently.

YY. "Product Copyrights" means rights to all original works of authorship of any kind directly related to the specified Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or

function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of the Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law) in connection with the acquisition of that Product; 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 or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

ZZ. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings

made to, received from or otherwise conducted with the FDA relating to the Application(s) related to the specified Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to the specified Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Product;

8. FDA approved patient circulars and information related to the specified Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to the specified Product;

10. summary of Product complaints from physicians related to the specified Product;

11. summary of Product complaints from customers related to the specified Product;

12. Product recall reports filed with the FDA related to the specified Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Product;

14. reports related to the specified Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of the specified Product;

16. analytical methods development records related to the specified Product;

17. manufacturing batch records related to the specified Product;

18. stability testing records related to the specified Product;

19. change in control history related to the specified Product; and

20. executed validation and qualification protocols and reports related to the specified Product.

AAA. "Product Employee Information" means the following, for each Oncology Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Oncology Product Core Employee (including former employees who were employed by the Respondent within ninety (90) days of the execution date of any Remedial Agreement);

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

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the Oncology

Product; *provided, however,* that, in lieu of this description, the Respondent may provide the employee's most recent performance appraisal;

d. the base salary or current wages;

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

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

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

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

BBB. "Product Intellectual Property" means all of the following related to an Oncology Product (other than Product Licensed Intellectual Property):

1. Patents;

2. Product Copyrights;

3. Product Trademarks;

4. Product Trade Dress;

5. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and

6. rights to obtain and file for patents, trademarks, and copyrights and registrations related to any of

the foregoing 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;

The term "Product Intellectual Property" excludes the corporate names or corporate trade dress of "Novartis" or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondent or the related corporate logos thereof, or general registered images or symbols by which Novartis can be identified or defined.

CCC. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to an Oncology Product that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued) Application 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 an Oncology Product and that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued) Application as of the Acquisition Date.

DDD. "Product Manufacturing Employees" means all salaried employees of the Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the Oncology Product(s) being acquired by the particular Acquirer

(irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the twelve (12) month period immediately prior to the Closing Date.

EEE. "Product Manufacturing Technology" means all of the following related to an Oncology Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, synthesis schemes, synthesis control forms, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. list of all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials;

3. copies of master batch record(s) for the regulatory process being used at the filed commercial manufacturing site(s) (as included in the Application related to the Product), complete batch records of all drug substance batches manufactured by the Respondent or its contractor(s) including copies of certificates of analysis/analysis reports for in-process controls test data, intermediates/raw

materials/reagents/solvents and final drug substance;

4. campaign experience reports; and,

5. list of all equipment used to manufacture a product.

FFF. "Product Marketing Materials" means all marketing materials specifically related to the specified Product and used, or intended for use in the marketing or sale of the specified Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the specified Product.

GGG. "Product Research and Development Employees" means all salaried employees of the Respondent who have directly participated in the research, Development, regulatory approval process, or clinical studies of the Oncology Product(s) being acquired by a particular Acquirer (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the twelve (12) month period immediately prior to the Closing Date.

HHH. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological,

pharmacological, toxicological, regulatory and Clinical Trial materials and information.

III. "Product Trade Dress" means the current trade dress of a Product, including, but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

JJJ. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

KKK. "Proposed Acquirer" means a Person proposed by the 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.

LLL. "Regulatory Package" means, with respect to each Oncology Product, all INDs and other regulatory applications submitted to any Agency, Product Approvals, pre-clinical and clinical data and information, regulatory materials, drug dossiers, master files (including Drug Master Files, as defined in 21 C.F.R. 314.420 (or any non-United States equivalent thereof)), and any other reports, records regulatory correspondence and other materials relating to Product Approvals of such Oncology Product or required to Develop, manufacture, distribute or otherwise commercialize such Oncology Product, including information that relates to pharmacology, toxicology, chemistry, manufacturing and controls data, batch records, safety and efficacy, and any safety database, in each case that is necessary or reasonably useful to the Clinical Trial(s).

MMM. "Remedial Agreement(s)" means the following:

1. any agreement between the 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 the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to an Oncology 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 the 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 the 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 the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to an Oncology 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.

NNN. "Retained Product" means any Product(s) other than an Oncology Product.

OOO. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application or to defend an Application, including the ability to make available the underlying raw data from the investigation for an FDA audit.

PPP. "Supply Cost" means a cost not to exceed the Respondent's average direct per unit cost in United States dollars of manufacturing any Oncology Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however,* that, in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for an Oncology Product, the term "Supply Cost" means the cost as specified in such Remedial Agreement for that Oncology Product.

QQQ. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

1. designating employees of the Respondent knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Oncology Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee(s), and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to any Oncology Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, inter alia, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee(s); and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee(s) to:

    a. manufacture any Oncology Product in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such Oncology Product;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee(s), to manufacture, distribute, market, and sell any Oncology Product in commercial quantities and to meet all Agency-approved specifications for such Oncology Product; and

    c. receive, integrate, and use all such Product Manufacturing Technology and all such

intellectual property related to any Oncology Product.

RRR. "Third Party(ies)" means any non-governmental Person other than the following: the Respondent; or, the Acquirer of particular assets or rights pursuant to this Order.

SSS. "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 the Respondent. The term "Website" excludes the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by the Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that the Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Oncology Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondent shall divest the B-Raf Inhibitor Product Assets and grant the related Oncology Product License, absolutely and in good faith, to Array pursuant to, and in accordance with, the Oncology Product Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Array or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the B-Raf Inhibitor Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if the Respondent has divested the B-Raf Inhibitor Product Assets to Array prior to

the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies the Respondent that Array is not an acceptable purchaser of the B-Raf Inhibitor Product Assets, then the Respondent shall immediately rescind the transaction with Array, in whole or in part, as directed by the Commission, and shall divest the B-Raf Inhibitor Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if the Respondent has divested the B-Raf Inhibitor Product Assets to Array prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies the Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the B-Raf Inhibitor Product Assets to Array (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

provided further, however, Respondent may retain such of the above-described assets and rights as are reasonably necessary to provide transitional services to the Acquirer and to Contract Manufacture for the Acquirer, until the conclusion of the Respondent's provision of such services or Contract Manufacture, and for use solely for the purposes of Respondent's compliance with this Order or the related Remedial Agreements.

B. Not later than ten (10) days after the Acquisition Date, Respondent shall divest the MEK Inhibitor Product Assets (to the extent not already owned, controlled or in the possession of Array) and grant the related

Oncology Product License, absolutely and in good faith, to Array pursuant to, and in accordance with, the Oncology Product Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Array or to reduce any obligations of the Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the MEK Inhibitor Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if the Respondent has divested the MEK Inhibitor Product Assets to Array prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies the Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the MEK Inhibitor Product Assets to Array (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order;

provided further, however, Respondent may retain such of the above-described assets and rights as are reasonably necessary to provide transitional services to the Acquirer and to Contract Manufacture for the Acquirer, until the conclusion of the Respondent's provision of such services or Contract Manufacture, and for use solely for the purposes of Respondent's compliance with this Order or the related Remedial Agreements.

C. Prior to the Closing Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are reasonably expected to be Product Contracts for the purposes of the divestitures required by this Order; *provided, however,*

that, if after the Closing Date, Respondent notifies Acquirer, or otherwise learns, of any contract or agreement that is a Product Contract but that Acquirer did not have such an opportunity to review, then the Acquirer shall determine whether or not it will assume such contracts or agreements and the extent to which it will assume such contracts or agreements.

D. Prior to the Order Date, unless specifically agreed otherwise by the Acquirer, the Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit the Respondent to divest the Divestiture Product Assets and grant the related Oncology Product License to an Acquirer, and to permit that Acquirer to continue the Business related to the Oncology Product(s) being acquired by that Acquirer;

provided, however, Respondent may satisfy this requirement by certifying that that Acquirer has executed all such agreements directly with each of the relevant Third Parties.

E. Respondent shall:

1. submit to each Acquirer, at Respondent's expense, all Confidential Business Information related to the Oncology Product(s) being acquired by that Acquirer;

2. deliver all Confidential Business Information to that Acquirer:

   a. in good faith;

   b. in a timely manner, i.e., as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to that Acquirer, upon reasonable written notice and request, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Oncology Products being acquired by that Acquirer that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any Confidential Business Information that is exclusively related to the Oncology Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's obligations to the Acquirer under the terms of any applicable Remedial Agreement; or

   c. applicable Law;

5. not disclose or convey any Confidential Business Information that is exclusively related to the Oncology Products, directly or indirectly, to any Person except (i) the Acquirer of the particular Oncology Product(s), (ii) Persons specifically authorized by that Acquirer to receive such information (including, without limitation, those employees of the Respondent authorized to receive such information), (iii) the Commission, (iv) the Interim Monitor (if any has been appointed); or (v) Government Entities that have jurisdiction and regulatory authority over the Acquisition or pharmaceutical marketing or manufacturing (including the European Commission and any monitoring trustee appointed or approved by the European Commission, or the EMA);

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information that is exclusively related to the particular research and Development (including, without limitation, the ongoing Clinical Trials) of each respective Oncology Product to any employee or subcontractor of the Respondent, other than such employee or subcontractor that is directly involved in the research and Development of the Oncology Product and for the purposes of such work as is necessary to accomplish the requirements of this Order or the related Remedial Agreements (e.g., providing transitional services to the Acquirer or ongoing Clinical Trial services as agreed to in the Remedial Agreements related to the Oncology Products); and,

7. institute procedures and requirements to ensure that the employees of the Respondent:

    a. do not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and,

    b. do not solicit, access or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose other than as is permitted by the Orders.

F. Respondent shall provide, or cause to be provided to each Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Oncology Product(s) being acquired by that Acquirer; and

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is

owned by a Third Party and licensed to the Respondent related to such Oncology Product(s).

Respondent shall obtain any consents from Third Parties required to comply with this provision. Respondent 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 Product Manufacturing Technology (including all related intellectual property) related to the Oncology Product(s) being acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than thirty (30) days after the Closing Date, Respondent shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer.

G. For each Acquirer, Respondent shall:

1. upon reasonable written notice and request from an Acquirer to the Respondent, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Supply Cost, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee(s) of that 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 the Respondent, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in

Application(s) for the applicable Oncology Product(s) from Persons other than the Respondent;

2. make representations and warranties to the Acquirer being supplied by the Respondent that the Contract Manufacture Product(s) supplied by the Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the Respondent shall agree to indemnify, defend and hold that Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to that Acquirer pursuant to a Remedial Agreement by the Respondent to meet cGMP. This obligation may be made contingent upon that Acquirer giving the Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

   provided, however, that the Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondent to be liable for any negligent act or omission of that Acquirer or for any representations and warranties, express or implied, made by that Acquirer that exceed the representations and warranties made by the Respondent to that Acquirer in an agreement to Contract Manufacture;

   provided further, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for an Oncology

Product, each such agreement may contain limits on Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to that Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give at least the same level of priority to manufacturing and supplying a Contract Manufacture Product to the Acquirer as Respondent gives to the manufacture and supply of Products for the Respondent's own use or sale;

4. promptly advise the Acquirer, the Interim Monitor and the Commission in the event material supply issues arise or appear likely to arise;

5. make representations and warranties to the Acquirer being supplied by the Respondent that the Respondent shall hold harmless and indemnify that 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 the Respondent can demonstrate that the failure was in no part the result of negligence or willful misconduct by the Respondent;

   provided, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for an Oncology Product, each such agreement may contain limits on the Respondent's aggregate liability for such a failure;

6. during the term of any agreement to Contract Manufacture, upon written request of the Acquirer or the Interim Monitor (if any has been appointed), make available to that Acquirer and the Interim Monitor (if any has been appointed) all records that are available to the Respondent that relate directly to the manufacture of the applicable Contract

Manufacture Products that are generated or created after the Closing Date;

7. during the term of any agreement to Contract Manufacture, Respondent shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture;

9. upon reasonable written notice and request from an Acquirer to the Respondent, provide consultation with knowledgeable employees of the Respondent and training, at a facility chosen by the requesting Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee(s) of the Acquirer) to obtain all Product Approvals to manufacture the Oncology Products acquired by that Acquirer in the same quality achieved by, or on behalf of, the Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent and sufficient to satisfy management of that Acquirer that its personnel (or personnel of the Manufacturing Designee(s)) are adequately trained in the manufacture of such Oncology Products;

The foregoing provisions, II.G.1. – 9., shall remain in effect with respect to each Oncology Product until the earliest of: (i) the date the Acquirer of that Oncology Product (or the Manufacturing Designee(s) of the Acquirer), respectively, is approved by the FDA to manufacture and sell such Oncology Product in the United States and able to manufacture such Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent; (ii) the date the Acquirer of a particular Oncology

Product notifies the Commission and Respondent of its intention to abandon its efforts to manufacture such Oncology Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Oncology Product has abandoned its efforts to manufacture such Oncology Product, or (iv) the date thirty (30) months from the Closing Date.

H. Respondent shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, that:

1. each employee who has or may have had access to Confidential Business Information sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, subcontractors, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order); and,

2. each employee who has responsibilities, within the one (1) year period before or during the two (2) year period after the Closing Date, related to the research, Development, marketing or sales of those Retained Products that both: (i) are on the market in the Geographic Territory, or are in Phase II or III Clinical Trials, for the identical indication (disease and disease state) as the Oncology Product(s) as of the Acquisition Date, and (ii) use the same type of mechanism of action to treat such disease, sign an agreement pursuant to which that employee shall not seek to obtain Confidential Business Information from employees who have or have had access to such Confidential Business Information;

Respondent shall advise the direct supervisors of any such employee of the responsibilities and restrictions related to the treatment of the Confidential Business Information under this Order.

I. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all of its employees described in Paragraph II.H. 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 three (3) years after the Closing Date. 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 stating that the acknowledgment program has been implemented and is being complied with. Upon the request of an Acquirer, Respondent shall provide that Acquirer with copies of all such certifications sent to the Commission, and all such notifications and reminders sent to Respondent's personnel related to the Oncology Product(s) acquired by that Acquirer.

J. Respondent shall:

1. for a period of two (2) years from the Closing Date, and for the purposes of the Orders, provide the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with the opportunity to enter into employment contracts with the Oncology Product Core Employees. Each of these periods is hereinafter referred to as the "Oncology Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent to provide the Product

Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the requesting Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Oncology Product Core Employees unless the Law requires a mandatory notice period prior to the release of such information in which case the information shall be provided not later than ten (10) days after the expiration of the notice period. Failure by Respondent to provide the Product Employee Information for any Oncology Product Core Employee within the time provided herein shall extend the Oncology Product 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 to consider whether to provide or continue providing to Oncology Product Core Employees the opportunity to enter into employment contracts during the Oncology Product Core Employee Access Period and not for any other purpose whatsoever, (iii) restrict access to the information to such of the applicable Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use, (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends, and (v) ensure that any Manufacturing Designee(s) or Clinical Research Organization Designee(s) agrees to abide by the preceding conditions, if the Acquirer provides such information to it;

3. during the Oncology Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer, its Manufacturing Designee, or its Clinical Research Organization Designee(s) of the Oncology Product Core

Employees, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Acquirer, its Manufacturing Designee(s), its Clinical Research Organization Designee(s), including, but not limited to, any noncompete or nondisclosure provision of employment with respect to an Oncology Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s). In addition, Respondent shall not make any counteroffer to such an Oncology Product Core Employee who has received a written offer of employment from an Acquirer, its Manufacturing Designee or its Clinical Research Designee(s);

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondent from continuing to employ any Oncology Product Core Employee under the terms of that employee's employment with Respondent prior to the date of the written offer of employment from an Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) to that employee;

4. until the Closing Date, provide all Oncology Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the applicable Oncology Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the applicable Oncology Product(s), and to ensure successful execution of the pre-Acquisition Development plans for the applicable Oncology Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent

until the Closing Date(s) for the divestiture of the assets related to the Oncology Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the Oncology Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with any amount of responsibility related to an Oncology Product ("Oncology Product Employee") to terminate his or her employment relationship with the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s); or hire any Oncology Product Employee;

   provided, however, Respondent may hire any former Oncology Product Employee whose employment has been terminated by the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s), or who independently applies for employment with the Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, however, that the Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Oncology Product Employees; or (ii) hire an Oncology Product Employee who contacts the Respondent on his or her own initiative without any direct or indirect

solicitation or encouragement from the Respondent.

K. Until Respondent completes the divestitures required by this Order and fully provides, or causes to be provided, the Product Manufacturing Technology related to a particular Oncology Product(s) to the Acquirer and transfers the Clinical Trials related to a particular Oncology Product(s) to the Acquirer,

1. Respondent shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses related to that Oncology 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 Oncology Product;

   d. ensure the assets related to each Oncology Product are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business related to each Oncology Product;

   e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. Respondent shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses related to that Oncology Product.

L. For each Acquirer, and with respect to any ongoing Clinical Trial(s) as of the Closing Date related to the

Oncology Products being acquired by that Acquirer, Respondent shall:

1. designate employees of the Respondent that have worked on such Clinical Trial(s) who will be responsible for communicating directly with the Acquirer and/or its Clinical Research Organization Designee(s), and the Interim Monitor (if one has been appointed), for the purpose of effecting any transition agreed upon between the Respondent and the Acquirer for the purposes of ensuring the continued prosecution of such Clinical Trials in a timely manner;

2. coordinate with the Acquirer to prepare any protocols necessary to transfer the Clinical Trials to the Acquirer or the Acquirer's Clinical Research Organization Designee(s);

3. assist the Acquirer to prepare and implement any Clinical Plan(s) and Regulatory Package(s) for the current phase of the Clinical Trial (i.e., the phase as of the Closing Date) until such time or specified event as agreed upon with the Acquirer in a Remedial Agreement occurs;

4. prepare and implement a detailed 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 information related to such Clinical Trial(s) to the Acquirer and/or its Clinical Research Organization Designee(s); and

5. provide, in a timely manner, assistance and advice to enable the Acquirer and/or its Clinical Research Organization Designee(s) to continue such Clinical Trial in its phase as of the Closing Date in the same quality, scope, and pace as was being achieved by the Respondent and in a manner consistent with Good Clinical Practices.

M. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Oncology Product Releasee(s) of the Acquirer under the following:

1. 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;

2. 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 the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Oncology Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Oncology Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of Oncology Product(s) acquired by that Acquirer. Respondent shall also covenant to the 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 the Acquirer or the related Oncology Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Oncology Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United

States of America of such Oncology Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Oncology 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.

N. Upon reasonable written notice and request from an Acquirer to the Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist the requesting Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Oncology Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Oncology Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Oncology Product(s) acquired by that Acquirer.

O. For any patent infringement suit filed prior to the Closing Date in which the Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that the 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 Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Oncology Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Oncology Product(s); or (ii)

the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Oncology Product(s) acquired by that Acquirer, the Respondent shall:

1. cooperate with the applicable 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 the applicable Oncology Product;

2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to the applicable Oncology Product; and/or

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of the Respondent's outside counsel related to the applicable Oncology Product.

P. The purpose of the divestiture of the B-Raf Inhibitor Assets and the MEK Inhibitor Assets, the provision of the related Product Manufacturing Technology, and the transfer of the related Clinical Trials 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 related to each Oncology Product within the Geographic Territory;

2. to create a viable and effective competitor that is independent of Respondent in the Business related to each Oncology Product within the Geographic Territory; and

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of 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 Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out

the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Oncology Product Assets and the transfer and delivery of the related Product Manufacturing Technology and related ongoing Clinical Trials to each respective Acquirer in a manner that fully satisfies the requirements of this Order and, with respect to each Oncology Product, until the earliest of: (i) the date the Acquirer of that Oncology Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Oncology Product and able to manufacture that Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent; (ii) the date the Acquirer notifies the Commission and Respondent of its intention to abandon its efforts to manufacture that Oncology Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Oncology Product;

   provided, however, that, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim 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. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim 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 Interim Monitor's duties and responsibilities.

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

H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the

reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order; *provided, however,* beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VII.B., and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Oncology Product and obtaining the ability to manufacture each Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent.

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

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

IV.

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 either the B-Raf Inhibitor Assets or the MEK Inhibitor 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, as applicable, 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, 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 Interim 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.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, the 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 or access original documents provided to an Acquirer, except under circumstances where redacted documents or copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure the 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 applicable Oncology Product(s) or the assets and Businesses associated with those Oncology Product(s);

provided, however, that the Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, however, that, pursuant to this Paragraph V, the Respondent shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but the Respondent shall not be deemed to have violated this requirement if the 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 the Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in each Remedial Agreement related to each of the Oncology Product(s) 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. 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 Oncology Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. Unless otherwise determined by the Commission, each of the Oncology Product Divestiture Agreements shall become a Remedial Agreement on the Order Date.

F. Respondent 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, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E.1, II.E.2, II.E.3, II.E.7., II.F., II.G. II.H., II.I. and II.J., Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent 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 Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondent shall notify the Commission prior to consenting to and/or entering into any agreement with, and/or proposing any remedial or other action from, any non-U.S. Government Entity that might have the effect of causing the Respondent and/or the Acquirer to sell or otherwise dispose of, any assets or intellectual property related to the Oncology Products that relate to countries outside of the United States of America. Respondent shall include in such notification, among other things that might be required

by staff of the Commission, a full description of all substantive contacts or negotiations related to the sale or disposal of such assets and/or intellectual property rights and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning the sale and/or disposal of such assets and/or intellectual property rights.

D. One (1) year after the Order Date, annually for the next nine 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 has complied and is complying with the Order.

VIII.

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

A. any proposed dissolution of the Respondent;

B. any proposed acquisition, merger or consolidation of the 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 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 the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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 April 7, 2025.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Novartis AG ("Novartis" or "Respondent") of certain assets related to certain oncology products of GlaxoSmithKline plc, 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 Orders ("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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtrasse 35, Basel, Switzerland, V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York.

2. GlaxoSmithKline plc is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9FS, United Kingdom.

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

ORDER

I.

IT IS ORDERED that, as used in this Order 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. "Novartis" or "Respondent" means the following: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Glaxo" means the following: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Glaxo SmithKline plc, 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. "Oncology Product Assets" means the B-Raf Inhibitor Product Assets and the MEK Inhibitor Product Assets, individually and collectively.

F. "Oncology Product Business(es)" means the Business of the Respondent related to each of the Oncology Products to the extent that such Business is owned, controlled, or managed by the Respondent and the Oncology Product Assets to the extent such Assets are owned by, controlled by, managed by, or licensed to, the Respondent.

G. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

H. "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 Respondent fully transfers and delivers the Oncology Product Assets to an Acquirer, Respondent shall take such actions with respect to the Oncology Product Assets as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Oncology Product Businesses, to minimize any risk of loss of competitive potential for such Oncology Product Businesses, and to prevent the

destruction, removal, wasting, deterioration, or impairment of such Oncology Product Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the Oncology Product 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 related Oncology Product Businesses.

B. Until Respondent fully transfers and delivers the Oncology Product Assets to an Acquirer, Respondent shall maintain the operations of the related Oncology 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 marketability, viability, and competitiveness of such Oncology Product Businesses and shall use its best efforts to preserve the existing relationships with the following: clinical research organizations; suppliers; end-use customers; Agencies; employees; and others having business relations with each of the respective Oncology Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Oncology 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 Oncology Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Oncology Product Businesses authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, Development (including ongoing Clinical

Trials), manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Oncology Products;

4. making available for use by each of the respective Oncology 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 Oncology Product Business; and

5. providing such support services to each of the respective Oncology Product Businesses as were being provided to such Oncology Product Business by Respondent as of the date the Consent Agreement was signed by Respondent.

C. Until Respondent fully transfers and delivers each of the respective Oncology Product Assets (including the ongoing Clinical Trials) to an Acquirer, Respondent 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 Oncology Products for the relevant Oncology Product's last fiscal year.

D. Respondent shall:

1. for a period of two (2) years from the Closing Date, and for the purposes of the Orders, provide the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with the opportunity to enter into employment contracts with the Oncology Product Core Employees. Each of these periods is hereinafter referred to as the "Oncology Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Oncology Product Core Employees unless the Law requires a mandatory notice period prior to the release of such information in which case the information shall be provided not later than ten (10) days after the expiration of the notice period. Failure by Respondent to provide the Product Employee Information for any Oncology Product Core Employee within the time provided herein shall extend the Oncology Product 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 to consider whether to provide or continue providing to Oncology Product Core Employees the opportunity to enter into employment contracts during an Oncology Product Core Employee Access Period and not for any other purpose whatsoever, (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, (iv) destroy or return the information without retaining copies at such time as the specified and permitted use ends and (v) ensure that any Manufacturing Designee(s) or Clinical Research Organization Designee(s) agrees to abide by the preceding conditions, if the Acquirer provides such information to it;

3. during the Oncology Product Core Employee Access Period(s), not interfere with the hiring or

employing by the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s) of the Oncology Product Core Employee, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s), including, but not limited to, any noncompete or nondisclosure provision of employment with respect to an Oncology Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s). In addition, Respondent shall not make any counteroffer to such an Oncology Product Core Employee who has received a written offer of employment from the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s);

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondent from continuing to employ any Oncology Product Core Employee under the terms of that employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) to that employee;

4. until the Closing Date, provide all Oncology Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Oncology Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Oncology Products and to ensure successful execution of the pre-Acquisition plans for the

Oncology Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Closing Date(s) has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided further, however, that this Paragraph does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the Oncology Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) with any amount of responsibility related to an Oncology Product ("Oncology Product Employee") to terminate his or her employment relationship with the Acquirer, its Manufacturing Designee(s) or its Clinical Research Organization Designee(s); or hire any Oncology Product Employee;

   provided, however, that Respondent may hire any former Oncology Product Employee whose employment has been terminated by the Acquire, its Manufacturing Designee(s), or its Clinical Research Organization Designee(s) or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, however, that Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Oncology Product Employees; or (ii) hire an Oncology Product Employee who contacts Respondent on his or her

own initiative without any direct or indirect solicitation or encouragement from Respondent.

E. Pending divestiture of the Oncology Product Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information that is exclusively related to the Oncology Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's 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 of the particular Oncology Product(s), (ii) other Persons specifically authorized by that Acquirer to receive such information(including, without limitation, those employees of the Respondent authorized to receive such information), (iii) the Commission, (iv) the Interim Monitor (if any has been appointed); or (v) Government Entities that have jurisdiction and regulatory authority over the Acquisition or pharmaceutical marketing or manufacturing (including the European Commission and any monitoring trustee appointed or approved by the European Commission, or the EMA);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information that is exclusively related to the particular research and Development (including, without limitation, the ongoing Clinical Trials) of each respective Oncology Product to the employees of the Respondent that both: (i) are

being Developed for the treatment of the identical indication (disease and disease state), and (ii) use the same mechanism of action to treat such disease, other than is necessary to accomplish the requirements of this Order or the related Remedial Agreements, (e.g., providing transitional services to the Acquirer or ongoing Clinical Trial services as agreed to in the Remedial Agreements related to the Oncology Products);

4. institute procedures and requirements to ensure that the employees of the Respondent:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and,

   b. do not solicit, access or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose other than as is permitted by the Orders.

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, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all of its employees who:

1. has or may have had access to Confidential Business Information; and/or

2. has responsibilities related to the research, Development, marketing or sales of those Retained Products that both: (i) are on the market in the Geographic Territory, or are in Phase II or III Clinical Trials, for the identical indication (disease and disease state) as the Oncology Product(s) as of

the Acquisition Date, and (ii) use the same mechanism of action to treat such disease.

G. 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. 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 stating that the acknowledgment program has been implemented and is being complied with. Upon the request of an Acquirer, Respondent shall provide that Acquirer with copies of all such certifications sent to the Commission and all such notifications and reminders sent to Respondent's personnel.

H. 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.

I. After the Closing Date, Respondent's obligations under Paragraphs II.A., II.B., and II.C. of this Order to Maintain Assets shall be as set forth in the Oncology Product Divestiture Agreements referenced in the Decision and Order unless the Commission determines not to make the relevant agreement or agreements Remedial Agreements.

J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Oncology Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Oncology Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting,

deterioration, or impairment of any of the Oncology Product Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim 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 Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

    1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations

and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Oncology Product Assets and the transfer and delivery of the related Product Manufacturing Technology and related ongoing Clinical Trials in a manner that fully satisfies the requirements of the Orders and, with respect to each Oncology Product, until the earliest of: (i) the date the Acquirer (or the Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Oncology Product and able to manufacture that Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondent; (ii) the date the Acquirer notifies the Commission and Respondent of its intention to abandon its efforts to manufacture that Oncology Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Oncology Product;

provided, however, that, with respect to each Oncology Product, the Interim Monitor's service shall not exceed five (5) years from 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 Interim Monitor shall have full and

complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim 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. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim 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 Interim Monitor's duties and responsibilities.

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

H. Respondent shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer

with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders; *provided, however,* that, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VII.B. of the Decision and Order, and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Oncology Product and obtaining the ability to manufacture each Oncology Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent.

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

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional

orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondent has fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondent 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 Orders. Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. 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 relevant assets and rights, (ii) transitional services being provided by the Respondent to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; 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 Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of the Respondent;

B. any proposed acquisition, merger or consolidation of the 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 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 Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

A. the later of:

1. 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

2. the day after the completion of all of the following: (i) the divestiture of all of the Oncology Product Assets to an Acquirer, (ii) the transfer of the Product Manufacturing Technology related to each of the Oncology Products to an Acquirer, and (iii) the transfer of the Clinical Trials related to each of the Oncology Products to an Acquirer, as required by and described in the Decision and Order; and, the Interim Monitor, 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 such divestitures and technology and clinical transfers are complete; or,

B. the date the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

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 Novartis AG ("Novartis"), which is designed to remedy the anticompetitive effects of Novartis' proposed acquisition of oncology assets from GlaxoSmithKline PLC ("GSK"). The Commission has placed the proposed Consent Agreement 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 any comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order ("Order").

Pursuant to an agreement dated April 22, 2014 (the "Agreement"), Novartis proposes to acquire GSK's marketed oncology products and two pipeline oncology compounds for approximately $16 billion (the "Transaction"). GSK currently has a BRAF inhibitor and an MEK inhibitor approved by the FDA, as well as the only BRAF/MEK combination therapy approved for sale in the United States. BRAF and MEK inhibitors are medicines that inhibit molecules associated with the development of cancer. Novartis has BRAF and MEK inhibitors in late-stage development, as well as a BRAF/MEK combination therapy that it expects to launch in the near future.

The Commission alleges in its Complaint that the 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, by substantially lessening competition in U.S. markets for BRAF inhibitors and MEK inhibitors. The proposed Consent Agreement will remedy the alleged violations by preserving competition that the Transaction would otherwise eliminate. Under the terms of the Consent Agreement, Novartis is required to divest all rights and

assets related to LGX818, its BRAF inhibitor, and MEK162, its MEK inhibitor, to Array BioPharma Inc. ("Array").

II. The Relevant Products and Markets

The relevant markets in which to analyze the Transaction are the development and sale of BRAF inhibitors and MEK inhibitors. BRAF and MEK inhibitors are orally administered, targeted oncology products. Physicians currently use BRAF and MEK inhibitors, increasingly in combination, to treat metastatic, late-stage melanoma. Last year in the United States, there were approximately 76,100 new cases of melanoma and 9,710 deaths caused by melanoma.[1] In addition to melanoma, researchers are studying BRAF and MEK inhibitors as potential treatments for a range of cancers, including ovarian cancer, colorectal cancer, and non-small cell lung cancer.

The United States is the relevant geographic market in which to assess the competitive effects of the Transaction because the FDA must approve BRAF and MEK inhibitors, as well as the use of the two inhibitors in combination, for marketing and sale in the United States. Accordingly, products sold outside of the United States, but not approved by the FDA, are not alternatives for U.S. consumers.

The BRAF and MEK inhibitor markets in the United States are highly concentrated. Tafinlar®, sold by GSK, and Zelboraf®, sold by F. Hoffman-La Roche AG ("Roche"), are currently the only FDA-approved BRAF inhibitors. Novartis' BRAF inhibitor in development, LGX818, is the only other product likely to begin competing with GSK and Roche in the near future. GSK's Mekinist® is currently the only FDA-approved MEK inhibitor, while Novartis' MEK162 is one of only a small number of MEK inhibitors in late-stage clinical development. GSK also sells the only FDA-approved BRAF/MEK combination therapy, which is comprised of Tafinlar and Mekinist. Aside from GSK, Roche and Novartis are the only companies with BRAF/MEK combinations in late-stage development.

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[1] U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, "Melanoma," http://www.cancer.gov/cancertopics/types/melanoma.

III. Entry

Entry into U.S. markets for BRAF inhibitors and MEK inhibitors would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Transaction. Like other oncology products, BRAF and MEK inhibitors must complete clinical trials and garner approval by the FDA before they can enter the U.S. markets. Development of new oncology medicines is expensive, time consuming, and has a high rate of failure. The time and resources required to develop and market a new oncology medicine make it unlikely that *de novo* entry into the relevant markets would be sufficient to offset the anticompetitive effects of the Transaction, and no firms currently have products in development that are likely to enter and prevent competitive harm from the Transaction.

IV. Effects of the Acquisition

Without a remedy, the Transaction will eliminate likely future competition between GSK and Novartis in the concentrated markets for BRAF and MEK inhibitors. Absent the acquisition, Novartis likely would have obtained FDA approval for and launched its LGX818 and MEK162 products in the near future in direct competition with GSK's combination offering for treating metastatic melanoma patients. The Transaction would also likely reduce the development of BRAF and MEK inhibitors to treat other types of cancer, because GSK and Novartis are currently developing their respective BRAF and MEK inhibitors for several of the same indications beyond melanoma. By eliminating the potential head-to-head competition between Novartis and GSK, the Transaction will likely result in higher prices for BRAF and MEK inhibitors and reduced choice for U.S. health care consumers.

V. The Consent Agreement

The proposed Consent Agreement effectively remedies the Transaction's anticompetitive effects by requiring Novartis to divest to Array all of its rights and assets related to LGX818 and MEK162. The divestiture will preserve the competition that

otherwise would have been lost in the markets for BRAF and MEK inhibitors.

Array is a biopharmaceutical company headquartered in Boulder, Colorado, that focuses on the discovery, development, and commercialization of oncology medicines. Array is well suited to acquire LGX818 and MEK162 because it initially developed MEK162 and is currently a partner with Novartis in the development of both products. Array is a sophisticated company that possesses both the incentive and ability to develop and commercialize LGX818 and MEK162 either independently or with a new partner.

The Order requires Novartis to divest its rights and interests in LGX818 and MEK162 to Array no later than ten days after consummation of the proposed transaction or on the date that the Order becomes final, whichever is earlier. The divestiture includes regulatory approvals, intellectual property, assets related to ongoing clinical trials and manufacturing processes, and other confidential business information related to the divested compounds. To ensure that the divestiture is successful, the Order requires Novartis to provide transitional support to Array and to manufacture and supply the divested compounds while it transfers manufacturing processes to Array.

The Commission has agreed to appoint an Interim Monitor to ensure that Novartis complies with all of its obligations under the Consent Agreement and to keep the Commission informed about the status of the transfer of rights and assets to Array.

The Commission's goal in evaluating possible divestiture purchasers is to maintain the competitive environment that existed prior to the Transaction. If the Commission ultimately determines that Array is not an acceptable acquirer, or that the manner of the divestiture is unacceptable, then the parties must unwind the sale of rights and assets to Array and divest them to a Commission-approved acquirer within six months of the date that the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the rights and assets if the parties fail to divest them as required.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement; 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

FOCUS EDUCATION, LLC, MICHAEL APSTEIN, AND JOHN ABLE

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

Docket No. C-4517; File No. 122 3153
Complaint, April 8, 2015 – Decision, April 8, 2015

This consent order concerns unsupported claims made by Focus Education, LLC and its principals, Michael Apstein and John Able (collectively, "Focus Education"), regarding their Jungle Rangers "brain training" game. The complaint alleges that Focus Education advertised that its Jungle Rangers game had "scientifically proven memory and attention brain training exercises, designed to improve focus, concentration and memory" and touted the game as giving children "the ability to focus, complete school work, homework, and to stay on task." Focus Education's website implied that these benefits would be permanent. The complaint alleges that Focus Education misrepresented the efficacy of its product and lacked any scientific evidence to support its claims. The consent order prohibits Focus Education from making claims about its brain training games (or any substantially similar product), unless the claims are non-misleading and are supported by competent and reliable scientific evidence. The order further prohibits the company from making unsubstantiated claims about the benefits, performance, or efficacy of products or services that supposedly alter the brain's structure or function, improve cognitive abilities, behavior, or academic performance, or treat or reduce the symptoms of cognitive disorders, including ADHD.

Participants

For the *Commission: Annette Soberats.*

For the *Respondents: Not Represented by Counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Focus Education, LLC, a limited liability company, Michael Apstein, individually and as an officer of Focus Education, LLC, and John Able, individually and as an officer of Focus Education, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Focus Education, LLC ("Focus Education") is a Texas limited liability company with its principal office or place of business in Houston, Texas.

2. Respondent Michael Apstein is the co-founder and Chief Executive Officer of Focus Education. Individually or in concert with others, he controlled or had the authority to control and participated in the acts and practices of Focus Education, including the acts and practices alleged in this complaint. His principal office or place of business is in Malibu, CA.

3. Respondent John Able is the co-founder and Chief Financial Officer of Focus Education. Individually or in concert with others, he controlled or had the authority to control and participated in the acts and practices of Focus Education, including the acts and practices alleged in this complaint. His principal office or place of business is in Houston, Texas.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed products to consumers, including the "ifocus System," which consists of the Jungle Rangers computer software and comic book and information on children's behavior, exercise, and diet. The ifocus System is a "device," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

IFOCUS SYSTEM

6. Since 2012, Respondents have sold the ifocus System directly to consumers for $214.75, plus tax, via a long-form television commercial ("infomercial"), and the company's websites, www.focuseducation.com, www.ifocussystem.com, www.ifocusgame.com, and www.junglerangers.com.

7. The centerpiece of the ifocus System is the Jungle Rangers computer software. Jungle Rangers is intended for children between the ages of six and twelve and purportedly offers adaptive cognitive training, so that the difficulty level of the

software's games continuously self-adjusts to the player. Focus Education recommends that children play Jungle Rangers for a total of twelve to twenty hours. Children play Jungle Rangers on their own without any supervision by a trained clinician, and parents can track their child's game performance through the Jungle Rangers "Dashboard."

8. The Jungle Rangers computer software is available for Apple and Microsoft operating systems and consists of nine games where children begin as "cadets" and train through three "worlds" to become "Jungle Rangers." The three worlds include exercises with embedded cognitive tasks, including simple span tasks (repeating a pattern in the order presented), backwards span tasks (repeating a pattern in the reverse order presented), complex span tasks (repeating a pattern even when faced with visual or sound interferences), n-back tasks (focusing on a list of items and making a specific response each time the currently presented item matches the item presented n times ago), and continuous performance tasks (paying attention to a low-frequency activity and responding to pre-defined action).

9. Respondents have advertised Jungle Rangers through an infomercial, radio spots, social media, and the company's websites. Respondents have represented, among other things, through express and implied claims and consumer endorsements, that Jungle Rangers permanently improves children's focus, memory, attention, behavior, and school performance, including in children with Attention Deficit Hyperactivity Disorder ("ADHD"). Respondents have also represented that Jungle Rangers is scientifically proven to improve children's cognitive abilities, behavior, and academic performance.

10. Sales of Jungle Rangers, minus returns, from 2012 through May 31, 2013 totaled approximately $4.5 million.

11. To induce consumers to purchase the ifocus System, Respondents have disseminated or have caused to be disseminated advertisements, including but not necessarily limited to the attached Exhibits A through F. These materials contain the following statements:

A. MALE ANNOUNCER: "Do you know your child is bright, but that struggles with focus or [sic] dragging down grades and self esteem?"

UNIDENTIFIED FEMALE: "Because she gets bored so easily, then she has a very difficult time focusing."

MALE ANNOUNCER: "What if you could give your child the ability to focus, complete school work, homework and to stay on task, to reach the promise of his or her potential simply by playing a fun and easy computer game? Now you can with ifocus. Ifocus has hidden[,] powerful brain training exercises inside the fun and easy Jungle Rangers game and the results are astounding."

[On screen depictions omitted]

* * *

"Ifocus is a powerful new approach developed to help kids focus in a groundbreaking new way. The secret is integrated neuro technology. Every challenge and sequence built into the ifocus game was scientifically engineered to strengthen important neuron connections, helping your child to filter, focus, absorb and remember."

[On screen depictions omitted]

* * *

ON SCREEN: "Connie
Jacquelyn's Mom"

CONNIE: "We just got done his [sic] parent-teacher conference and
Jacquelyn's one of the highest one [sic] in her classes in reading. . . ."

* * *

UNIDENTIFIED FEMALE: "He's actually going into a higher level in reading. He has - - he gets more comprehension."

* * *

ON SCREEN: "John Able
Parent, ifocus Co-Founder. . . ."

JOHN ABLE: "It's taking their brain and opening up the neuro pathways and their ability to focus and pay attention is improved."

(Ex. A, Infomercial version 1, at p. 5-8, 11, 23, 41-42)

B. FEMALE ANNOUNCER: "Here to tell us more is brain specialist and ifocus scientific advisor, Dr. Daniel Amen. He's a child psychiatrist and brain imaging specialist and he's authored 28 books on the brain. Dr. Amen is also a father and a grandfather."

DR. DANIEL AMEN: "As a child psychiatrist, I've not been all that excited about video games for children because children have developing brains. Here, we had developers, in a thoughtful way, develop a game to actually strengthen the connections in the brain. It's a very interesting term called 'long-term potentiation.' So, what that means is the connections between cells actually become stronger. So, to have the opportunity to actually study it and show that it is, in fact, helpful was very exciting for me. So, we had a group of 45 children. What we found was their ability to regulate themselves[,] so self regulation and emotion statistically significantly increased after the kids played the game. If you can help a child with their emotions[,] regulate themselves, they're more successful in their lives. Not only are they happier, but they're able to stay on task. So, I think any kid will benefit from this."

[On screen depictions omitted]

* * *

MALE ANNOUNCER: "[B]ecause hidden within every level of the nine innovative ifocus Jungle Rangers games are scientifically proven memory and attention brain training exercises, designed to improve focus, concentration and memory[,] strengthening important neuron connections like these span sequences[,] which ask players to remember complex information, even while distracted. So, many kids who play Jungle Rangers span games feel a jump in math and reading comprehension."

[On screen depictions omitted]

ON SCREEN: "CONTINUOUS PERFORMANCE
PAY ATTENTION
LEARN PATIENCE
FOCUS"

MALE ANNOUNCER: "Continuous performance games are all about paying attention and learning patience. Research proves kids who play continuous performance games are able to stay alert, be less distracted and really focus on what's going on around them."

ON SCREEN: "N-BACK
HOLD INFORMATION
UPDATE INFORMATION
REMEMBER AND FOCUS"

MALE ANNOUNCER: "And N-Back requires players to hold information and update that information. It's practice for real life, helping kids to think about what they've learned and to focus and remember what they need to do. It's this innovative[,] groundbreaking combination of proven science and increasingly challenging fun that has kids hooked from the very first time they play."

[On screen depictions omitted]

* * *

FEMALE ANNOUNCER: "Zak and Zane are identical twins. Think busy times two. Their dad knows how important exercise is for young boys, so he makes sure they spend a lot of time outside working off their energy. And while they're great when it comes to sports, both Zak and Zane had trouble focusing at school."

GARTH: "But to try to focus to do homework, there'd be times where it would take me a half-hour to just do one math problem."

FEMALE ANNOUNCER: "But since playing the Jungle Rangers game and using the ifocus System, Zak and Zane are able to focus, filter out distractions and homework has become much more productive."

ON SCREEN: "Garth
Zak and Zane's Dad
Individual Result - your child may not be as successful"

(disclosure appears in fine print at the bottom of the TV screen)

GARTH: "Well, they're doing better in school. We just got their report cards, and we were shocked, all As and Bs. They've never had that before."

On SCREEN: "Zak and Zane
age 9 www.ifocusSystem.com"

CHILD: "Every time we come home from school, we can do our math all by ourselves."

* * *

FEMALE ANNOUNCER: "Parents and teachers notice a difference in attention, behavior and focus

when kids use the ifocus system. But we wanted to see for ourselves, so we put ifocus to the real test, real kids at a real school."

FEMALE ANNOUNCER: "The ifocus Jungle Rangers game isn't available at schools, so elementary school principal Lori Jensen jumped at the opportunity to test it as part of her curriculum."

LORI JENSEN: "It fit into what we were trying to do with our students, engage them in the learning process, but also expand what their brains were going to be able to do."

FEMALE ANNOUNCER: "The teachers were enthusiastic."

JANE MARSHALL: "And, actually, as educators, that's what we're trying to do. We're trying to create new pathways in the brain."

FEMALE ANNOUNCER: "So, students played the ifocus Jungle Rangers game in computer lab and teachers noticed a difference in their classrooms."

JANE MARSHALL: "A typical third grade class you're really working to keep them focused."

LORI JENSEN: "She can tell a difference in their attention span in the classroom."

LAVONNE RIGGS: "I have seen a vast improvement. This class seems to be motivated and focused, and the only thing we're doing differently is Jungle Rangers."

JANE MARSHALL: "I love finding ways to help the children learn and Jungle Rangers does play a part in helping the children learn how to focus and to retrieve information and they enjoy doing it, so half the battle's gone right there. . . ."

LORI JENSEN: "It will help them with their attention span and their focus."

[On screen depictions omitted]

* * *

FEMALE ANNOUNCER: "Isaac is a busy nine-year-old and Isaac had trouble paying attention in school until his mom discovered the ifocus System."

[On screen depictions omitted]

FEMALE ANNOUNCER: "He started playing Jungle Rangers and she learned easy ways to help him change his behavior, to get organized and to get focused."

ON SCREEN: "Alitza
Issac's Mom www.ifocusSystem.com"

ALITZA: "The teacher actually has told me that this couple weeks [sic], she's noticed big, big change."
FEMALE ANNOUNCER: "Now, instead of spending hours on homework, Isaac is able to stay on task."

* * *

FEMALE ANNOUNCER: "Trista is a bubbly six-year-old who is very bright. . . ."

ON SCREEN: "Taffie
Trista's Mom www.ifocusSystem.com"

TAFFIE: "Trista is very intelligent, but because she gets bored so easily, then she has a very difficult time focusing. Every parent-teacher conference, it's always, you know, she's a little chatterbox, we have a hard time keeping her in her seat."

FEMALE ANNOUNCER: "That was before Trista starting playing the ifocus Jungle Rangers game."

TAFFIE: "So, we went to this parent-teacher conference this last time and I said to her teacher, you know, how are things going? She said, I don't know what you're doing at home, but you need to keep it up because it's helping her."

FEMALE ANNOUNCER: "Playing Jungle Rangers really has made a difference for Trista and she knows exactly why."

TRISTA: "It does help me pay attention."

[On screen depictions omitted]

(Ex. B, Infomercial version 4, at p. 16-18, 20-21, 29-30, 33-35, 41, 46-47)

C. MALE ANNOUNCER: "Jungle Rangers game is cutting edge science [with] proven memory and attention brain training exercises, every one of them designed to help improve your child's concentration and memory."

TIFFANY: "When I got that game, I started doing really, really good in school."

FORRESTER: "I pay attention to my teacher a lot more."

CHAZZ: "I have better grades."

JACKSON: "I've been getting a lot more 100 percents."

[On screen depictions omitted]

(Ex. C, Infomercial version 7, at p. 8-9)

D. MALE ANNOUNCER: "But what if there was a way to fight that summer brain drain by sharpening your child's memory and attention skills so that the very first day of class he or she is alert on task and ready to

learn? Well, now you can. Introducing the ifocus Jungle Rangers Brain Training System. What looks like a simple computer game is really much more. You're actually looking at cutting edge science[,] a series of proven memory and attention brain training exercises integrated into this fun, challenging game, every one of them designed to help ensure kids stay sharp and focused over the brain draining summer."

[On screen depictions omitted]

* * *

ON SCREEN: "Research has shown self-regulation is far more important than IQ"

MALE ANNOUNCER: "And studies say that ability to pay attention, to sit and focus can be even more important to a child's academic success than a high IQ. And the more kids play the ifocus Jungle Rangers game over the summer, the stronger those memory and attention muscles can become. That can mean an advantage when school starts in the falls. [sic]"

(Ex. D, Infomercial version 11, at p. 5-6, 9)

E. **"Will this help with ADD or AD/HD?**

While the ifocus system can help any child improve their focus and attention, much of its design was based upon cognitive training for children with impairments including AD/HD, so it will be highly beneficial for them."

"Will my child's improvements from ifocus / Jungle Rangers last or will they fade?

Research shows that once neuro pathways have been opened or strengthened they do not recede unless there is either a disease or until the onset of issues later with aging."

(Ex. E, Focus Education website – FAQs, at p. 2)

F. ANNC: "Does your child struggle with focus and concentration? Do they spend hours trying to finish their homework? Are you disappointed with your child's report card, because you know they can do better?

Because now there's an easy solution. No tutors. No classes. Remarkably… it's a video game. One that's already helped kids get good grades who'd never seen it happen before."

[script note omitted]

(Ex. F, Game Time radio ad script)

12. Daniel Amen, M.D. appears in Focus Education's infomercial describing a pilot study he conducted on Jungle Rangers in 2011. In that study, forty-five children between the ages of six and twelve trained during a twelve-week period with Jungle Rangers for an average of five hours total and were evaluated before and after the testing period using WebNeuro, an online neuro-psychological evaluation containing four outcome measures: Self-Regulation, Emotion, Feeling, and Thinking. Dr. Amen reported "statistically significant" improvements only in the Self-Regulation and Emotion outcome measures, but not in the Feeling or Thinking measures. This study was not randomized, blinded, or controlled; the children's performance in the Self-Regulation and Emotion outcome measures was in the normal range before and after using Jungle Rangers; the Self-Regulation, Emotion, and Feeling outcome measures do not measure focus, attention, or behavior; and the study did not conduct any follow-up testing to measure any permanent effects of Jungle Rangers training or collect any data on the children's existing diagnoses or academic performance.

COUNT I
FALSE OR UNSUBSTANTIATED EFFICACY CLAIMS

13. In connection with the advertising, promotion, offering for sale, or sale of the ifocus System, including through the use of the

product name, Respondents have represented, directly or indirectly, expressly or by implication, that:

A. Playing the ifocus System's Jungle Rangers computer game improves children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD; and

B. Playing the ifocus System's Jungle Rangers computer game causes permanent improvements in children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD.

14. The representations set forth in Paragraph 13 are false or misleading, or were not substantiated at the time the representations were made.

COUNT II
FALSE ESTABLISHMENT CLAIMS

15. In connection with the advertising, promotion, offering for sale, or sale of the ifocus System, Respondents have represented, directly or indirectly, expressly or by implication, that scientific studies prove:

A. Playing the ifocus System's Jungle Rangers computer game improves children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD; and

B. Playing the ifocus System's Jungle Rangers computer game causes permanent improvements in children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD.

16. In fact, scientific studies do not prove the representations set forth in Paragraph 15. Therefore, the representations set forth in Paragraph 15 are false or misleading.

VIOLATIONS OF SECTIONS 5 AND 12

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

THEREFORE, the Federal Trade Commission this eighth day of April, 2015, has issued this Complaint against Respondents.

By the Commission.

Complaint

EXHIBIT A

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1223153
TITLE iFOCUS EDUCATION, LLC
DATE RECORDED: FEBRUARY 17, 2012
TRANSCRIBED: NOVEMBER 12, 2013

PAGES 1 THROUGH 63

JUNGLE RANGERS BRAIN TRAINING SYSTEM
IFOCUS EDUCATION
INFOMERCIAL (IFV1)

Complaint

EXHIBIT A

FEDERAL TRADE COMMISSION

I N D E X

Complaint

EXHIBIT A

FEDERAL TRADE COMMISSION

In the Matter of:)
iFocus Education, LLC) Matter No. 1223153
)
----------)
February 17, 2012

The following transcript was produced from a CD-Rom provided to For The Record, Inc. on October 24, 2013.

Complaint

EXHIBIT A

P R O C E E D I N G S

- - - - -

JUNGLE RANGERS INFOMERCIAL

ON SCREEN: Excellence in Post-Production and Customization

NORTH COUNTRY

CLIENT: FOCUS EDUCATION

AGENCY: MEDIA DESIGN GROUP

TITLE: IFOCUS V.1/MDG

CODE: IFOC

MISC: CLOSED CAPTIONED/VEIL ENCODED

PHONE NUMBER: 1-800-624-0625

DATE: FRIDAY, FEBRUARY 17, 2012 @ 2:00:50 P.M.

EDITOR: KC AUDIO: STEREO

MASTER: 97309 LENGTH: 28:30

LAKE McDONALD - GLACIER NATIONAL PARK

ON SCREEN: ifocus

The following is a paid presentation for the ifocus system

MALE ANNOUNCER: The following is a paid presentation for the ifocus System.

ON SCREEN: CONSTANTLY

Nagging your child?

MALE ANNOUNCER: Are you frustrated reminding your kids to finish daily tasks?

Complaint

EXHIBIT A

EXHIBIT A

UNIDENTIFIED FEMALE: I can say, go brush your teeth or go get your homework or go do this, and five minutes later, it's still not done or even began.

ON SCREEN: SPENDING HOURS on basic homework?

MALE ANNOUNCER: Are you spending hours every night desperately trying to help your child finish basic homework assignments?

UNIDENTIFIED FEMALE: Homework took him like four to five hours and for me to sit down with him.

ON SCREEN: PROBLEMS at School?

MALE ANNOUNCER: Do you dread getting those calls from school?

UNIDENTIFIED FEMALE: Every single day I was getting calls from the teacher or he was getting sent to the office.

ON SCREEN: Bright but STRUGGLES with grades?

MALE ANNOUNCER: Do you know your child is bright, but that struggles with focus or dragging down grades and self esteem?

UNIDENTIFIED FEMALE: Because she gets bored so easily, then she has a very difficult time focusing.

Complaint

EXHIBIT A

ON SCREEN: FOCUS
COMPLETE SCHOOLWORK
COMPLETE HOMEWORK
STAY ON TASK
REACH POTENTIAL
MALE ANNOUNCER: What if you could give your child the ability to focus, complete school work, homework and to stay on task, to reach the promise of his or her potential simply by playing --
ON SCREEN: Fun Easy
COMPUTER GAME
MALE ANNOUNCER: -- a fun and easy computer game?
Now you can with ifocus.
ON SCREEN: Powerful
BRAIN TRAINING
MALE ANNOUNCER: Ifocus has hidden powerful brain training exercises inside the fun and easy Jungle Rangers Game --
ON SCREEN: Incredible
RESULTS
MALE ANNOUNCER: -- and the results are astounding.
ON SCREEN: Jennifer
Kaida's Mom

Complaint

EXHIBIT A

JENNIFER: I really didn't expect to see that big of change that quickly.

ON SCREEN: Susan Forrester's Mom

SUSAN: It worked for our family. In two weeks time, we noticed.

ON SCREEN: Marissa Chazz's Mom

MARISSA: Ifocus gave me the tools to help my child do better in school.

ON SCREEN: Powerful NEW APPROACH!

MALE ANNOUNCER: Ifocus is a powerful new approach developed to help kids focus in a groundbreaking new way.

ON SCREEN: The Secret... INTEGRATED NEURO TECHNOLOGY

MALE ANNOUNCER: The secret is integrated neuro technology. Every challenge and sequence built into the ifocus game was --

ON SCREEN: Scientifically ENGINEERED

MALE ANNOUNCER: -- scientifically engineered to strengthen important neuron connections, helping your child to --

Complaint

EXHIBIT A

ON SCREEN: Filter
Focus
Absorb
Remember
MALE ANNOUNCER: -- filter, focus, absorb and remember.
ON SCREEN: Tiffany
age 11
TIFFANY: When I got that game, I started doing really, really good in school.
ON SCREEN: Forrester
age 10
FORRESTER: I pay attention to my teacher a lot more.
ON SCREEN: Lindsey
age 9
LINDSEY: I noticed that I can focus more.
ON SCREEN: Anna
age 10
ANNA: I have more confidence in myself.
ON SCREEN: Chazz
age 10
CHAZZ: I have better grades.
ON SCREEN: Jackson
age 11

Complaint

EXHIBIT A

JACKSON: I've been getting a lot more 100 percents.

ON SCREEN: DEVELOPED BY

Scientists Educators Teachers

MALE ANNOUNCER: Ifocus was developed by scientists, educators, and concerned parents who saw that the difference between success and failure for some children is often simply their ability to pay attention.

ON SCREEN: FOCUSING "MUSCLE"

Becomes Stronger

MALE ANNOUNCER: For children, the ability to focus is like a muscle that becomes stronger with repeated use.

ON SCREEN: BRAIN TRAINING EXERCISES

JUNGLE RANGERS

EVERYONE E CONTENT RATED BY ESRB

SCIENTIFICALLY ENGINEERED

MALE ANNOUNCER: The ifocus Jungle Rangers Game is really a sophisticated series of brain training exercises, scientifically engineered so the players actually --

ON SCREEN: Strengthens

FOCUSING MUSCLE!

MALE ANNOUNCER: -- strengthen their focusing muscle, all while playing a --

Complaint

EXHIBIT A

EXHIBIT A
10

ON SCREEN: Fun Easy
GAME!
MALE ANNOUNCER: -- fun and easy game.
ON SCREEN: Chazz
age 10
CHAZZ: It's called ifocus and the game is Jungle Rangers.
ON SCREEN: Anna
age 10
ANNA: You go in as a cadet and you train and you play games so you can become a jungle ranger.
ON SCREEN: JUNGLE RANGERS
CHAZZ: It's fun. It helps you learn, remember and make you concentrate more.
ANNA: I can concentrate and I can focus and it's a lot easier than it was.
MALE ANNOUNCER: Parents and teachers say that children who play the ifocus game are able to --
ON SCREEN: STAY ON TASK
ABSORB INFORMATION
IMPROVE GRADES
ifocus
MALE ANNOUNCER: -- stay on task, absorb information, improve their grades. In short, they improve their focus, sometimes dramatically.

Complaint

EXHIBIT A

ON SCREEN: Garth
Zak and Zane's Dad
GARTH: Well, they're doing better in school. We just got their report card and we were shocked, all As and Bs.
ON SCREEN: Kelly
Cami and Kemp's Mom
KELLY: And this was the first time -- well, he got all As and one A minus.
ON SCREEN: Connie
Jacquelyn's Mom
CONNIE: We just got done his parent-teacher conference and Jacquelyn's one of the highest one in her classes in reading.
ON SCREEN: Alitza
Issac's Mom
ALITZA: Say that is a game that gives you results, that once the kids are into it, they're hooked, they stay there, and I would recommend it.
ON SCREEN: Jennifer Beals
Actress, Mother
MALE ANNOUNCER: Actress and mother Jennifer Beals is convinced of the ifocus difference after learning about the game and talking with parents just like you.

Complaint

EXHIBIT A

EXHIBIT A
12

ON SCREEN: COMING UP
The Science Behind
MALE ANNOUNCER: Join her as she interviews brain specialist, Dr. Daniel Amen, about the science behind ifocus.
ON SCREEN: Daniel Amen, M.D.
ifocus Scientific Advisor
DR. DANIEL AMEN: They were thoughtful about different brain processes. So, those things are built into the game.
ON SCREEN: COMING UP
The JUNGLE RANGERS Game Developer
MALE ANNOUNCER: Go behind the scenes with the ifocus award-winning game developer --
ON SCREEN: COMING UP
The Importance of ifocus
MALE ANNOUNCER: -- and find out what former U.S. Secretary of Education William Bennett has to say about the importance of ifocus.
ON SCREEN: Dr. William Bennett
Former U.S. Secretary of Education
DR. WILLIAM BENNETT: Smart people using technology develop things which can help kids learn and develop their mental muscle.
ON SCREEN: COMING UP

Complaint

EXHIBIT A

EXHIBIT A

13

The ifocus Difference!

MALE ANNOUNCER: And coming up, find out how ifocus can help make a difference for your child, too. This is an exclusive television offer.

ON SCREEN: Try it

RISK FREE!

PARENT TO PARENT PROMISE

6 MONTH

100% MONEY BACK GUARANTEE

EXCLUSIVE TV OFFER

MALE ANNOUNCER: Try ifocus in your home risk-free with our six-month money back guarantee. It's the ifocus parent to parent promise. Our promise that with ifocus, you'll see a difference in your child at home and at school.

And, now, actress and mother, Jennifer Beals.

ON SCREEN: Jennifer Beals

Actress, Mother

JENNIFER BEALS: I value education. So, the idea of children learning to focus so they can focus on learning caught my attention. But the more I saw kids play the game and the more I learned about all of the materials that make up ifocus, the more I realized that ifocus was one of the --

ON SCREEN: Groundbreaking

Complaint

EXHIBIT A

EXHIBIT A

14

EDUCATIONAL SYSTEM

JENNIFER BEALS: -- most groundbreaking, educational systems available to kids.

ON SCREEN: Jackson
age 11

JACKSON: It's a game that helps kids concentrate.

ON SCREEN: Forrester
age 10

FORRESTER: It helps me focus.

ON SCREEN: Zach
age 11

ZACH: It gives you confidence.

ON SCREEN: Trista
age 6

TRISTA: It does help me pay attention.

JENNIFER BEALS: Ifocus is easy to use and it's fun, and it will bring you and your child into a world that you never before would have imagined.

ON SCREEN: Marissa
Chazz's Mom

MARISSA: It's helped a lot at the house even, not just at school. His behavior with his chores, helping out.

ON SCREEN: Colleen

Complaint

EXHIBIT A

EXHIBIT A
15

Michael and Nelson's Mom
COLLEEN: I've seen a lot more focus, a lot of motivation.
ON SCREEN: Kristin
Anna's Mom
KRISTIN: She seems to be trying harder to want to do what I asked.
ON SCREEN: Julie
Zach's Mom
JULIE: This is a great way to strengthen their brain, which is their biggest asset in life.
ON SCREEN: ifocus
Jennifer Beals
Actress, Mother
JENNIFER BEALS: The secret to the success of ifocus is integrated neuro technology. And here to tell us more is brain specialist and ifocus scientific advisor, Dr. Daniel Amen. He's a child psychiatrist and brain imaging specialist and he's authored 28 books on the brain including four New York Times bestsellers. Dr. Amen is also a father and a grandfather.
ON SCREEN: Daniel Amen, M.D.
Brain Imaging Specialist
DR. DANIEL AMEN: As a child psychiatrist, I've not been all that excited about video games for children

Complaint

EXHIBIT A

because children have developing brains.

JENNIFER BEALS: And how is -- how are most video games different than ifocus' Jungle Rangers?

DR. DANIEL AMEN: Here, we had developers, in a thoughtful way, develop a game to actually strengthen the connections in the brain. It's a very interesting term called "long-term potetiation." So, what that means is the connections between cells actually become stronger.

ON SCREEN: Daniel Amen, M.D.

Author, 28 books on the brain

DR. DANIEL AMEN: So, to have the opportunity to actually study it and show that it is, in fact, helpful was very exciting for me.

ON SCREEN: ifocus

GROUP STUDY

Pre. vs. Post Comparison

(Bar Graph)

THINKING SELF REGULATION EMOTION FEELING

DR. DANIEL AMEN: So, we had a group of 45 children. What we found was their ability to regulate themselves, so self regulation, and emotion, statistically significantly --

ON SCREEN: Bar Graph on screen

After average 5 hours gametime

Recommended gametime: 12-15 hours

Complaint

EXHIBIT A

EXHIBIT A

17

DR. DANIEL AMEN: -- increased after the kids played the game.

ON SCREEN: Jennifer Beals

Actress, Mother

JENNIFER BEALS: Why is self regulation so important when it comes to focus?

DR. DANIEL AMEN: If you can help a child with their emotions, regulate themselves, they're more successful in their lives. Not only are they happier, but they're able to stay on task.

JENNIFER BEALS: What kind of kids will benefit from the ifocus system?

ON SCREEN: Daniel Amen, M.D.

Brain Imaging Specialist

DR. DANIEL AMEN: So, I think any kid will benefit from this, and the reason I say that is I love the approach. It's a brain training exercise. None of it's hard. I mean, that's sort of the exciting thing. None of it's hard and it can give you a big benefit. And as a parent, you feel confident that this is helping my child and not hurting my child.

JENNIFER BEALS: Right.

ON SCREEN: ifocus

ON SCREEN: Julie

Zach's Mom

Complaint

EXHIBIT A

EXHIBIT A

18

JULIE: My kids love to play video games and this is a great way to strengthen their brain.

ON SCREEN: Taffie

Trista's Mom

TAFFIE: And it settles them in and it helps them to learn to focus.

ON SCREEN: Kristin

Anna's Mom

KRISTIN: She's doing better in school and doing better at tasks and that gives her self esteem and self confidence, and that's been good to see.

JENNIFER BEALS: Parents and teachers notice a difference in attention, behavior, and focus when kids use the ifocus system. But we wanted to see for ourselves, so we put ifocus to the real test, real kids at a real school.

ON SCREEN: JUNGLE RANGERS

NOT AVAILABLE AT SCHOOLS!

JENNIFER BEALS: The ifocus Jungle Rangers game isn't available at schools, so elementary school principal Lori Jensen jumped at the opportunity to test it as part of her curriculum.

ON SCREEN: Lori Jensen

Principal, 30 years in education

LORI JENSEN: It fit into what we were trying

Complaint

EXHIBIT A

to do with our students, engage them in the learning process, but also expand what their brains were going to be able to do.

JENNIFER BEALS: The teachers were enthusiastic.

ON SCREEN: Karen DelVecchio
Teacher

KAREN DELVECCHIO: Any kind of a task where they're sitting in one place and they're using that part of their brain that they have to focus on something and improve on something is an excellent tool for them.

ON SCREEN: Jane Marshall
Teacher

JANE MARSHALL: And, actually, as educators, that's what we're trying to do. We're trying to create new pathways in the brain.

JENNIFER BEALS: So, students played the ifocus Jungle Rangers game in computer lab and teachers noticed a difference in their classrooms.

JANE MARSHALL: A typical third grade class, you're really working to keep them focused.

LORI JENSEN: She can tell a difference in their attention span in the classroom.

JANE MARSHALL: I love finding ways to help the children learn and Jungle Rangers does play a part in

Complaint

EXHIBIT A

helping the children learn how to focus --

ON SCREEN: Jane Marshall

Teacher

JANE MARSHALL: -- and to retrieve information, and they enjoy doing it, so half the battle's gone right there.

ON SCREEN: Lavonne Riggs

Teacher

LAVONNE RIGGS: I have seen a vast improvement. This class seems to be motivated and focused and the only thing we're doing differently is Jungle Rangers. Pretty amazing.

JENNIFER BEALS: With ifocus, your child can learn to focus so that your child --

ON SCREEN: This is a paid advertisement for the ifocus System

JENNIFER BEALS: -- can focus on learning, to succeed in the classroom and beyond.

ON SCREEN: ifocus

ON SCREEN: FOCUS

COMPLETE SCHOOLWORK

COMPLETE HOMEWORK

STAY ON TASK

REACH POTENTIAL

MALE ANNOUNCER: What if you could give your

Complaint

EXHIBIT A

child the ability to focus, complete school work, home work, and to stay on task, achieve his or her potential, simply by playing --

ON SCREEN: Fun

Easy

COMPUTER GAME

MALE ANNOUNCER: -- a fun and easy computer game? Now, you can with ifocus.

ON SCREEN: DEVELOPED BY

Scientists

Educators

Parents

MALE ANNOUNCER: ifocus was developed by scientists, educators, and concerned parents who saw that --

ON SCREEN: THE DIFFERENCE BETWEEN

Success Failure

Their Ability

TO PAY ATTENTION!

MALE ANNOUNCER: -- the difference between success and failure for some children is often simply their ability to pay attention.

For children, the ability to focus is like a muscle that becomes stronger with repeated use.

ON SCREEN: ifocus

Complaint

EXHIBIT A

EXHIBIT A
22

JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Available for Windows Mac
MALE ANNOUNCER: The cornerstone of the ifocus system is the Jungle Rangers game, rated E for everyone, and available for PC and Mac.
ON SCREEN: More than
JUST A GAME!
MALE ANNOUNCER: Kids think they're just playing a fun and easy game --
ON SCREEN: BRAIN TRAINING EXERCISES
SCIENTIFICALLY ENGINEERED
JUNGLE RANGERS
MALE ANNOUNCER: -- but Jungle Rangers is really a sophisticated series of brain training exercises scientifically engineered so that children can actually --
ON SCREEN: Strengthens
FOCUSING MUSCLE!
20 minutes A DAY 3X A WEEK
MALE ANNOUNCER: -- strengthen their focusing muscle in as little as 20 minutes a day, three times a week.
ON SCREEN: PARENT'S DASHBOARD
MONITOR PROGRESS

Complaint

EXHIBIT A

MALE ANNOUNCER: And parents can track their progress through the innovative ifocus parent's dashboard.

ON SCREEN: Taffie
Trista's Mom

TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.

ON SCREEN: Jennifer
Kaida's Mom

JENNIFER: It helps you be able to track what he's doing, his progress.

TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.

UNIDENTIFIED FEMALE: He's actually going into a higher level in reading. He has -- he gets more comprehension.

ON SCREEN: The Secret...
INTEGRATED NEURO TECHNOLOGY

MALE ANNOUNCER: The secret is integrated neuro technology.

ON SCREEN: Stimulates
THE CORTEX

MALE ANNOUNCER: Key areas of the cortex are stimulated in careful order --

Complaint

EXHIBIT A

EXHIBIT A

24

ON SCREEN: KEY NEURONS
Fire together
Wire together
MALE ANNOUNCER: -- first, firing neurons and then creating connections that get stronger, literally wiring them together the more your child plays the game.
ON SCREEN: Challenged,
NOT FRUSTRATED
MALE ANNOUNCER: Children who play Jungle Rangers are challenged, but not frustrated, because Jungle Rangers --
ON SCREEN: Game Adapts
TO EACH PLAYER
MALE ANNOUNCER: -- constantly adapts and readjusts the level of difficulty for each player --
ON SCREEN: Kids Love
JUNGLE RANGERS
MALE ANNOUNCER: -- and kids are hooked the very first time they play.
ON SCREEN: FIRST TIME PLAYERS!
JUNGLE RANGERS
CHILD: It was really fun.
CHILD: It was challenging, but then I would really want to play it again.
CHILD: It's like a puzzle.

Complaint

EXHIBIT A

EXHIBIT A

25

CHILD: It's fun.

CHILD: It's just an awesome game.

ON SCREEN: HOW MUCH

Wasted Money?

DO NOTHING GAMES

BORING TUTORING SESSIONS

AFTER SCHOOL PROGRAMS

MALE ANNOUNCER: How much time and money have you wasted on do nothing video games for your child, boring tutoring sessions or after school programs that simply don't make a difference?

ON SCREEN: PARENT TO PARENT PROMISE

6 MONTH 100% MONEY BACK GUARANTEE

JUNGLE RANGERS

MALE ANNOUNCER: The Jungle Rangers game and ifocus system are 100 percent guaranteed.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

Play JUNGLE RANGERS in your home!

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: And, right now, your family has an extraordinary opportunity to try ifocus and play Jungle Rangers in your home for 30 days for just $14.95.

Complaint

EXHIBIT A

That's right. It's a very special ifocus Jungle Rangers --

ON SCREEN: Product information shown above

Quick Start System

AVAILABLE FOR Mac Windows

MALE ANNOUNCER: -- quick start offer. Use it in your own home for a full 30 days for just $14.95.

ON SCREEN: Product information shown above

Not all children will achieve this result.

UNIDENTIFIED FEMALE: He says, Mom, I can focus in class.

UNIDENTIFIED MALE: I can't see any reason I would not recommend this.

UNIDENTIFIED FEMALE: I would really encourage parents to do it.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: Call or click ifocusystem.com right now and try the incredible new ifocus Jungle

Complaint

EXHIBIT A

Rangers Quick Start System for 30 days for just $14.95.

ON SCREEN: Product information shown above

JUNGLE RANGERS

Brain Training Game

Checklist

MALE ANNOUNCER: You'll receive the ifocus brain training Jungle Rangers game and user-friendly checklist.

ON SCREEN: Product information shown above

Science Behind the Game AUDIO CD

MALE ANNOUNCER: Plus, our audio CD explains the science behind the game --

ON SCREEN: Product information shown above

5 ways in 5 days

QUICK START CARDS

MALE ANNOUNCER: -- and increase your child's focus and attention five ways in five days with our exclusive quick start cards.

ON SCREEN: Product information shown above

Focus on Behavior HANDBOOK

Behavior Advice from Experts AUDIO CD

Focus on Behavior QUICK START CARDS

MALE ANNOUNCER: You'll also get our Focus on Behavior Handbook and get behavior tips from experts on our audio CD, again with easy-to-follow quick start

Complaint

EXHIBIT A

cards.

ON SCREEN: Product information shown above

FIRST EDITION JUNGLE RANGERS Comic Book

MALE ANNOUNCER: And because kids love the Jungle Rangers game, we'll even give them our first edition Jungle Rangers comic book.

UNIDENTIFIED FEMALE: I was really impressed with the CDs that were included.

UNIDENTIFIED FEMALE: I was just expecting a Jungle Rangers game.

UNIDENTIFIED FEMALE: The informational discs that you sent helped me to be able to understand him and help him out.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: That's the entire ifocus Quick Start System, including the Jungle Rangers game, checklist and comic book, plus the five ways in five days cards and behind the science audio CD, the Focus on Behavior Handbook, quick start cards, and audio CD, all yours to try for just $14.95.

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ON SCREEN: CALL in the next 18 MINUTES!
Product information shown above
FREE SHIPPING
MALE ANNOUNCER: Call or click ifocussystem.com in the next 18 minutes and we'll even include free shipping.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Remember, the ifocus Jungle Rangers Quick Start System is not available in any stores or at any schools. This is an exclusive television offer. You have absolutely nothing to lose and your child has everything to gain.
We're so certain you'll see positive improvements in your child's ability to focus at school and at home with ifocus, we want you to use it in your home, have your child play the game for six months guaranteed.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY OFFER

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EXHIBIT A

EXHIBIT A

30

EXCLUSIVE TV OFFER
PARENT TO PARENT PROMISE
6 MONTH 100% MONEY BACK GUARANTEE
CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: It's the ifocus parent to parent promise. If you aren't completely happy, send it back any time within those six months and we'll refund your money, period.

ON SCREEN: Product information shown above
$70 VALUE
Keep your FREE GIFTS!

MALE ANNOUNCER: But keep the behavior handbook, audio CD, cards, and the Jungle Rangers comic book, a $70 value as your free gifts.

ON SCREEN: Product information shown above
Not all children will achieve this result.

UNIDENTIFIED FEMALE: I'm happy to have a tool that helps my daughter focus and helps her to do better in school.

UNIDENTIFIED FEMALE: The game has -- is teaching my boys how to focus and how to filter out distractions.

UNIDENTIFIED FEMALE: It makes me very, very happy. Happy mom.

ON SCREEN: CALL or Click

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EXHIBIT A

TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Call or click ifocussystem.com and order right now and you could be hearing these words, too.
CHILD: Jungle Rangers helps me pay attention.
ON SCREEN: CALL or Click
TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Call 1-800-624-0625 for the ifocus system. Call 1-800-624-0625 now.
ON SCREEN: Zak and Zane
age 9
JENNIFER BEALS: Zak and Zane are identical twins. Think busy times two. Their dad knows how

Complaint

EXHIBIT A

important exercise is for young boys, so he makes sure they spend a lot of time outside working off their energy.

GARTH: The boys keep me going. They're fun.

ON SCREEN: Garth
Zak and Zane's Dad

GARTH: They keep me busy, but they are a lot of fun and they're good, good kids.

JENNIFER BEALS: And while they're great when it comes to sports, both Zak and Zane had trouble focusing at school.

GARTH: But to try to focus to do homework, there'd be times where it would take me a half-hour to just do one math problem.

JENNIFER BEALS: But since playing the Jungle Rangers game and using the ifocus system --

ON SCREEN: 1-800-624-0625
ifocusSystem.com

JENNIFER BEALS: -- Zak and Zane are able to focus, filter out distractions, and homework has become much more productive.

GARTH: Well, they're doing better in school.

ON SCREEN: Garth 1-800-624-0625
Zak and Zane's Dad ifocusSystem.com

GARTH: We just got their report cards, and we

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EXHIBIT A

were shocked, all As and Bs. They've never had that before. Their focus is un -- it's the biggest key, is their focus, they can focus on doing their work.

ON SCREEN: Zak and Zane

age 9

CHILD: We're getting better on math and stuff.

CHILD: Yeah.

CHILD: And we got three As.

ON SCREEN: Garth

Zak and Zane's Dad

GARTH: And now, they come home and do their homework. It's -- you see the difference. You see the difference. One game, hmm, makes a difference.

JENNIFER BEALS: Kids think they're just playing a game, but this game is so much more than just a game. It's designed to stimulate their brain in new ways.

ON SCREEN: The Secret...

INTEGRATED NEURO TECHNOLOGY

JENNIFER BEALS: It uses integrated neuro technology designed to --

ON SCREEN: KEY NEURONS

Fire together

Wire together

JENNIFER BEALS: -- get key neurons to fire

Complaint

EXHIBIT A

together and then wire together. This creates pathways that helps kids to --

ON SCREEN: Filter, Focus, Absorb, Remember

JENNIFER BEALS: -- filter, focus, absorb and remember.

ON SCREEN: Game Adapts

TO PLAYER!

JENNIFER BEALS: And the game adapts as your child improves, and as a parent you can track those improvements through the game's dashboard.

ON SCREEN: PARENT'S DASHBOARD

MONITOR PROGRESS

JENNIFER BEALS: You'll see at a glance how your child is progressing through the game, and best of all --

ON SCREEN: 1-800-624-0625

ifocusSystem.com

JENNIFER BEALS: -- you'll know ifocus is working because you'll see it working in your child's daily life.

ON SCREEN: Marissa 1-800-624-0625

Chazz's Mom ifocusSystem.com

MARISSA: When he brings home his paperwork from school and they're As, they're 100 percent, 95 percents versus the 65 percents.

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EXHIBIT A

ON SCREEN: Chazz 1-800-624-0625
age 10 ifocusSystem.com
CHAZZ: Yeah, I have better grades. I used to blurt out in class and now I don't do that as much anymore.
ON SCREEN: Marissa 1-800-624-0625
Chazz's Mom ifocusSystem.com
MARISSA: I would have never in a million years thought that a video game, ifocus Jungle Rangers, would have been able to do that for us.
JENNIFER BEALS: Former Secretary of Education Bill Bennett agrees.
ON SCREEN: Dr. William Bennett
Former U.S. Secretary of Education
DR. WILLIAM BENNETT: Well, there are games and there are games. There are games that you learn from and games that you don't.
ON SCREEN: Jennifer Beals
Actress, Mother
JENNIFER BEALS: Dr. Bennett understands how deeply important it is for America's parents to give kids the tools and skills they need to succeed during their school years and beyond.
DR. WILLIAM BENNETT: Smart people using technology develop things which can help kids learn and

Complaint

EXHIBIT A

develop their mental muscle. Supposing you had something which would help kids increase their focus and attention and parents could confidently --

ON SCREEN: Dr. William Bennett
Former U.S. Secretary of Education

DR. WILLIAM BENNETT: -- that's a very important word -- confidently say, sit here, do this, you have given a great gift to that parent and that child and you may even have restored greater measures of harmony at home.

ON SCREEN: Jennifer 1-800-624-0625
Kaida's Mom ifocusSystem.com

JENNIFER: He seems to come home and jump right in, get his schoolwork done that he's supposed to.

ON SCREEN: Kristin 1-800-624-0625
Anna's Mom ifocusSystem.com

KRISTIN: We had the best parent-teacher conference that we've ever had.

ON SCREEN: Marissa 1-800-624-0625
Chazz's Mom ifocusSystem.com

MARISSA: I don't get phone calls anymore.

ON SCREEN: 1-800-624-0625
ifocusSystem.com

DR. WILLIAM BENNETT: What a blessing that is.

JENNIFER BEALS: Trista is a bubbly six-year

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EXHIBIT A

old who's very bright, but who had problems in school.

ON SCREEN: Taffie 1-800-624-0625

Trista's Mom ifocusSystem.com

TAFFIE: Trista is very intelligent, but because she gets bored so easily, then she has a very difficult time focusing.

JENNIFER BEALS: That was before Trista starting playing the ifocus Jungle Rangers game.

ON SCREEN: 1-800-624-0625

ifocusSystem.com

TAFFIE: The wonderful thing about the ifocus and the Jungle Rangers game is that they can go at their own pace. And as a pediatric RN and as a mother of nine and as a grandmother of three and a foster mom, I was thrilled. I just thank you for a wonderful product.

JENNIFER BEALS: Playing Jungle Rangers really has made a difference for Trista and she knows exactly why.

ON SCREEN: Trista 1-800-624-0625

age 6 ifocusSystem.com

TRISTA: It helps me focus at school.

ON SCREEN: 1-800-624-0625

ifocusSystem.com

JENNIFER BEALS: With ifocus, your child can learn to focus so that your child can focus on learning,

Complaint

EXHIBIT A

to succeed in the classroom and in life.

UNIDENTIFIED FEMALE: Oh, my gosh, this game is amazing, 100 percent recommend it.

ON SCREEN: Garth 1-800-624-0625

Zak and Zane's Dad ifocusSystem.com

GARTH: This is one thing that I'm very glad my wife and I decided to do. I think it's been beneficial for our boys. Thank you.

ON SCREEN: This is a paid advertisement for the ifocus System

GARTH: That's about what I want to say, thank you for ifocus.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: Call or click ifocusystem.com right now and try the incredible new ifocus Jungle Rangers Quick Start System for 30 days for just $14.95.

ON SCREEN: Product information shown above

JUNGLE RANGERS

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EXHIBIT A

Brain Training Game
Checklist
MALE ANNOUNCER: You'll receive the ifocus brain training Jungle Rangers game and user-friendly checklist.
ON SCREEN: Product information shown above
Science Behind the Game AUDIO CD
MALE ANNOUNCER: Plus, our audio CD explains the science behind the game --
ON SCREEN: Product information shown above
5 ways in 5 days
QUICK START CARDS
MALE ANNOUNCER: -- and increase your child's focus and attention five ways in five days with our exclusive quick start cards.
ON SCREEN: Product information shown above
Focus on Behavior HANDBOOK
Behavior Advice from Experts AUDIO CD
Focus on Behavior QUICK START CARDS
MALE ANNOUNCER: You'll also get our Focus on Behavior Handbook and get behavior tips from experts on our audio CD, again with easy-to-follow quick start cards.
ON SCREEN: Product information shown above
FIRST EDITION JUNGLE RANGERS Comic Book

Complaint

EXHIBIT A

MALE ANNOUNCER: And because kids love the Jungle Rangers game, we'll even give them our first edition Jungle Rangers comic book.

ON SCREEN: ifocus

$14.95 PLUS S&H

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EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: That's the entire ifocus Quick Start System, including the Jungle Rangers game, checklist and comic book, plus the five ways in five days cards and behind the science audio CD, the Focus on Behavior Handbook, quick start cards, and audio CD, all yours to try for just $14.95.

ON SCREEN: CALL in the next 10 MINUTES!

Product information shown above

FREE SHIPPING

MALE ANNOUNCER: Call or click ifocussystem.com in the next 10 minutes and we'll even include free shipping.

ON SCREEN: ifocus

$14.95 PLUS S&H

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EXHIBIT A

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CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: Call or click ifocusystem.com and order right now.

MALE ANNOUNCER: Call 1-800-624-0625 for the ifocus system. Call 1-800-624-0625 now.

ON SCREEN: Jennifer Beals

Actress, Mother ifocusSystem.com

JENNIFER BEALS: Behind ifocus is a team of scientists, doctors, educators, child psychologists, award-winning game designers, and parents. The result, something truly unique and remarkable that children love to play.

ON SCREEN: John Able

Parent, ifocus Co-Founder

JOHN ABLE: It's really wonderful. It's a little bit like Sesame Street brought education to TV. Children were going to watch TV, Sesame Street brought them something that they liked watching, and the same thing's going on with Jungle Rangers.

JASON LEON: Well, we made it really approachable for them. You're going to become a Jungle Rangers.

ON SCREEN: JUNGLE RANGERS

GAME: Good day, I need your help.

Complaint

EXHIBIT A

ON SCREEN: Jason Leon
ifocus Game Developer
JASON LEON: Each and every game is adaptive. So, it's actually designed to scale up in difficulty so that it keeps your brain energy up as high as it possibly can. That's one of the aspects that sets our game apart from other games is that it's constantly challenging you to get better.
JOHN ABLE: It's taking their brain and opening up the neuro pathways and their ability to focus and pay attention is improved.
ON SCREEN: CALL or Click
TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Call or click ifocusystem.com right now and try the incredible new ifocus Jungle Rangers Quick Start System for 30 days for just $14.95.
ON SCREEN: Product information shown above
JUNGLE RANGERS
Brain Training Game

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Checklist

MALE ANNOUNCER: You'll receive the ifocus brain training Jungle Rangers game and user-friendly checklist.

ON SCREEN: Product information shown above

Science Behind the Game AUDIO CD

MALE ANNOUNCER: Plus, our audio CD explains the science behind the game --

ON SCREEN: Product information shown above

5 ways in 5 days

QUICK START CARDS

MALE ANNOUNCER: -- and increase your child's focus and attention five ways in five days with our exclusive quick start cards.

ON SCREEN: Product information shown above

Focus on Behavior HANDBOOK

Behavior Advice from Experts AUDIO CD

Focus on Behavior QUICK START CARDS

MALE ANNOUNCER: You'll also get our Focus on Behavior Handbook and get behavior tips from experts on our audio CD, again with easy-to-follow quick start cards.

ON SCREEN: Product information shown above

FIRST EDITION JUNGLE RANGERS Comic Book

MALE ANNOUNCER: And because kids love the

Complaint

EXHIBIT A

Jungle Rangers game, we'll even give them our first edition Jungle Rangers comic book.

UNIDENTIFIED FEMALE: I was really impressed with the CDs that were included.

UNIDENTIFIED FEMALE: I was just expecting a Jungle Rangers game.

UNIDENTIFIED FEMALE: The informational discs that you sent helped me to be able to understand him and help him out.

ON SCREEN: ifocus

$14.95 PLUS S&H

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EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

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ON SCREEN: CALL in the next 18 MINUTES!

Product information shown above

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MALE ANNOUNCER: Call or click ifocussystem.com

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MALE ANNOUNCER: Call or click ifocussystem.com

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$14.95 PLUS S&H

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EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

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MALE ANNOUNCER: Remember, the ifocus Jungle Rangers Quick Start System is not available in any stores or at any schools. This is an exclusive television offer. You have absolutely nothing to lose and your child has everything to gain.

We're so certain you'll see positive improvements in your child's ability to focus at school and at home with ifocus, we want you to use it in your home, have your child play the game for six months guaranteed.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

PARENT TO PARENT PROMISE

6 MONTH 100% MONEY BACK GUARANTEE

CALL NOW 1-800-624-0625 ifocusSystem.com

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MALE ANNOUNCER: It's the ifocus parent to parent promise. If you aren't completely happy, send it back any time within those six months and we'll refund your money, period.

ON SCREEN: Product information shown above

$70 VALUE

Keep your FREE GIFTS!

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Not all children will achieve this result.

UNIDENTIFIED FEMALE: I'm happy to have a tool that helps my daughter focus and helps her to do better in school.

UNIDENTIFIED FEMALE: The game has -- is teaching my boys how to focus and how to filter out distractions.

UNIDENTIFIED FEMALE: It makes me very, very happy. Happy mom.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY OFFER

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EXHIBIT A

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EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Call or click ifocussystem.com and order right now and you could be hearing these words, too.
CHILD: Jungle Rangers helps me pay attention.
ON SCREEN: 1-800-624-0625
ifocusSystem.com
JENNIFER BEALS: Kids think they're just playing a game, but this game is so much more than just a game. It's designed to stimulate their brain in new ways.
ON SCREEN: The Secret...
INTEGRATED NEURO TECHNOLOGY
JENNIFER BEALS: It uses integrated neuro technology designed to --
ON SCREEN: KEY NEURONS
Fire together
Wire together
JENNIFER BEALS: -- get key neurons to fire together and then wire together. This creates pathways that helps kids to --
ON SCREEN: Filter, Focus, Absorb, Remember
JENNIFER BEALS: -- filter, focus, absorb and

Complaint

EXHIBIT A

EXHIBIT A

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remember.

Dr. Daniel Amen is the ifocus scientific advisor.

Can you tell us a little bit about the science behind ifocus?

ON SCREEN: Daniel Amen, M.D.

Author, 28 books on the brain

DR. DANIEL AMEN: It was developed in a thoughtful way to actually enhance brain development. And, so, what we did is we did a very sophisticated neuro psychological assessment of a big group of kids before and then after they played the game.

ON SCREEN: ifocus

GROUP STUDY

Pre. vs. Post Comparison

(Bar Graph)

THINKING SELF REGULATION EMOTION FEELING

DR. DANIEL AMEN: And it was actually very exciting to find in areas of emotion and self-regulation --

ON SCREEN: Bar Graph on screen

After average 5 hours gametime

Recommended gametime: 12-15 hours

DR. DANIEL AMEN: -- that their scores improved significantly.

Complaint

EXHIBIT A

EXHIBIT A

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ON SCREEN: Jennifer Beals

Actress, Mother

JENNIFER BEALS: And how are the different elements of thinking and emotion connected to self-regulation?

ON SCREEN: 1-800-624-0625

ifocusSystem.com

DR. DANIEL AMEN: Self-regulation is really one of the secrets to long-term success. The brain is so interesting. It has many different abilities. So, the ability to regulate itself comes from the front part of your brain. It helps you with things like focus and forethought, judgment, impulse control. And it's very exciting. With ifocus there, in fact, is evidence that it helps them especially in those areas of self-regulation and emotion.

JENNIFER BEALS: Isaac is a busy nine-year-old and Isaac had trouble paying attention in school until his mom discovered the ifocus system. He started playing Jungle Rangers and she learned easy ways to help him change his behavior, to get organized, and to get focused.

ON SCREEN: Alitza

Issac's Mom

ALITZA: The teacher actually has told me that

Complaint

EXHIBIT A

this couple weeks, she's noticed big, big change.

JENNIFER BEALS: Now, instead of spending hours on homework, Isaac is able to stay on task.

ON SCREEN: Isaac

age 9

ISAAC: It's a good game. Everyone should play if they have trouble listening or paying attention.

ALITZA: Oh, my gosh, this game is amazing, 100 percent recommend it. And he likes that, he enjoys it, and that's what makes me very happy.

ON SCREEN: Dr. William Bennett

Former U.S. Secretary of Education

DR. WILLIAM BENNETT: What parents want to do is the right thing by their children and what they need are things that can help them. It can help children develop focus and attention in a way that can pay great dividends.

ON SCREEN: Colleen

Michael and Nelson's Mom

COLLEEN: I could see the improvement in him.

ON SCREEN: Susan 1-800-624-0625

Forrester's Mom www.ifocuSystem.com

SUSAN: Things come easier.

ON SCREEN: Kristin 1-800-624-0625

Anna's Mom www.ifocusSystem.com

Complaint

EXHIBIT A

KRISTIN: She's been better at being a self-starter.

ON SCREEN: Connie 1-800-625-0625
Landon's Mom www.ifocusSystem.com

CONNIE: He was able to follow directions a lot better.

ON SCREEN: Garth 1-800-625-0625
Zak and Zane's Mom www.ifocusSystem.com

GARTH: The fact that he came home and wanted to do his homework.

ON SCREEN: Marissa 1-800-625-0625
Chazz's Mom www.ifocusSystem.com

MARISSA: When I come home from work, his chores are done.

ON SCREEN: Adell 1-800-625-0625
Tiffany's Mom www.ifocusSystem.com

ADELL: I definitely would recommend it.

ON SCREEN: Trista 1-800-625-0625
age 6 www.ifocusSystem.com

TRISTA: It does help me pay attention.

ON SCREEN: Forrester 1-800-625-0625
age 10 www.ifocusSystem.com

FORRESTER: The best thing about Jungle Rangers is everything.

Complaint

EXHIBIT A

EXHIBIT A

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ON SCREEN: Jennifer Beals 1-800-624-0625
Actress, Mother www.ifocusSystem.com
JENNIFER BEALS: When a child feels successful, he or she can be successful in the areas that are most important to them. It starts at home, they take it with them to school, and then it comes right back around to happier kids at home.
ON SCREEN: This is a paid advertisement for the ifocus System.
JENNIFER BEALS: And happy kids make happy families.
ON SCREEN: ifocus
FOCUS
COMPLETE SCHOOLWORK
COMPLETE HOMEWORK
STAY ON TASK
REACH POTENTIAL
MALE ANNOUNCER: What if you could give your child the ability to focus, complete schoolwork, homework and to stay on task, achieve his or her potential simply by playing a --
ON SCREEN: Fun Easy
COMPUTER GAME
MALE ANNOUNCER: -- fun and easy computer game? Now you can with ifocus.

Complaint

EXHIBIT A

ON SCREEN: DEVELOPED BY
Scientists Educators Parents
MALE ANNOUNCER: Ifocus was developed by scientists, educators and concerned parents --
ON SCREEN: THE DIFFERENCE BETWEEN
Success Failure
Their Ability
TO PAY ATTENTION!
MALE ANNOUNCER: -- who saw that the difference between success and failure for some children is often simply their ability to pay attention. For children, the ability to focus is like a muscle that becomes stronger with repeated use.
ON SCREEN: ifocus
JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Available for Windows Mac
MALE ANNOUNCER: The cornerstone of the ifocus system is the Jungle Rangers game, rated E for everyone and available for PC and Mac.
ON SCREEN: More than
JUST A GAME!
MALE ANNOUNCER: Kids think they're just playing a fun and easy game --
ON SCREEN: BRAIN TRAINING EXERCISES

Complaint

EXHIBIT A

EXHIBIT A
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JUNGLE RANGERS

MALE ANNOUNCER: -- but Jungle Rangers is really a sophisticated series of brain training exercises --

ON SCREEN: SCIENTIFICALLY ENGINEERED

JUNGLE RANGERS

MALE ANNOUNCER: -- scientifically engineered so that children can actually --

ON SCREEN: Strengthens

FOCUSING MUSCLE!

3X A WEEK

20 minutes A DAY

MALE ANNOUNCER: -- strengthen their focusing muscle in as little as 20 minutes a day, three times a week.

ON SCREEN: Dr. William Bennett

Former U.S. Secretary of Education

DR. WILLIAM BENNETT: There are games that you learn from and games that you don't. That's why it's important to sort out the wheat from the chaff.

ON SCREEN: Lori Jensen

Principal, 30 years in education

LORI JENSEN: It will help their with their attention span and their focus.

ON SCREEN: The Secret...

Complaint

EXHIBIT A

INTEGRATED NEURO TECHNOLOGY

MALE ANNOUNCER: The secret is integrated neuro technology.

ON SCREEN: Stimulates

THE CORTEX

MALE ANNOUNCER: Key areas of the cortex are stimulated in careful order --

ON SCREEN: KEY NEURONS

Fire together

Wire together

MALE ANNOUNCER: -- first, firing neurons and then creating connections that get stronger, literally wiring them together the more your child plays the game.

ON SCREEN: Challenged,

NOT FRUSTRATED!

MALE ANNOUNCER: Children who play Jungle Rangers are challenged, but not frustrated because Jungle Rangers --

ON SCREEN: Game Adapts

TO EACH PLAYER

MALE ANNOUNCER: -- constantly adapts and readjusts the level of difficulty for each players --

ON SCREEN: Kids Love

JUNGLE RANGERS

MALE ANNOUNCER: -- and kids are hooked the

Complaint

EXHIBIT A

very first time they play.

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS

CHILD: I like Jungle Rangers.

CHILD: Very cool, awesome game.

CHILD: Pretty challenging.

CHILD: A little easy, a little hard.

CHILD: You have to memorize a pattern in order to go onto the next level.

CHILD: And you do all this fun stuff.

CHILD: I like Jungle Rangers.

ON SCREEN: HOW MUCH

Wasted Money?

DO NOTHING GAMES

BORING TUTORING SESSIONS

AFTER SCHOOL PROGRAMS

MALE ANNOUNCER: How much time and money have you wasted on do nothing video games for your child, boring tutoring sessions or after school programs that simply don't make a difference?

ON SCREEN: PARENT TO PARENT PROMISE

6 MONTH 100% MONEY BACK GUARANTEE

JUNGLE RANGERS

MALE ANNOUNCER: The Jungle Rangers game and ifocus system are 100 percent guaranteed.

ON SCREEN: ifocus

Complaint

EXHIBIT A

$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
Play JUNGLE RANGERS in your home!
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: And, right now, your family has an extraordinary opportunity to try ifocus and play Jungle Rangers in your home for 30 days for just $14.95. That's right. It's a very special ifocus Jungle Rangers --
ON SCREEN: Product information shown above
Quick Start System
AVAILABLE FOR Mac Windows
MALE ANNOUNCER: -- quick start offer. Use it in your own home for a full 30 days for just $14.95.
UNIDENTIFIED FEMALE: I definitely would recommend this product.
ON SCREEN: Product information shown above
Not all children will achieve this result.
UNIDENTIFIED FEMALE: Jungle Rangers has helped Forrester maximize his potential.
UNIDENTIFIED FEMALE: I definitely would recommend it.
ON SCREEN: CALL or Click
TO ORDER NOW!

Complaint

EXHIBIT A

ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Call or click ifocussystem.com right now and try the incredible ifocus Jungle Rangers Quick Start System for 30 days for just $14.95.
ON SCREEN: Product information shown above
JUNGLE RANGERS
Brain Training Game
Checklist
MALE ANNOUNCER: You'll receive the ifocus brain training Jungle Rangers game and user-friendly checklist.
ON SCREEN: Product information shown above
Science Behind the Game AUDIO CD
MALE ANNOUNCER: Plus, our audio CD explains the science behind the game --
ON SCREEN: Product information shown above
5 ways in 5 days
QUICK START CARDS
MALE ANNOUNCER: -- and increase your child's focus and attention five ways in five days with our

Complaint

EXHIBIT A

exclusive quick start cards.

ON SCREEN: Product information shown above

Focus on Behavior HANDBOOK

Behavior Advice from Experts AUDIO CD

Focus on Behavior QUICK START CARDS

MALE ANNOUNCER: You'll also get our Focus on Behavior Handbook and get behavior tips from experts on our audio CD, again with easy-to-follow quick start cards.

ON SCREEN: Product information shown above

FIRST EDITION JUNGLE RANGERS Comic Book

MALE ANNOUNCER: And because kids love the Jungle Rangers game, we'll even give them our first edition Jungle Rangers comic book.

UNIDENTIFIED FEMALE: ifocus has given me different tools to be more organized at home.

UNIDENTIFIED FEMALE: Like little steps for her that would be easy for her to remember and write out and keep on track.

ON SCREEN: Product information shown above

Not all children will achieve this result.

UNIDENTIFIED FEMALE: ifocus gave me the tools to help my children do better in school.

ON SCREEN: ifocus

$14.95 PLUS S&H

Complaint

EXHIBIT A

EXHIBIT A

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30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: That's the entire ifocus Quick Start System, including the Jungle Rangers game, checklist and comic book, plus the five ways in five days cards and behind the science audio CD, the Focus on Behavior Handbook, quick start cards, and audio CD, all yours to try for just $14.95.
ON SCREEN: CALL in the next 6 MINUTES!
Product information shown above
FREE SHIPPING
MALE ANNOUNCER: Call or click ifocussystem.com in the next 6 minutes and we'll even include free shipping.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY OFFER
EXCLUSIVE TV OFFER
THE ENTIRE ifocus Quick Start System
CALL NOW 1-800-624-0625 ifocusSystem.com
MALE ANNOUNCER: Remember, the ifocus Jungle Rangers Quick Start System is not available in any stores or at any schools. This is an exclusive television

Complaint

EXHIBIT A

offer. You have absolutely nothing to lose and your child has everything to gain.

We're so certain you'll see positive improvements in your child's ability to focus at school and at home with ifocus, we want you to use it in your home, have your child play the game for six months guaranteed.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

PARENT TO PARENT PROMISE

6 MONTH 100% MONEY BACK GUARANTEE

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: It's the ifocus parent to parent promise. If you aren't completely happy, send it back any time within those six months and we'll refund your money, period.

ON SCREEN: Product information shown above

$70 VALUE

Keep your FREE GIFTS!

MALE ANNOUNCER: But keep the behavior handbook, audio CD, cards, and the Jungle Rangers comic book, a $70 value as your free gifts.

CHILD: Last year, I would just daydream in

Complaint

EXHIBIT A

class and now I'm more focused with my teacher.

ON SCREEN: Product information shown above

Not all children will achieve this result.

CHILD: I can read faster.

CHILD: It helps me in school and my homework.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY OFFER

EXCLUSIVE TV OFFER

THE ENTIRE ifocus Quick Start System

CALL NOW 1-800-624-0625 ifocusSystem.com

MALE ANNOUNCER: Call or click ifocussystem.com and order right now, and you could be hearing these words, too.

CHILD: Jungle Rangers help me pay attention.

MALE ANNOUNCER: Call 1-800-624-0625 for the ifocus system. Call 1-800-624-0625 now.

ON SCREEN: ifocus

The preceding was a paid presentation for the ifocus system

MALE ANNOUNCER: The preceding was a paid presentation for the ifocus system.

(The recording was concluded.)

Complaint

EXHIBIT A

C E R T I F I C A T I O N O F T Y P I S T

MATTER NUMBER: 1223153
CASE TITLE: IFOCUS EDUCATION, LLC
TAPING DATE: FEBRUARY 17, 2012
TRANSCRIPTION DATE: NOVEMBER 12, 2013

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: NOVEMBER 12, 2013

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

Complaint

EXHIBIT B

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1223153

TITLE iFOCUS EDUCATION, LLC

DATE RECORDED: JUNE 18, 2012

TRANSCRIBED: NOVEMBER 12, 2013

PAGES 1 THROUGH 60

JUNGLE RANGERS BRAIN TRAINING SYSTEM

IFOCUS EDUCATION

INFOMERCIAL (IFV4)

Complaint

EXHIBIT B

FEDERAL TRADE COMMISSION

I N D E X

Complaint

EXHIBIT B

FEDERAL TRADE COMMISSION

In the Matter of:)
iFocus Education, LLC) Matter No. 1223153
)
----------)
June 18, 2012

The following transcript was produced from a CD-Rom provided to For The Record, Inc. on October 24, 2013.

Complaint

EXHIBIT B

P R O C E E D I N G S

- - - - -

JUNGLE RANGERS INFOMERCIAL

ON SCREEN: PRODUCT: ifocus System

COMPANY: focus education

TITLE: ifocus $14.95 Trial Offer - No Host

6 Month Guarantee

TRT: 28:30

ISCI: FEIF0104

AGENCY: Script to Screen

DATE: 06/18/2012

AUDIO: 1 & 2 Stereo Mix

www.scripttoscreen.com

ON SCREEN: The following is a paid presentation for the ifocus Jungle Rangers Brain Training System brought to you by Focus Education

MALE ANNOUNCER: The following is a paid presentation for the ifocus Jungle Rangers Brain Training System, brought to you by Focus Education.

MALE ANNOUNCER: In today's modern world, kids are bombarded by --

ON SCREEN: DISTRACTED

FRUSTRATED

UNABLE TO FINISH TASKS

MALE ANNOUNCER: -- so many distractions that

Complaint

EXHIBIT B

they often become frustrated and can't stay on track to even finish the simplest of tasks.

UNIDENTIFIED FEMALE: I can say, go brush your teeth or go get your homework or go do this, and five minutes later, it's still not done or even began.

ON SCREEN: STRUGGLING

WITH GRADES AND HOMEWORK?

MALE ANNOUNCER: Efforts in the classroom or at home can often become a tedious chore or even a constant struggle.

UNIDENTIFIED FEMALE: Homework took him like four to five hours and for me to sit down with him.

ON SCREEN: PROBLEMS AT SCHOOL?

MALE ANNOUNCER: And when the problem becomes too overwhelming, that's when the phone calls start.

UNIDENTIFIED FEMALE: Every single day I was getting calls from the teacher or he was getting sent to the office.

ON SCREEN: Powerful

BREAKTHROUGH

Ages 6-12

MALE ANNOUNCER: Now, there's a brilliant breakthrough, a powerful way to teach boys and girls, ages 6 through 12, to effectively --

ON SCREEN: Filter, Focus, Absorb, Remember

Complaint

EXHIBIT B

EXHIBIT B

MALE ANNOUNCER: -- filter, focus, absorb and remember and have a great time doing it.

Introducing the ifocus Jungle Rangers Brain Training System for your computer.

ON SCREEN: JUNGLE RANGERS

MALE ANNOUNCER: At first glance, Jungle Rangers looks like a simple and basic video game --

ON SCREEN: Groundbreaking
BRAIN TRAINING PROGRAM
for attention

MALE ANNOUNCER: -- but it's really a groundbreaking, state-of-the-art brain training program for attention. Throughout all the levels and sequences of the game, every action, interaction, and reaction is a meticulously and carefully --

ON SCREEN: Strategies
HIDDEN IN GAME!
FILTER OUT DISTRACTIONS
FOCUS ON TASKS
REMEMBER INFORMATION
ifocus

MALE ANNOUNCER: -- designed hidden strategy to train your child to filter out distractions, focus on tasks at hand and absorb and remember important information.

Complaint

EXHIBIT B

ON SCREEN: IMPROVEMENT
Thinking +93%
Self-Regulation +38%
Average Thinking Improvement 24% in 5 hours.
Average Self-Regulation Improvement 30% in 5 hours.
Tiffany
age 11
TIFFANY: When I got that game, I started doing really, really good in school.
ON SCREEN: IMPROVEMENT
Sustained Attention +33%
Thinking +95%
Average Sustained Attention Improvement 14% in 5 hours.
Average Thinking Improvement 14% in 5 hours.
Forrester
age 10
FORRESTER: I pay attention to my teacher a lot more.
ON SCREEN: IMPROVEMENT
Self-Regulation +105%
Feeling +44%
Average Self-Regulation Improvement 30% in 5 hours.

Complaint

EXHIBIT B

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Average Feeling Improvement 36% in 5 hours.
Chazz
age 10
CHAZZ: I have better grades.
ON SCREEN: Jackson
age 11 Individual result - your child may not be as successful
JACKSON: I've been getting a lot more 100 percents.
MALE ANNOUNCER: Based on years of advanced scientific and pediatric neuro brain research, each level of the Jungle Rangers game is designed to --
ON SCREEN: Stimulate, Strengthen
CONNECTIONS
MALE ANNOUNCER: -- stimulate and strengthen neuron connections in the brain, using proven visual and auditory --
ON SCREEN: BRAIN TRAINING Exercises
MALE ANNOUNCER: -- brain training exercises imbedded within the game itself.
ON SCREEN: ifocus
MALE ANNOUNCER: Over the next half-hour, join us as we talk with parents, teachers, and kids about how the incredible ifocus system is improving young minds and changing lives for the better.

Complaint

EXHIBIT B

ON SCREEN: Jennifer
Kaida's Mom
JENNIFER: I really didn't expect to see that big of a change that quickly.
ON SCREEN: Susan
Forrester's Mom
SUSAN: It worked for our family. In two weeks' time, we noticed.
ON SCREEN: Marissa
Chazz's Mom
MARISSA: ifocus gave me the tools to help my child do better in school.
ON SCREEN: COMING UP The Science Behind
MALE ANNOUNCER: Plus we'll speak with Dr. Daniel Amen, medical doctor, brain specialist, and best-selling author, about how the ifocus program works to positively impact children's potential in life.
ON SCREEN: Daniel Amen, M.D.
Brain Imaging Specialist
DR. DANIEL AMEN: We did a very sophisticated neuropsychological assessment and it was actually very exciting.
ON SCREEN: EMOTION: +25%
Jackson age 11
Average Emotion Improvement 45% in 5 hours For

Complaint

EXHIBIT B

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MALE ANNOUNCER: After just a few hours of playing ifocus Jungle Rangers --

ON SCREEN: THINKING: +63%

Anna age 10

Average Thinking Improvement 24% in 5 hours

MALE ANNOUNCER: -- these kids --

ON SCREEN: SUSTAINED ATTENTION: +250%

Zach age 11

Average Sustained Attention 14% in 5 hours

MALE ANNOUNCER: -- were able to significantly increase --

ON SCREEN: SELF-REGULATION: +105%

Chazz age 10

Average Self-Regulation 30% in 5 hours

MALE ANNOUNCER: -- their focus and attention --

ON SCREEN: FEELING: +54%

Jacquelyn age 11

Average Feeling Improvement 36% in 5 hours

MALE ANNOUNCER: -- some of them dramatically.

ON SCREEN: Connie

Jacquelyn's Mom

CONNIE: We just got done with parent-teacher conference and Jacquelyn's one of the highest ones in her classes in reading.

Complaint

EXHIBIT B

ON SCREEN: EVERYONE E CONTENT RATED BY ESRB
JUNGLE RANGERS
MALE ANNOUNCER: And we'll meet with the award-winning game designer who personally supervised the creation and extraordinary development of the ifocus Jungle Rangers video game adventure.
ON SCREEN: Jason Leon
ifocus Game Developer
JASON LEON: It was all about just innovating to make it the best product it could be. It seemed like every step of the way there was just a, wait, we can do this better.
ON SCREEN: NEVER BEFORE!
SCIENCE & EDUCATION
COMBINED
JUNGLE RANGERS
MALE ANNOUNCER: Never before has science and education been designed into a video game experience like Jungle Rangers, one that is able to make such an intelligent and beneficial impact on the minds of young boys and girls.
And because many of the ifocus system developers are also concerned parents, they've established an unheard of guarantee --
ON SCREEN: PARENT TO PARENT

Complaint

EXHIBIT B

6 MONTH 100% MONEY BACK GUARANTEE
PROMISE
FOCUS
ATTENTION
MEMORY
SCHOOL WORK
SELF ESTEEM
Guarantee less return shipping
MALE ANNOUNCER: -- a six-month parent to parent promise. If your child does not see an improvement in focus, attention, memory, school work or self esteem within six months, simply return the program for a complete refund. That's how confident the people at ifocus are that you will absolutely see a significant difference in how your child acts and responds at school and at home.
ON SCREEN: Scientifically Proven
BRAIN TRAINING EXERCISES
EVERYONE E CONTENT RATED BY ESRB
JUNGLE RANGERS
MALE ANNOUNCER: The ifocus Jungle Rangers game features the same series of proven brain training techniques used by neuropsychologists, therapists, and scientists for years, now designed as a fun computer video game. For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXHIBIT B

ON SCREEN: Jason Leon
ifocus Game Developer
JASON LEON: We worked directly with the neuro therapist that would tell us what was supposed to be in and why it was supposed to be in. Oftentimes, when folks try and mix these two worlds, they forget that you've got to make it fun first. So, it was kind of this convergence of science and fun.
ON SCREEN: Science:
BRAIN TRAINING TECHNIQUES
MALE ANNOUNCER: The science is using effective brain training techniques and --
ON SCREEN: Fun:
EASY GAME!
MALE ANNOUNCER: -- the fun is turning them into games. The Jungle Rangers adventure takes players through --
ON SCREEN: 9 ADVANCING
Games
MALE ANNOUNCER: -- nine separate advancing games --
ON SCREEN: 3 DIFFERENT
Worlds
MALE ANNOUNCER: -- in three different worlds, all of which include exercises proven to --

Complaint

EXHIBIT B

ON SCREEN: GAMES IMPROVE
Focus, Concentration, Memory
MALE ANNOUNCER: -- improve focus, concentration and memory --
ON SCREEN: SPAN SEQUENCES
REMEMBER AND RECALL
FILTER DISTRACTIONS
IMPROVE COMPREHENSION
MALE ANNOUNCER: -- like these span sequences which ask players to remember complex information, even while distracted. So, many kids who play Jungle Rangers span games feel a jump in math and reading comprehension.
ON SCREEN: CONTINUOUS PERFORMANCE
PAY ATTENTION
LEARN PATIENCE
FOCUS
MALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research shows kids learn to stay alert and to really focus on what's going on, even at times when they'd normally zone out.
ON SCREEN: N-BACK
HOLD INFORMATION
UPDATE INFORMATION
REMEMBER AND FOCUS

Complaint

EXHIBIT B

MALE ANNOUNCER: And N-Back requires players to hold information and to update that information. Adding new levels of difficulty is practice for real life, helping kids to focus and remember what they need to do.

Bottom line, kids who play Jungle Rangers practice new skills so they learn to --

ON SCREEN: Filter, Focus, Absorb, Remember

MALE ANNOUNCER: -- filter, focus, absorb, and remember.

ON SCREEN: Marissa
Chazz's Mom

MARISSA: It's helped a lot at the house even, not just at school. His behavior with his chores, helping out.

ON SCREEN: Colleen
Michael and Nelson's Mom

COLLEEN: I see a lot more focus, a lot more motivation.

ON SCREEN: Kristin
Anna's Mom

KRISTIN: She seems to be trying harder to want to do what I ask.

ON SCREEN: Julie
Zach's Mom

JULIE: This is a great way to strengthen their

Complaint

EXHIBIT B

brain, which is their biggest asset in life.

FEMALE ANNOUNCER: Here to tell us more is brain specialist and ifocus scientific advisor, Dr. Daniel Amen. He's a child psychiatrist and brain imaging specialist and he's authored 28 books on the brain. Dr. Amen is also a father and a grandfather.

ON SCREEN: Daniel Amen, M.D.

Brain Imaging Specialist

DR. DANIEL AMEN: As a child psychiatrist, I've not been all that excited about video games for children because children have developing brains. Here, we had developers, in a thoughtful way, develop a game to actually strengthen the connections in the brain. It's a very interesting term called "long-term potentiation." So, what that means is the connections between cells actually become stronger.

ON SCREEN: Daniel Amen, M.D.

Author, 28 books on the brain

DR. DANIEL AMEN: So, to have the opportunity to actually study it and show that it is, in fact, helpful was very exciting for me.

So, we had a group of 45 children.

ON SCREEN: SELF REGULATION: +200%

Anna age 10

Average Self Regulation Improvement 30% in 5 For

Complaint

EXHIBIT B

hours
DR. DANIEL AMEN: What we found was their
ability to --
ON SCREEN: SELF REGULATION: +38%
Tiffany age 11
Average Self Regulation Improvement 30% in 5
hours
DR. DANIEL AMEN: -- regulate themselves --
ON SCREEN: SELF REGULATION: +105%
Chazz age 10
Average Self Regulation Improvement 30% in 5
hours
DR. DANIEL AMEN: -- so self regulation and --
ON SCREEN: EMOTION: +25%
Jackson age 11
Average Emotion Improvement 45% in 5 hours
DR. DANIEL AMEN: -- emotion --
ON SCREEN: EMOTION: +29%
Zach age 11
Average Emotion Improvement 45% in 5 hours
DR. DANIEL AMEN: -- statistically
significantly increased --
ON SCREEN: EMOTION: +350%
Isaac age 9
Average Emotion Improvement 45% in 5 hours For

Complaint

EXHIBIT B

EXHIBIT B

18

DR. DANIEL AMEN: -- after the kids played the game.

If you can help a child with their emotions --

ON SCREEN: Self Regulation

DR. DANIEL AMEN: -- regulate themselves, they're more successful in their lives. Not only are they happier, but they're able to stay on task. So, I think any kid will benefit from this.

ON SCREEN: Daniel Amen, M.D.

Brain Imaging Specialist

DR. DANIEL AMEN: And the reason I say that is I love the approach. It's a brain training exercise. None of it's hard. I mean, that's sort of the exciting thing. None of it's hard and it can give you a big benefit. And as a parent, you feel confident --

ON SCREEN: This is a paid advertisement for the ifocus System

DR. DANIEL AMEN: -- that this is helping my child and not hurting my child.

ON SCREEN: Julie

Zach's Mom

JULIE: My kids love to play video games and this is a great way to strengthen their brain.

ON SCREEN: Taffie

Trista's Mom

Complaint

EXHIBIT B

TAFFIE: And it settles them in and it helps them to learn to focus.

UNIDENTIFIED FEMALE: He says, mom, I can focus in class.

ON SCREEN: JUNGLE RANGERS
BRAIN TRAINING SYSTEM
for Attention!

MALE ANNOUNCER: Introducing the ifocus Jungle Rangers Brain Training System. What looks like just a video game is actually a --

ON SCREEN: Sophisticated
BRAIN TRAINING TOOL

MALE ANNOUNCER: -- sophisticated and highly developed state-of-the-art brain training tool, designed as a series of --

ON SCREEN: 9 COMPUTER GAME
Adventures

MALE ANNOUNCER: -- nine fun, exciting and challenging computer game adventures.

ON SCREEN: EVERYONE E CONTENT RATED BY ESRB
JUNGLE RANGERS
AVAILABLE FOR Windows Mac

MALE ANNOUNCER: Rated E for everyone and available for both PC and Mac, the ifocus Jungle Rangers game is unlike any educational game you've ever seen,

Complaint

EXHIBIT B

because hidden within every level of the nine innovative ifocus Jungle Rangers games are --

ON SCREEN: Scientifically Proven

BRAIN TRAINING EXERCISES

MALE ANNOUNCER: -- scientifically proven memory and attention brain training exercises, designed to improve --

ON SCREEN: Focus

Concentration

Memory

MALE ANNOUNCER: -- focus, concentration and memory --

ON SCREEN: Stimulate, Strengthen

CONNECTIONS

MALE ANNOUNCER: -- strengthening important neuron connections --

ON SCREEN: SPAN SEQUENCES

REMEMBER AND RECALL

FILTER DISTRACTIONS

IMPROVE COMPREHENSION

MALE ANNOUNCER: -- like these span sequences which ask players to remember complex information, even while distracted. So, many kids who play Jungle Rangers span games feel a jump in math and reading comprehension.

ON SCREEN: CONTINUOUS PERFORMANCE

Complaint

EXHIBIT B

PAY ATTENTION
LEARN PATIENCE
FOCUS
MALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research proves kids who play continuous performance games are able to stay alert, be less distracted and really focus on what's going on around them.
ON SCREEN: N-BACK
HOLD INFORMATION
UPDATE INFORMATION
REMEMBER AND FOCUS
MALE ANNOUNCER: And N-Back requires players to hold information and update that information. It's practice for real life, helping kids to think about what they've learned and to focus and remember what they need to do.
ON SCREEN: INNOVATIVE
COMBINATION!
PROVEN CHALLENGING
Science Fun
MALE ANNOUNCER: It's this innovative groundbreaking combination of proven science and increasingly challenging fun that has kids hooked from the very first time they play.

Complaint

EXHIBIT B

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS
CHILD: It was really fun.
CHILD: It's like a puzzle.
CHILD: It's fun.
CHILD: It's just an awesome game.
MALE ANNOUNCER: While kids enjoy the games, parents will love the dashboard tracking system.
ON SCREEN: PARENT DASHBOARD
MALE ANNOUNCER: This exclusive feature records your child's progress and reveals how they're improving in key cognitive areas like sequencing, performance and memory.
ON SCREEN: Taffie Trista's Mom
TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.
ON SCREEN: Jennifer Kaida's Mom
JENNIFER: It helps you be able to track what he's doing, his progress.
TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.
ON SCREEN: ifocus

Complaint

EXHIBIT B

$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: Now, through this extraordinary and exclusive introductory offer, you can get the entire ifocus Jungle Rangers Brain Training System --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
INCLUDES JUNGLE RANGERS GAMES
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.
It comes with everything your child needs to succeed --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER

Complaint

EXHIBIT B

EXHIBIT B

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JUNGLE RANGERS GAME CD Mac Windows
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- including the Jungle Rangers game CD --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
INCLUDING Parent Dashboard
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- with a parent dashboard tracker for monitoring their time and progress --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Science Behind the Game AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- this in-depth parent audio CD that explains the science behind this groundbreaking program --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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Focus on Behavior HANDBOOK + AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD that helps both child and parent to understand and recognize good and bad behavioral patterns --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Plus Additional BONUS EXTRAS!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.
But listen to this, the creators at Focus Education, who are also concerned parents, are so

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EXHIBIT B

confident that you and your child will absolutely fall in love with this amazing system that they're offering an unheard of parent to parent promise.

ON SCREEN: ifocus
Guarantee less return shipping
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
PARENT TO PARENT PROMISE
6 MONTH 100%
MONEY BACK GUARANTEE
Play JUNGLE RANGERS in your home!
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: If you order today, ifocus will give you up to six months -- yes, six full months to put the ifocus Jungle Rangers Brain Training System to the test and truly discover its ultimate potential for you and your child, or your money back.

UNIDENTIFIED FEMALE: I'm happy to have a tool that helps my daughter focus and helps her to do better in school.

UNIDENTIFIED FEMALE: The game has -- is teaching my boys how to focus and how to filter out distractions.

ON SCREEN: CALL in the next 18 minutes!

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EXHIBIT B

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ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
FREE SHIPPING & HANDLING
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And it gets even better. Call and order in the next 18 minutes and we'll ship this total and complete breakthrough system, with all the extras and included bonus items right to your door for free. That's right, absolutely free shipping and handling, but only if you call and order right away.
UNIDENTIFIED FEMALE: I would say that it's a game that gives you results.
ON SCREEN: Product information shown above
Individual result - your child may not be as successful
UNIDENTIFIED MALE: Well, they're doing better in school. We just got their report cards and we were shocked, all As and Bs.
UNIDENTIFIED FEMALE: And this was the first time -- well, he got all As and one A minus.
MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System for attention is not available in stores or schools. For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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ON SCREEN: CALL or Click
TO ORDER NOW!
ifocus
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30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
NOT AVAILABLE AT SCHOOLS!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: It's only available online or through this exclusive television offer. So, make the commitment to help your child filter, focus, absorb and remember. Call now or click on ifocusSystem.com.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
PARENT TO PARENT PROMISE
6 MONTH 100%
MONEY BACK GUARANTEE
Guarantee less return shipping
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And, remember, with the ifocus system, your child will achieve and succeed or your money back. Call now.
UNIDENTIFIED FEMALE: 100 percent recommend it.

Complaint

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ON SCREEN: CALL or Click
TO ORDER NOW!
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30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
CALL NOW www.ifocusSystem.com
ON SCREEN: Zak and Zane
age 9 www.ifocusSystem.com
FEMALE ANNOUNCER: Zak and Zane are identical twins. Think busy times two. Their dad knows how important exercise is for young boys, so he makes sure they spend a lot of time outside working off their energy. And while they're great when it comes to sports, both Zak and Zane had trouble focusing at school.
GARTH: But to try to focus to do homework, there'd be times where it would take me a half-hour to just do one math problem.
FEMALE ANNOUNCER: But since playing the Jungle Rangers game and using the ifocus System, Zak and Zane are able to focus, filter out distractions and homework has become much more productive.
ON SCREEN: Garth
Zak and Zane's Dad
Individual Result - your child may not be as For

Complaint

EXHIBIT B

successful

GARTH: Well, they're doing better in school. We just got their report cards, and we were shocked, all As and Bs. They've never had that before.

ON SCREEN: Zak and Zane

age 9 www.ifocusSystem.com

CHILD: Every time we come home from school, we can do our math all by ourselves.

ON SCREEN: Garth

Zak and Zane's Dad www.ifocusSystem.com

GARTH: And now, they come home and do their homework. It's -- you see the difference. You see the difference. One game, hmm, makes a difference.

FEMALE ANNOUNCER: Kids think they're just playing a game, but this game is so much more than just a game.

ON SCREEN: NEURON TECHNOLOGY

KEY NEURONS

Fire together

Wire together

FEMALE ANNOUNCER: It uses integrated neuro technology designed to get key neurons to fire together and then wire together.

ON SCREEN: Filter, Focus, Absorb, Remember

FEMALE ANNOUNCER: This creates pathways that

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EXHIBIT B

helps kids to filter, focus, absorb and remember --

ON SCREEN: SPAN SEQUENCES

www.ifocusSystem.com

REMEMBER AND RECALL

FILTER DISTRACTIONS

IMPROVE COMPREHENSION

FEMALE ANNOUNCER: -- using span sequences which ask players to remember complex information, even while distracted. So, many kids who play Jungle Rangers span games feel a jump in math and in reading comprehension.

ON SCREEN: CONTINUOUS PERFORMANCE

www.ifocusSystem.com

PAY ATTENTION

LEARN PATIENCE

FOCUS

FEMALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research proves kids who play continuous performance games are able to stay alert, be less distracted, and really focus on what's going on around them.

ON SCREEN: N-BACK

www.ifocusSystem.com

HOLD INFORMATION

UPDATE INFORMATION

Complaint

EXHIBIT B

REMEMBER AND FOCUS

FEMALE ANNOUNCER: And N-back requires players hold information and update that information. It's practice for real life, helping kids to think about what they've learned and to focus and remember what they need to do.

And the game adapts as your child improves, and as a parent, you can track those improvements through the game's dashboard.

ON SCREEN: PARENT'S DASHBOARD

MONITOR PROGRESS

FEMALE ANNOUNCER: You'll see at a glance how your child is progressing through the game, and best of all, you'll know ifocus is working because you'll see it working in your child's daily life.

ON SCREEN: Marissa

Chazz's Mom

Individual Result - your child may not be as successful

MARISSA: When he brings home his paperwork from school and they're As, they're 100 percents, 95 percents versus the 65 percents.

ON SCREEN: Chazz

age 10 www.ifocusSystem.com

CHAZZ: Yeah, I have better grades. I used to

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blurt out in class and now I don't do that as much anymore.

ON SCREEN: Marissa
Chazz's Mom www.ifocusSystem.com

MARISSA: I would have never in a million years thought that a video game, ifocus Jungle Rangers, would have been able to do that for us.

ON SCREEN: www.ifocusSystem.com

FEMALE ANNOUNCER: Parents and teachers notice a difference in attention, behavior and focus when kids use the ifocus system. But we wanted to see for ourselves, so we put ifocus to the real test, real kids at a real school.

ON SCREEN: JUNGLE RANGERS
NOT AVAILABLE AT SCHOOLS!

FEMALE ANNOUNCER: The ifocus Jungle Rangers game isn't available at schools, so elementary school principal Lori Jensen jumped at the opportunity to test it as part of her curriculum.

ON SCREEN: Lori Jensen
Principal, 30 years in education
www.ifocusSystem.com

LORI JENSEN: It fit into what we were trying to do with our students, engage them in the learning process, but also expand what their brains were going to

Complaint

EXHIBIT B

be able to do.

FEMALE ANNOUNCER: The teachers were enthusiastic.

ON SCREEN: Jane Marshall
Teacher www.ifocusSystem.com

JANE MARSHALL: And, actually, as educators, that's what we're trying to do. We're trying to create new pathways in the brain.

FEMALE ANNOUNCER: So, students played the ifocus Jungle Rangers game in computer lab and teachers noticed a difference in their classrooms.

JANE MARSHALL: A typical third grade class you're really working to keep them focused.

LORI JENSEN: She can tell a difference in their attention span in the classroom.

ON SCREEN: Lavonne Riggs
Teacher www.ifocusSystem.com

LAVONNE RIGGS: I have seen a vast improvement. This class seems to be motivated and focused, and the only thing we're doing differently is Jungle Rangers.

JANE MARSHALL: I love finding ways to help the children learn and Jungle Rangers does play a part in helping the children learn how to focus and to retrieve information --

ON SCREEN: Jane Marshall

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EXHIBIT B

Teacher www.ifocusSystem.com
JANE MARSHALL: -- and they enjoy doing it, so half the battle's gone right there.
LAVONNE RIGGS: Pretty amazing.
FEMALE ANNOUNCER: With ifocus, your child can learn to focus so that your child can focus on learning to succeed in the classroom and beyond.
ON SCREEN: Lori Jensen
Principal, 30 years in education
www.ifocusSystem.com
LORI JENSEN: It will help them with their attention span and their focus.
ON SCREEN: ifocus
ON SCREEN: Garth
Zak and Zane's Dad
GARTH: This is one thing that I'm very glad my wife and I decided to do. I think it's been beneficial for our boys.
ON SCREEN: This is a paid advertisement for the ifocus System
GARTH: Thank you. That's about what I want to say. Thank you for ifocus.
ON SCREEN: ifocus
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30 DAY TRIAL For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: Now, through this extraordinary and exclusive introductory offer, you can get the entire ifocus Jungle Rangers Brain Training System --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
INCLUDES JUNGLE RANGERS GAMES
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.
It comes with everything your child needs to succeed --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
JUNGLE RANGERS GAME CD Mac Windows
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MALE ANNOUNCER: -- including the Jungle Rangers game CD --
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EXCLUSIVE INTRODUCTORY OFFER
INCLUDING Parent Dashboard
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- with a parent dashboard tracker for monitoring their time and progress --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Science Behind the Game AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- this in-depth parent audio CD that explains the science behind this groundbreaking program --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Focus on Behavior HANDBOOK + AUDIO CD
CALL NOW www.ifocusSystem.com

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MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD that helps both child and parent to understand and recognize good and bad behavioral patterns --

ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Plus Additional BONUS EXTRAS!
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.

ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.

ON SCREEN: ifocus
Guarantee less return shipping
$14.95 PLUS S&H
30 DAY TRIAL

Complaint

EXHIBIT B

EXHIBIT B

39

EXCLUSIVE INTRODUCTORY OFFER
PARENT TO PARENT PROMISE
6 MONTH 100%
MONEY BACK GUARANTEE
Play JUNGLE RANGERS in your home!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And don't forget the incredible parent to parent promise. If you order today, ifocus will give you up to six months. Yes, six full months to put the ifocus Jungle Rangers Brain Training System to the test, or your money back.
ON SCREEN: ifocus
CALL in the next 10 MINUTES!
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
FREE SHIPPING & HANDLING
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: If you call and order in the next ten minutes, we'll ship the entire system right to your door for free. That's right, absolutely free shipping and handling. But only if you call and order right away.
ON SCREEN: CALL or Click
TO ORDER NOW! For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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ifocus
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30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
NOT AVAILABLE AT SCHOOLS!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System for attention is not available in stores or schools. It's only available online or through this exclusive television offer.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: So, make the commitment to help your child filter, focus, absorb and remember. Call now or click on ifocussystem.com.
ON SCREEN: CALL or Click
TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
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PARENT TO PARENT PROMISE For The Record, Inc.
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6 MONTH 100%
MONEY BACK GUARANTEE
Guarantee less return shipping
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And, remember, with the ifocus system, your child will achieve and succeed or your money back. Call now.
FEMALE ANNOUNCER: Isaac is a busy nine-year-old and Isaac had trouble paying attention in school until his mom discovered the ifocus System.
ON SCREEN: www.ifocusSystem.com
FEMALE ANNOUNCER: He started playing Jungle Rangers and she learned easy ways to help him change his behavior, to get organized and to get focused.
ON SCREEN: Alitza
Issac's Mom www.ifocusSystem.com
ALITZA: The teacher actually has told me that this couple weeks, she's noticed big, big change.
FEMALE ANNOUNCER: Now, instead of spending hours on homework, Isaac is able to stay on task.
ALITZA: Oh, my gosh, this game is amazing, 100 percent recommend it. And he likes that, he enjoys it, and that's what makes me very happy.
ON SCREEN: DEVELOPED BY
Scientists Educators Parents For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXHIBIT B

FEMALE ANNOUNCER: Behind ifocus is a team of scientists, doctors, educators, child psychologists, award-winning game designers and parents. The result, something truly unique and remarkable that children love to play.

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS

CHILD: I like Jungle Rangers.

CHILD: Very cool, awesome game.

CHILD: Pretty challenging.

CHILD: A little easy, a little hard.

CHILD: You have to memorize the pattern in order to go on to the next level.

CHILD: And you do all this fun stuff.

CHILD: I like Jungle Rangers.

ON SCREEN: www.ifocusSystem.com

JASON LEON: Well, we made it really approachable for them. You're going to become a Jungle Ranger.

GAME: Good day, I need your help.

ON SCREEN: Game Adapts

TO PLAYER!

JASON LEON: Each and every game is adaptive.

ON SCREEN: Jason Leon

ifocus Game Developer www.ifocusSystem.com

JASON LEON: So, it's actually designed to For

Complaint

EXHIBIT B

scale up in difficulty so that it keeps your brain energy up as high as it possibly can.

ON SCREEN: Lori Jensen
Principal, 30 years in education
www.ifocusSystem.com

LORI JENSEN: Being able to use the Jungle Rangers and having the students actually learn how to think through a problem because they don't have those problem-solving skills, and Jungle Rangers has that problem-solving portion built in.

JASON LEON: That's one of the aspects that sets our game apart from other games is that it's constantly challenging you to get better.

MALE ANNOUNCER: The creators of the ifocus Jungle Rangers Brain Training System knew that the game had to be a --

ON SCREEN: INNOVATIVE COMBINATION!
PROVEN CHALLENGING
Science Fun
www.ifocusSystem.com

MALE ANNOUNCER: -- careful balance of science and fun.

ON SCREEN: EFFECTIVE TOOL FOR
Parents & Kids
Patience

Complaint

EXHIBIT B

Forethought
Discipline
Self-Regulations
MALE ANNOUNCER: That balance makes it an effective tool for parents and an exciting way for kids to learn patience, forethought, and discipline, and also to self-regulate their emotions.
This is where brain specialist and ifocus scientific advisor Dr. Daniel Amen realized the huge positive potential of the Jungle Rangers' game.
ON SCREEN: Daniel Amen, M.D.
Brain Imaging Specialist www.ifocusSystem.com
DR. DANIEL AMEN: So, what we did is we did a very sophisticated neuropsychological assessment of a big group of kids before and then after they played the game.
ON SCREEN: EMOTION: +25%
Jackson age 11
Average Emotion Improvement 45% in 5 hours
DR. DANIEL AMEN: And it was actually very --
ON SCREEN: EMOTION: +29%
Zach age 11
Average Emotion Improvement 45% in 5 hours
DR. DANIEL AMEN: -- exciting to find in --
ON SCREEN: EMOTION: +350%
Isaac age 9

Complaint

EXHIBIT B

Average Emotion Improvement 45% in 5 hours
DR. DANIEL AMEN: -- areas of motion and --
ON SCREEN: SELF REGULATION: +200%
Anna age 10
Average Self Regulation Improvement 30% in 5 hours
DR. DANIEL AMEN: -- self-regulation that --
ON SCREEN: SELF REGULATION: +38%
Tiffany age 11
Average Self Regulation Improvement 30% in 5 hours
DR. DANIEL AMEN: -- their scores --
ON SCREEN: SELF-REGULATION: +105%
Chazz age 10
Average Self-Regulation 30% in 5 hours
DR. DANIEL AMEN: -- improved significantly.
ON SCREEN: www.ifocusSystem.com
DR. DANIEL AMEN: Self-regulation is really one of the secrets to long-term success.
The brain is so interesting. It has many different abilities. So, the ability to regulate itself comes from the front part of your brain. It helps you with things like focus and forethought, judgment, impulse control. And it's very exciting. With ifocus, there, in fact, is evidence that it helps them especially in those

Complaint

EXHIBIT B

areas of self-regulation and emotion.

ON SCREEN: ifocus

FEMALE ANNOUNCER: Trista is a bubbly six-year-old who is very bright.

TRISTA: I'm a good reader. I'm a good -- I'm good at math, I'm good at almost everything in school but spelling. I'm not that good at spelling.

ON SCREEN: Taffie

Trista's Mom www.ifocusSystem.com

TAFFIE: Trista is very intelligent, but because she gets bored so easily, then she has a very difficult time focusing. Every parent-teacher conference, it's always, you know, she's a little chatterbox, we have a hard time keeping her in her seat.

FEMALE ANNOUNCER: That was before Trista starting playing the ifocus Jungle Rangers game.

TAFFIE: So, we went to this parent-teacher conference this last time and I said to her teacher, you know, how are things going? She said, I don't know what you're doing at home, but you need to keep it up because it's helping her.

FEMALE ANNOUNCER: Playing Jungle Rangers really has made a difference for Trista and she knows exactly why.

ON SCREEN: Trista

Complaint

EXHIBIT B

EXHIBIT B

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age 6 www.ifocusSystem.com

TRISTA: It does help me pay attention.

FEMALE ANNOUNCER: When a child feels successful, he or she can be successful in the areas that are most important to them. It starts at home. They take it with them to school --

ON SCREEN: This is a paid advertisement for the ifocus System

FEMALE ANNOUNCER: -- and then it comes right back around to happier kids at home and happy kids make happy families.

ON SCREEN: Colleen

Michael and Nelson's Mom

COLLEEN: I could see the improvement in him.

ON SCREEN: Susan

Forrester's Mom

SUSAN: Things come easier.

ON SCREEN: Kristin

Anna's Mom

KRISTIN: She's been better at being a self starter.

ON SCREEN: Connie

Landon's Mom

LANDON: He was able to follow directions a lot better.

Complaint

EXHIBIT B

ON SCREEN: Garth
Zak and Zane's Dad
GARTH: The fact that he came home and wanted to do his homework.
ON SCREEN: Marissa
Chazz's Mom
MARISSA: When I come home from work, his chores are done.
ON SCREEN: Adell
Tiffany's Mom
ADELL: I definitely would recommend it.
ON SCREEN: Forrester
age 10
FORRESTER: The best thing about Jungle Rangers is everything.
ON SCREEN: JUNGLE RANGERS
BRAIN TRAINING SYSTEM
for Attention!
MALE ANNOUNCER: Introducing the ifocus Jungle Rangers Brain Training System.
ON SCREEN: JUNGLE RANGERS
MALE ANNOUNCER: What looks like just a video game is actually a --
ON SCREEN: Sophisticated
BRAIN TRAINING TOOL

Complaint

EXHIBIT B

MALE ANNOUNCER: -- sophisticated and highly developed state-of-the-art brain training tool, designed as a series of --

ON SCREEN: 9 COMPUTER GAME Adventures

MALE ANNOUNCER: -- nine fun, exciting and challenging computer game adventures.

ON SCREEN: EVERYONE E CONTENT RATED BY ESRB JUNGLE RANGERS AVAILABLE FOR Windows Mac

MALE ANNOUNCER: Rated E for everyone and available for both PC and Mac, the ifocus Jungle Rangers game is unlike any educational game you've ever seen, because hidden within every level of the nine innovative ifocus Jungle Rangers games are --

ON SCREEN: Scientifically Proven BRAIN TRAINING EXERCISES

MALE ANNOUNCER: -- scientifically proven memory and attention brain training exercises, designed to improve --

ON SCREEN: Focus Concentration Memory

MALE ANNOUNCER: -- focus, concentration and memory --

Complaint

EXHIBIT B

ON SCREEN: Stimulate, Strengthen
CONNECTIONS
MALE ANNOUNCER: -- strengthening important neuron connections --
ON SCREEN: SPAN SEQUENCES
REMEMBER AND RECALL
FILTER DISTRACTIONS
IMPROVE COMPREHENSION
MALE ANNOUNCER: -- like these span sequences which ask players to remember complex information, even while distracted. So, many kids who play Jungle Rangers span games feel a jump in math and reading comprehension.
ON SCREEN: CONTINUOUS PERFORMANCE
PAY ATTENTION
LEARN PATIENCE
FOCUS
MALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research proves kids who play continuous performance games are able to stay alert, be less distracted and really focus on what's going on around them.
ON SCREEN: N-BACK
HOLD INFORMATION
UPDATE INFORMATION
REMEMBER AND FOCUS

Complaint

EXHIBIT B

MALE ANNOUNCER: And N-Back requires players to hold information and update that information. It's practice for real life, helping kids to think about what they've learned and to focus and remember what they need to do.

ON SCREEN: INNOVATIVE COMBINATION!
PROVEN Science
CHALLENGING Fun

MALE ANNOUNCER: It's this innovative groundbreaking combination of proven science and increasingly challenging fun that has kids hooked from the very first time they play.

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS

CHILD: It was really fun.

CHILD: It was challenging, but then I would really want to play it again.

CHILD: It's like a puzzle.

CHILD: It's fun.

CHILD: It's just an awesome game.

MALE ANNOUNCER: While kids enjoy the games, parents will love the dashboard tracking system.

ON SCREEN: PARENT DASHBOARD

MALE ANNOUNCER: This exclusive feature records

Complaint

EXHIBIT B

your child's progress and reveals how they're improving in key cognitive areas like sequencing, performance and memory.

ON SCREEN: Taffie
Trista's Mom

TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.

ON SCREEN: Jennifer
Kaida's Mom

JENNIFER: It helps you be able to track what he's doing, his progress.

TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.

ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Now, through this extraordinary and exclusive introductory offer, you can get the entire ifocus Jungle Rangers Brain Training System --

ON SCREEN: ifocus

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EXHIBIT B

$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
INCLUDES JUNGLE RANGERS GAMES
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.
It comes with everything your child needs to succeed --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
JUNGLE RANGERS GAME CD Mac Windows
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- including the Jungle Rangers game CD --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
INCLUDING Parent Dashboard
CALL NOW www.ifocusSystem.com

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MALE ANNOUNCER: -- with a parent dashboard tracker for monitoring their time and progress --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Science Behind the Game AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- this in-depth parent audio CD that explains the science behind this groundbreaking program --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Focus on Behavior HANDBOOK + AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD that helps both child and parent to understand and recognize good and bad behavioral patterns --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER

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EXHIBIT B

Plus Additional BONUS EXTRAS!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.
But listen to this, the creators at Focus Education, who are also concerned parents, are so confident that you and your child will absolutely fall in love with this amazing system that they're offering an unheard of parent to parent promise.
ON SCREEN: ifocus
Guarantee less return shipping
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
PARENT TO PARENT PROMISE
6 MONTH 100% For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

EXHIBIT B

MONEY BACK GUARANTEE
Play JUNGLE RANGERS in your home!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: If you order today, ifocus will give you up to six months -- yes, six full months to put the ifocus Jungle Rangers Brain Training System to the test and truly discover its ultimate potential for you and your child, or your money back.
UNIDENTIFIED FEMALE: I'm happy to have a tool that helps my daughter focus and helps her to do better in school.
UNIDENTIFIED FEMALE: The game has -- is teaching my boys how to focus and how to filter out distractions.
ON SCREEN: CALL in the next 6 minutes!
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE INTRODUCTORY OFFER
FREE SHIPPING & HANDLING
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And it gets even better. Call and order in the next 6 minutes and we'll ship this total and complete breakthrough system, with all the extras and included bonus items right to your door for free. That's

Complaint

EXHIBIT B

right, absolutely free shipping and handling, but only if you call and order right away.

UNIDENTIFIED FEMALE: I would say that it's a game that gives you results.

ON SCREEN: Product information shown above

Individual result - your child may not be as successful

UNIDENTIFIED MALE: Well, they're doing better in school. We just got their report cards and we were shocked, all As and Bs.

UNIDENTIFIED FEMALE: And this was the first time -- well, he got all As and one A minus.

MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System for attention is not available in stores or schools.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE INTRODUCTORY OFFER

NOT AVAILABLE AT SCHOOLS!

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: It's only available online or through this exclusive television offer. So, make the For

Complaint

EXHIBIT B

commitment to help your child filter, focus, absorb and remember. Call now or click on ifocusSystem.com.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE INTRODUCTORY OFFER

PARENT TO PARENT PROMISE

6 MONTH 100%

MONEY BACK GUARANTEE

Guarantee less return shipping

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: And, remember, with the ifocus system, your child will achieve and succeed or your money back. Call now.

UNIDENTIFIED FEMALE: 100 percent recommend it.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE INTRODUCTORY OFFER

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: The preceding has been a paid presentation for the ifocus Jungle Rangers Brain Training System, brought to you by Focus Education. For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXHIBIT B

ON SCREEN: ifocus
The preceding was a paid presentation for the ifocus Jungle Rangers Brain Training System brought to you by Focus Education
(The recording was concluded.)

Complaint

EXHIBIT B

C E R T I F I C A T I O N O F T Y P I S T

MATTER NUMBER: 1223153
CASE TITLE: IFOCUS EDUCATION, LLC
TAPING DATE: JUNE 18, 2012
TRANSCRIPTION DATE: NOVEMBER 12, 2013

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: NOVEMBER 12, 2013

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

Complaint

EXHIBIT C

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1223153

TITLE iFOCUS EDUCATION, LLC

DATE RECORDED: NOVEMBER 21, 2012

TRANSCRIBED: NOVEMBER 13, 2013

PAGES 1 THROUGH 62

JUNGLE RANGERS BRAIN TRAINING SYSTEM

IFOCUS EDUCATION

INFOMERCIAL (IFV7)

Complaint

EXHIBIT C

FEDERAL TRADE COMMISSION

I N D E X

Complaint

EXHIBIT C

FEDERAL TRADE COMMISSION

In the Matter of:)
iFocus Education, LLC) Matter No. 1223153
)
----------)
November 21, 2012

The following transcript was produced from a CD-Rom provided to For The Record, Inc. on October 24, 2013.

Complaint

EXHIBIT C

P R O C E E D I N G S

- - - - -

ON SCREEN: Product: ifocus System

Company: ifocus education

Title: Focus Education IFV #7

TRT: 28:30

ISCI: FEIF 0107

Agency: Script to Screen

Date: 12/21/12

Audio: 1 & 2 Stereo Mix

ON SCREEN: ifocus

The following is a paid presentation for the ifocus Jungle Rangers Brain Training System brought to you by Focus Education

MALE ANNOUNCER: The following is a paid presentation for the iFocus Jungle Rangers Brain Training System, brought to you by Focus Education.

MALE ANNOUNCER: As a parent, you know it, a confident child is a successful child and a successful child is a happy child. It's a critical domino that begins early in their lives with the ability to focus, and the ability to focus in class today can help your children succeed in life tomorrow.

ON SCREEN: focus today means success tomorrow

MALE ANNOUNCER: But teachers say these days,

Complaint

EXHIBIT C

more and more kids have a tough time paying attention in class.

ON SCREEN: Lori Jensen

Principal, 30 years in education

LORI JENSEN: I've been in education for almost 30 years and I have noticed that students are more distracted today than when I first started in education.

ON SCREEN: Jane Marshall

Teacher

JANE MARSHALL: Many distractions inside the classroom, many distractions in life. We need to teach the children how to focus. I don't think it's -- it can be done on command. I don't think you can tell children focus now. I think they need to train their brain so their brain knows what it feels like to focus.

MALE ANNOUNCER: What if there was a way to train your child's brain so he or she did know what it feels like --

ON SCREEN: Focus Succeed

MALE ANNOUNCER: -- to focus and succeed?

ON SCREEN: Fun Easy Effortless

MALE ANNOUNCER: And what if it was done in a way that was fun, easy and effortless on your part? What if we told you that just by playing this computer game, your child could build up brain power --

Complaint

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ON SCREEN: Focus
Concentration
Memory
Incredible NEW GAME!
MALE ANNOUNCER: -- learn to focus, improve concentration and memory? Because this is no ordinary game.
ON SCREEN: Scientifically Based
BRAIN TRAINING EXERCISES
CHALLENGING Fun
MALE ANNOUNCER: It's actually a series of scientifically based brain training exercises hidden within challenging fun games.
ON SCREEN: Julie
Zach's Mom
JULIE: My kids love to play video games and this is a great way to strengthen their brain.
ON SCREEN: Taffie
Trista's Mom
TAFFIE: And it settles them in and it helps them to learn to focus.
ON SCREEN: Denise
Seth's mother
Individual Result - your child may not be as successful

Complaint

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DENISE: He says, Mom, I can focus in class.
MALE ANNOUNCER: Introducing the iFocus Jungle Rangers --
ON SCREEN: BRAIN TRAINING SYSTEM!
MALE ANNOUNCER: -- Brain Training System --
ON SCREEN: JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Ages 6-12
MALE ANNOUNCER: -- rated E for everyone, and created especially for children aged 6 to 12.
ON SCREEN: Innovative Combination
Science Fun
MALE ANNOUNCER: Jungle Rangers is an amazing, innovative combination of science and fun that can make a big difference for your child at home and in the classroom.
ON SCREEN: Lori Jensen
Principal, 30 years in education
LORI JENSEN: It will help them with their attention span and their focus.
MALE ANNOUNCER: Kids think they're just playing a fun and easy game, but hidden within each level of the --
ON SCREEN: 9 ADVANCING Games
MALE ANNOUNCER: -- nine innovative ifocus

Complaint

EXHIBIT C

Jungle Rangers game is cutting edge science --

ON SCREEN: Scientifically Proven

BRAIN TRAINING EXERCISES

MALE ANNOUNCER: -- proven memory and attention brain training exercises, every one of them designed to help improve your --

ON SCREEN: Concentration

Memory

MALE ANNOUNCER: -- child's concentration and memory.

ON SCREEN: IMPROVEMENT

Thinking +93%

Self-Regulation +38%

Average Thinking Improvement 24% in 5 hours.

Average Self-Regulation Improvement 30% in 5 hours.

Tiffany

age 11

TIFFANY: When I got that game, I started doing really, really good in school.

ON SCREEN: IMPROVEMENT

Sustained Attention +33%

Thinking +95%

Average Sustained Attention Improvement 14% in 5 hours.

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Average Thinking Improvement 14% in 5 hours.
Forrester
age 10
FORRESTER: I pay attention to my teacher a lot more.
ON SCREEN: IMPROVEMENT
Self-Regulation +105%
Feeling +44%
Average Self-Regulation Improvement 30% in 5 hours.
Average Feeling Improvement 36% in 5 hours.
Chazz
age 10
CHAZZ: I have better grades.
ON SCREEN: Jackson
age 11 Individual result - your child may not be as successful
JACKSON: I've been getting a lot more 100 percents.
MALE ANNOUNCER: Based on years of --
ON SCREEN: ADVANCED BRAIN RESEARCH
MALE ANNOUNCER: -- advanced scientific and pediatric neuro brain research, each level of the Jungle Rangers game is designed to --
ON SCREEN: Stimulate, Strengthen

Complaint

EXHIBIT C

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CONNECTIONS

MALE ANNOUNCER: -- stimulate and strengthen neuron connections in the brain, using proven visual and auditory --

ON SCREEN: BRAIN TRAINING Exercises

MALE ANNOUNCER: -- brain training exercises imbedded within the game itself. It's this innovative groundbreaking combination of proven science and challenging fun that has kids hooked from the very first time they play.

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS

CHILD: It was really fun.

CHILD: It's like a puzzle.

CHILD: It's fun.

CHILD: It's just an awesome game.

MALE ANNOUNCER: The ifocus Jungle Rangers game features the same series of --

ON SCREEN: Neuropsychologists

Therapists

Scientists

BRAIN TRAINING EXERCISES

JUNGLE RANGERS

MALE ANNOUNCER: -- proven brain training techniques used for years by neuropsychologists, therapists and scientists.

Complaint

EXHIBIT C

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ON SCREEN: Strengthens FOCUSING MUSCLE!

MALE ANNOUNCER: They help children to strengthen their memory and attention muscles, so playing Jungle Rangers can give you child results that can be astounding.

ON SCREEN: Jennifer

Kaida's Mom

JENNIFER: I really didn't expect to see that big of a change that quickly.

ON SCREEN: Susan

Forrester's Mom

Individual Result - your child may not be as successful

SUSAN: It worked for our family. In two weeks' time, we noticed.

ON SCREEN: Marissa

Chazz's Mom

MARISSA: Ifocus gave me the tools to help my child do better in school.

ON SCREEN: Focus Succeed

MALE ANNOUNCER: The ifocus Jungle Rangers game can help kids to focus and succeed, to reach their full potential in school and at home.

This is Dr. Daniel Amen. He's an expert who's written dozens of books about how the brain works.

Complaint

EXHIBIT C

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Ifocus scientific advisor, Dr. Amen, studied kids who played ifocus Jungle Rangers and what he discovered was amazing.

ON SCREEN: Daniel Amen, M.D.

ifocus Scientific Advisor

DR. DANIEL AMEN: So, what we did is we did a very sophisticated neuropsychological assessment of a big group of kids before and then after they played the game.

ON SCREEN: EMOTION: +25%

Jackson age 11

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: And it was actually --

ON SCREEN: EMOTION: +29%

Zach age 11

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- very exciting to find in the areas of --

ON SCREEN: EMOTION: +350%

Isaac age 9

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- emotion and --

ON SCREEN: SELF REGULATION: +25%

Anna age 10

Average Self Regulation Improvement 12% in 5 hours

Complaint

EXHIBIT C

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DR. DANIEL AMEN: -- self-regulation that --
ON SCREEN: SELF REGULATION: +38%
Tiffany age 11
Average Self Regulation Improvement 12% in 5 hours
DR. DANIEL AMEN: -- their scores --
ON SCREEN: SELF REGULATION: +105%
Chazz age 10
Average Self Regulation Improvement 12% in 5 hours
DR. DANIEL AMEN: -- improved significantly.
ON SCREEN: Daniel Amen, M.D.
Self Regulation Secret to Success
ON SCREEN: Daniel Amen, M.D.
Self Regulation Secret to Success
DR. DANIEL AMEN: Self-regulation is really one of the secrets to long-term success.
The brain is so interesting. It has many different abilities. So, the ability to regulate itself comes from the front part of your brain.
ON SCREEN: Focus
Forethought
Judgement
Impulse Control
DR. DANIEL AMEN: It helps you with things like

Complaint

EXHIBIT C

focus and forethought, judgment, impulse control.

ON SCREEN: Daniel Amen, M.D.

Evidence ifocus Helps Self Regulation

DR. DANIEL AMEN: And it's very exciting. With ifocus, there, in fact, is evidence that it helps them, especially in those areas of self-regulation and emotion.

ON SCREEN: Marissa

Chazz's Mom

MARISSA: It's helped a lot at the house even, not just at school. His behavior with his chores, helping out.

ON SCREEN: Colleen

Michael and Nelson's mom

COLLEEN: I see a lot more focus, a lot more motivation.

ON SCREEN: Kristin

Anna's Mom

KRISTIN: She seems to be trying harder to want to do what I ask.

ON SCREEN: Julie

Zach's Mom

JULIE: This is a great way to strengthen their brain, which is their biggest asset in life.

ON SCREEN: Jane Marshall

Teacher

Complaint

EXHIBIT C

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JANE MARSHALL: And, actually, as educators, that's what we're trying to do. We're trying to create new pathways in the brain. Oftentimes, the same pathways are just used over and over again. The more we can create, the better thinker they're going to be.

ON SCREEN: Daniel Amen, M.D.

Author, 28 books on the brain

DR. DANIEL AMEN: Which is what's good for the brain, is when you do things you're not good at, but you persist at it and you build skill, you're building new connections in the brain, and that's a very exciting thing.

MALE ANNOUNCER: Exciting for parents who finally have an --

ON SCREEN: Effective

EASY TO USE

MALE ANNOUNCER: -- effective, easy-to-use tool that can help their children --

ON SCREEN: Focus Succeed

MALE ANNOUNCER: -- to focus and succeed and exciting for kids who don't care about the science, but do care about the fun --

ON SCREEN: Fun

GAME!

MALE ANNOUNCER: -- and that's where the talent

Complaint

EXHIBIT C

and expertise of --

ON SCREEN: Award winning ifocus Game Designer

MALE ANNOUNCER: -- award-winning game designer Jason Leon made all the difference, creating this innovative blend of science and fun.

ON SCREEN: Jason Leon

ifocus Game Developer

JASON LEON: Well, we made it really approachable for them. You're going to become a jungle ranger.

ON SCREEN: JUNGLE RANGER

GAME: Good day, I need your help.

ON SCREEN: Game Adapts

TO PLAYER!

JASON LEON: Each and every game is adaptive, so it's actually designed to scale up in difficulty so that it keeps your brain energy up as high as it possibly can.

CHILD: Pretty challenging.

CHILD: A little easy, a little hard.

ON SCREEN: Jason Leon

Constantly Challenges you to Improve

JASON LEON: That's one of the aspects that sets our game apart from other games is that it's constantly challenging you to get better.

Complaint

EXHIBIT C

GAME: Now, this one's a little tricky. You're going to have to jump on the stumps in the reverse order from how I do it.

CHILD: You have to memorize a pattern in order to go on to the next level.

CHILD: And you do all this fun stuff.

ON SCREEN: Jason Leon

ifocus Game Developer

JASON LEON: We worked directly with a neuro therapist that would tell us what was supposed to be in and why it was supposed to be in. Oftentimes, when folks try and mix these two worlds, they forget that you've got to make it fun first. So, it was kind of this convergence of science and fun.

ON SCREEN: Science:

BRAIN TRAINING TECHNIQUES

MALE ANNOUNCER: The science is using effective brain training techniques and --

ON SCREEN: Fun:

EASY GAME!

MALE ANNOUNCER: -- the fun is the Jungle Rangers adventure.

ON SCREEN: 9 ADVANCING

Games

MALE ANNOUNCER: Players advance through nine

Complaint

EXHIBIT C

games --
ON SCREEN: 3 DIFFERENT
Worlds
MALE ANNOUNCER: -- in three different worlds, all of which include exercises designed to improve focus --
ON SCREEN: GAMES IMPROVE
Focus, Concentration, Memory
MALE ANNOUNCER: -- concentration and memory --
ON SCREEN: SPAN SEQUENCES
REMEMBER AND RECALL
FILTER DISTRACTIONS
IMPROVE COMPREHENSION
MALE ANNOUNCER: -- like these span sequences which ask players to remember complex information, even while distracted, which is so important for kids in math and reading comprehension.
ON SCREEN: CONTINUOUS PERFORMANCE
PAY ATTENTION
LEARN PATIENCE
FOCUS
MALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research shows kids learn to stay alert and to really focus on what's going on, even at times when they'd

Complaint

EXHIBIT C

normally zone out.

ON SCREEN: N-BACK

HOLD INFORMATION

UPDATE INFORMATION

REMEMBER AND FOCUS

MALE ANNOUNCER: And N-Back requires players to hold information and to update that information. Adding new levels of difficulty is practice for real life, helping kids to focus and remember what they need to do.

Bottom line, kids who play Jungle Rangers work their memory and attention muscles, strengthen their focus.

ON SCREEN: Strengthens

THEIR FOCUS

MALE ANNOUNCER: You'll see the difference.

ON SCREEN: Marissa

Chazz's Mom

Individual Result - your child may not be as successful

MARISSA: When he brings home his paperwork from school and they're As, they're 100 percents, 95 percents versus the 65 percents.

ON SCREEN: Chazz

age 10

CHAZZ: I have better grades. I used to blurt

Complaint

EXHIBIT C

out in class and now I don't do that as much anymore.

MARISSA: I would have never in a million years thought that a video game --

ON SCREEN: This is a paid advertisement for the ifocus System.

MARISSA: -- ifocus Jungle Rangers, would have been able to do that for us.

ON SCREEN: ifocus

ON SCREEN: Jackson age 11 THINKING: +105%

Average Thinking Improvement 4% in 5 hours

Anna age 10 SELF REGULATION: +200%

Average Self Regulation Improvement 12% in 5 hours

Zach age 11 SUSTAINED ATTENTION: +250%

Average Sustained Attention Improvement 14% in 5 hours

Chazz age 10 SELF REGULATION: +105%

Average Self Regulation Improvement 12% in 5 hours

Isaac age 9 EMOTION: +305%

Average Emotional Improvement 28% in 5 hours

Tiffany age 11 EMOTION: +75%

Average Emotional Improvement 8% in 5 hours

Forrester age 10 THINKING: +95%

Average Thinking Improvement 4% in 5 hours

Complaint

EXHIBIT C

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FEMALE ANNOUNCER: Seeing the difference Jungle Rangers makes for children and parents is what motivates ifocus found John Able.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: I've been driven completely by the thought that I'd help kids.

FEMALE ANNOUNCER: John has six children of his own, so parent to parent he knows how difficult it can be to help a child who's struggling.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: I learned through trial and error and 31 years of parenting, I call them -- I call them arrows in your quiver or tools in your toolbox. The more tools you have, the better parenting you can do.

ON SCREEN: Powerful BRAIN TRAINING

FEMALE ANNOUNCER: John knows the ifocus Jungle Rangers game can give you a powerful new parenting tool, one that can help your children to --

ON SCREEN: Focus Succeed

FEMALE ANNOUNCER: -- focus and succeed.

ON SCREEN: Julie

Zach's Mom

JULIE: The game has -- is teaching my boys how

Complaint

EXHIBIT C

to focus and how to filter our distractions.

ON SCREEN: Colleen

Michael and Nelson's Mom

COLLEEN: To have a product like this is exciting for me.

ON SCREEN: Connie

Jacquelyn's Mom

CONNIE: And this was so easy, too. It was just, you know, let them go play and they enjoyed it. So, it was a good thing.

MALE ANNOUNCER: It's a good thing that just got better. Now, you can experience the same innovative game thousands of families all over the country have already discovered with the ifocus system, because ifocus is giving you an unheard of promise, a parent to parent guarantee that gives you up to six months to use Jungle Rangers in your home.

ON SCREEN: PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

IMPROVE:

FOCUS

ATTENTION

MEMORY

SCHOOL WORK

Complaint

EXHIBIT C

SELF ESTEEM

MALE ANNOUNCER: Yes, six full months to put the ifocus Jungle Rangers brain training system to the test and truly discover its ultimate potential for you and your child or your money back.

JOHN ABLE: That's the kind of company we are. We're a human company, very human.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: The fact that children's lives are changed is important to me.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

Entire ifocus BRAIN TRAINING SYSTEM

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Right now, through this extraordinary and exclusive offer, you can get the entire ifocus Jungle Rangers brain training system --

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

INCLUDES JUNGLE RANGERS GAMES

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EXHIBIT C

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CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.

ON SCREEN: CALL or Click TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Just call or click and order right now and we'll send you the ifocus Jungle Rangers brain training system --

ON SCREEN: Product information shown above

JUNGLE RANGERS BRAIN TRAINING SYSTEM

MALE ANNOUNCER: -- with everything your child needs to success --

ON SCREEN: Product information shown above

JUNGLE RANGERS GAME CD

MALE ANNOUNCER: -- the Jungle Rangers game CD --

ON SCREEN: Product information shown above

PARENT DASHBOARD

MALE ANNOUNCER: -- including the exclusive

Complaint

EXHIBIT C

parent dashboard tracker.

ON SCREEN: Product information shown above

Taffie

Trista's Mom

MONITOR PROGRESS

TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.

ON SCREEN: Product information shown above

Jennifer

Kaida's Mom

JENNIFER: It helps you be able to track what he's doing, his progress.

TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.

ON SCREEN: Product information shown above

Science Behind the Game AUDIO CD

MALE ANNOUNCER: You'll also receive this in-depth parent audio CD that explains the science behind this groundbreaking program --

ON SCREEN: Product information shown above

Focus on Behavior

HANDBOOK + AUDIO CD

MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD. It helps both child and parent to

Complaint

EXHIBIT C

understand and recognize good and bad behavior patterns --

ON SCREEN: Product information shown above

Plus Additional BONUS EXTRAS!

MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

Entire ifocus BRAIN TRAINING SYSTEM

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.

ON SCREEN: CALL in the next 18 minutes!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

FREE SHIPPING & HANDLING

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: And it gets even better. Call and order in the next 18 minutes and we'll ship this total and complete breakthrough system with all the

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extras and included bonus items right to your door for free. That's right, absolutely free shipping and handling. Call and order right away.

UNIDENTIFIED FEMALE: I would say that it is a game that gives you results.

ON SCREEN: Product information shown above

Individual Result - your child may not be as successful

UNIDENTIFIED FEMALE: And this was the first time -- well, he got all As and one A minus.

ON SCREEN: CALL or Click TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

NOT AVAILABLE AT SCHOOLS!

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: The ifocus Jungle Rangers brain training system for attention is not available in stores or schools, it's only available online or through this exclusive television offer.

So, make the commitment now to help your child reach his or her potential. Call now or click on ifocusSystem.com.

ON SCREEN: Order Now

Complaint

EXHIBIT C

extras and included bonus items right to your door for free. That's right, absolutely free shipping and handling. Call and order right away.

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So, make the commitment now to help your child reach his or her potential. Call now or click on ifocusSystem.com.

ON SCREEN: Order Now

Complaint

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PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Focus Succeed
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: And, remember, with the ifocus system and our exclusive parent to parent promise, your child will focus and succeed or your money back. Order now.

UNIDENTIFIED FEMALE: 100 percent recommended.

CHILD: The best thing about Jungle Rangers is everything.

ON SCREEN: CALL or Click TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW www.ifocusSystem.com
ON SCREEN: Zak and Zane
age 9
www.ifocusSystem.com

Complaint

EXHIBIT C

FEMALE ANNOUNCER: Zak and Zane are identical twins. Think busy times two. Their dad makes sure they spend a lot of time outside working off their energy. Even so, both Zak and Zane had trouble focusing at school.

GARTH: But to try to focus to do homework, there'd be times where it would take me a half-hour to just do one math problem.

FEMALE ANNOUNCER: But since playing the Jungle Rangers game and using the iFocus system, Zak and Zane are able to focus, filter out distractions and homework has become much more productive.

ON SCREEN: Garth

Zak and Zane's Dad

Individual Result - your child may not be as successful

GARTH: Well, they're doing better in school. We just got their report cards, and we were shocked, all As and Bs. They've never had that before.

ON SCREEN: Zak and Zane

age 9 www.ifocusSystem.com

CHILD: Every time we come home from school, we can do our math all by ourselves.

ON SCREEN: Garth

Zak and Zane's Dad www.ifocusSystem.com

Complaint

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GARTH: And now, they come home and do their homework. It's -- you see the difference. You see the difference. One game, hmm.

ON SCREEN: ifocus

ON SCREEN: Cami

age 11

CAMI: In class, I usually daydream and then I am -- with homework I'm like, ugh, I don't know how to do this.

ON SCREEN: Kelly

Cami and Kemp's Mom

KELLY: My daughter, she's like, Mom, I really noticed that it's really important to just, you know, clue in on what I'm doing.

ON SCREEN: Individual Result - your child may not be as successful www.ifocusSystem.com

CAMI: And I focus more on my homework.

KELLY: I really noticed a lot of positives.

CAMI: It's for kids; it's not for grown-ups, it's just for us to play with and have fun.

MALE ANNOUNCER: The ifocus Jungle Rangers game is designed for kids to have fun while also helping --

ON SCREEN: Focus Succeed

MALE ANNOUNCER: -- children to focus and succeed.

Complaint

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ON SCREEN: JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
AVAILABLE FOR Windows Mac
MALE ANNOUNCER: Rated E for everyone and available in both Mac and PC --
ON SCREEN: INNOVATIVE COMBINATION!
Science Fun
MALE ANNOUNCER: -- it's an innovative combination of science and fun that works because hidden within every level of the --
ON SCREEN: 9 COMPUTER GAME
Adventures
MALE ANNOUNCER: -- nine innovative ifocus Jungle Rangers games are --
ON SCREEN: Sophisticated
BRAIN TRAINING TOOL www.ifocusSystem.com
MALE ANNOUNCER: -- sophisticated memory and attention brain training exercises.
For instance, this is a span sequence.
GAME: You have to jump on the stumps in the same order as me.
ON SCREEN: SPAN SEQUENCES
REMEMBER AND RECALL
FILTER DISTRACTIONS
IMPROVE COMPREHENSION www.ifocusSystem.com

Complaint

EXHIBIT C

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FEMALE ANNOUNCER: A span sequence requires players to remember information even while distracted. That helps in real life, to remember homework assignments or what should go in the backpack.

ON SCREEN: CONTINUOUS PERFORMANCE

PAY ATTENTION www.ifocusSystem.com

LEARN PATIENCE

FOCUS

FEMALE ANNOUNCER: And continuous performance games are all about paying attention and learning patience, and that can mean the ability to sit quietly and read, something so important for success in higher education.

ON SCREEN: N-BACK

HOLD INFORMATION

UPDATE INFORMATION www.ifocusSystem.com

REMEMBER AND FOCUS

MALE ANNOUNCER: N-Back games have players hold information and update that information over time, taking what they know and assimilating new facts, making connections. It's practice for real life.

ON SCREEN: Kimberly

Mother of nine www.ifocusSystem.com

KIMBERLY: When you give a child an instruction, it may have three parts, like go upstairs,

Complaint

EXHIBIT C

get dressed, and then come back down. And before, I was seeing a lot of going upstairs and then I'd have to go search for them. So, the improvement I've seen is they actually can complete the two, three, five-part instruction, which is huge.

ON SCREEN: 9 ADVANCING Games
Game Adapts
TO EACH PLAYER

MALE ANNOUNCER: Every one of the nine Jungle Rangers games is designed to adapt to the ability of the players --

ON SCREEN: Challenged, NOT FRUSTRATED

MALE ANNOUNCER: -- so the kids are challenged, but not frustrated. And that's important. It means they're always playing --

ON SCREEN: Peak Performance

MALE ANNOUNCER: -- at peak performance --

ON SCREEN: Stimulate, Strengthen
CONNECTIONS

MALE ANNOUNCER: -- strengthening those important neuron connections --

ON SCREEN: Focus
Concentration
Memory

MALE ANNOUNCER: -- helping them to improve

Complaint

EXHIBIT C

focus, concentration and memory.

ON SCREEN: Jackson

age 11 www.ifocusSystem.com

JACKSON: It's a game that helps kids concentrate.

ON SCREEN: Forrester

age 10 www.ifocusSystem.com

FORRESTER: You have to remember patterns.

ON SCREEN: Lindsey

age 9 www.ifocusSystem.com

LINDSEY: It's just fun.

ON SCREEN: Nelson

age 12 www.ifocusSystem.com

NELSON: It makes your brain work.

FEMALE ANNOUNCER: And teachers say that's exactly what will help them to --

ON SCREEN: Focus Succeed

MALE ANNOUNCER: -- focus and succeed in the classroom.

LORI JENSEN: Because you can't really teach a child to think.

ON SCREEN: Lori Jensen

Principal, 30 years in education

www.ifocusSystem.com

LORI JENSEN: Being able to use the Jungle

Complaint

EXHIBIT C

Rangers and having the students actually learn how to think through a problem, we can show them --

ON SCREEN: Lori Jensen

Learn how to think through a problem

www.ifocusSystem.com

LORI JENSEN: -- but we're not actually sometimes teaching them at a brain level of how to make those choices and how to think for themselves.

ON SCREEN: Jane Marshall

Teacher www.ifocusSystem.com

JANE MARSHALL: And my observation of the program, from what I've seen, is that it is trying to create more branches in the brain for those higher-level thinking skills.

ON SCREEN: JUNGLE RANGERS

NOT AVAILABLE IN SCHOOLS!

FEMALE ANNOUNCER: The ifocus Jungle Rangers game isn't available at schools. So, elementary school principal Lori Jensen jumped at the opportunity to test it as part of her curriculum.

ON SCREEN: Lori Jensen

Principal, 30 years in education

www.ifocusSystem.com

LORI JENSEN: It fit into what we were trying to do with our students, engage them in the learning

Complaint

EXHIBIT C

process, but also expand what their brains were going to be able to do.

FEMALE ANNOUNCER: The teachers were enthusiastic.

JANE MARSHALL: I really think that the more the children do the program, the better the results are going to be.

FEMALE ANNOUNCER: So, students played the Jungle Rangers game in computer lab and the --

ON SCREEN: Groundbreaking
Science Fun
www.ifocusSystem.com

FEMALE ANNOUNCER: -- innovative groundbreaking combination of science and challenging fun had them hooked from the very first time they played.

CHILD: You get to jump on logs.

CHILD: I'm talking to a man in a frog costume.

CHILD: I would play it every day.

CHILD: And I'm a trainee Jungle Rangers. This game is really fun.

CHILD: Can we play this at home?

CHILD: This is the funnest game on earth.

FEMALE ANNOUNCER: Fun? Absolutely.

ON SCREEN: GAMES IMPROVE
Focus, Concentration, Memory

Complaint

EXHIBIT C

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www.ifocusSystem.com

FEMALE ANNOUNCER: But Jungle Rangers also work the memory and focus muscle for these students and the teachers noticed a difference in their classrooms.

ON SCREEN: Lavonne Riggs

Teacher www.ifocusSystem.com

LAVONNE RIGGS: I have seen a vast improvement. This class seems to be motivated and focused --

ON SCREEN: Lavonne Riggs

Class is motivated and focused

www.ifocusSystem.com

LAVONNE RIGGS: -- and the only thing we're doing differently is Jungle Rangers.

JANE MARSHALL: A typical third grade class, you're really working to keep them focused.

ON SCREEN: Lori Jensen

A difference in attention www.ifocusSystem.com

LORI JENSEN: She can tell a difference in their attention span in the classroom.

JANE MARSHALL: I love finding ways to help the children learn and Jungle Rangers does play a part in helping the children learn how to focus --

ON SCREEN: Jane Marshall

Teacher www.ifocusSystem.com

JANE MARSHALL: -- and to retrieve information.

Complaint

EXHIBIT C

LAVONNE RIGGS: Pretty amazing.

ON SCREEN: ifocus

ON SCREEN: Garth

Zak and Zane's Dad

GARTH: This is one thing that I'm very glad my wife and I decided to do. I think it's been beneficial for our boys.

ON SCREEN: This is a paid advertisement for the ifocus System

GARTH: Thank you. That's about what I want to say, thank you for ifocus.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

Entire ifocus BRAIN TRAINING SYSTEM

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Right now, through this extraordinary and exclusive offer, you can get the entire ifocus Jungle Rangers brain training system --

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

INCLUDES JUNGLE RANGERS GAMES

Complaint

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EXHIBIT C

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CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.

It comes with everything your child needs to succeed --

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

JUNGLE RANGERS GAME CD Mac Windows

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- including the Jungle Rangers game CD --

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

INCLUDING Parent Dashboard

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- with a parent dashboard tracker for monitoring their time and progress --

ON SCREEN: ifocus

$14.95 PLUS S&H

Complaint

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EXHIBIT C

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30 DAY TRIAL
EXCLUSIVE TV OFFER
Science Behind the Game AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- this in-depth parent audio CD that explains the science behind this groundbreaking program --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Focus on Behavior HANDBOOK + AUDIO CD
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD that helps both child and parent to understand and recognize good and bad behavioral patterns --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Plus Additional BONUS EXTRAS!
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.

Complaint

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ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.

FEMALE ANNOUNCER: Thousands of families have already made the commitment to help their child focus and succeed. Now, it's your turn to put this powerful program to work in your home --

ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW www.ifocusSystem.com

FEMALE ANNOUNCER: -- because when you order today, ifocus will give you up to six months -- yes, an incredible six full months to put the ifocus Jungle Rangers Brain Training System to the test or your money

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back. It's an unprecedented parent to parent promise from ifocus to you.

ON SCREEN: CALL in the next 10 MINUTES!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

FREE SHIPPING & HANDLING

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: It gets better, because when you call and order in the next 10 minutes, we'll ship the entire system right to your door for free. That's right, absolutely free shipping and handling. Call and order right away.

ON SCREEN: CALL or Click TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

NOT AVAILABLE AT SCHOOLS!

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System for attention is not available in stores or schools. It's only available online or through this exclusive television offer.

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So, make the commitment to help your child focus and succeed. Call now or click on ifocussystem.com.

ON SCREEN: CALL or Click TO ORDER NOW!

PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: And, remember, with the ifocus system, your child will focus and succeed or your money back. Call now.

FEMALE ANNOUNCER: Pediatric nurse and mother of nine, Taffie Evans, was very skeptical about the ifocus Jungle Rangers game.

ON SCREEN: Taffie

Trista's Mom

TAFFIE: I think video games are a waste of time. I -- TV and video games, they just suck the life out of children.

ON SCREEN: www.ifocusSystem.com

FEMALE ANNOUNCER: Her daughter Trista is a

Complaint

EXHIBIT C

bubbly six-year-old who's very bright.

ON SCREEN: Trista

age 6 www.ifocusSystem.com

TRISTA: I'm good at math, I'm good at almost everything in school but spelling.

FEMALE ANNOUNCER: But Trista was having problems at school.

ON SCREEN: Taffie

Trista's Mom www.ifocusSystem.com

TAFFIE: Trista is very intelligent, but because she gets bored so easily, then she has a very difficult time focusing. Every parent-teacher conference, it's always, you know, she's a little chatterbox, we have a hard time keeping her in her seat.

FEMALE ANNOUNCER: That was before Trista started playing the ifocus Jungle Rangers game.

TAFFIE: So, we went to this parent-teacher conference this last time. She said, I don't know what you're doing at home, but you need to keep it up because it's helping her.

FEMALE ANNOUNCER: Playing Jungle Rangers really has made a difference for Trista.

TAFFIE: I would recommend ifocus to anyone who's having trouble keeping their children's attention.

ON SCREEN: Taffie

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Pediatric Nurse www.ifocusSystem.com

TAFFIE: Yeah, like I said before, I was completely skeptical. I honestly and truly did not think it was going to work for my children. And, now, I'm a believer.

TRISTA: It does help me pay attention.

MALE ANNOUNCER: That's because Jungle Rangers is no ordinary video game. It's an --

ON SCREEN: INNOVATIVE COMBINATION!

PROVEN Science CHALLENGING Fun

www.ifocusSystem.com

MALE ANNOUNCER: -- innovative combination of challenging fun combined with cutting edge science. Kids think they're just playing a game, but Jungle Rangers is so much more.

ON SCREEN: NEURON

TECHNOLOGY

MALE ANNOUNCER: It uses integrated neuro technology designed to get --

ON SCREEN: KEY NEURONS

Fire together

Wire together

MALE ANNOUNCER: -- key neurons to fire together and then wire together. This is where brain specialist --

Complaint

EXHIBIT C

ON SCREEN: Daniel Amen, M.D.
ifocus Scientific Advisor www.ifocusSystem.com
MALE ANNOUNCER: -- and ifocus scientific advisor Dr. Daniel Amen realized the huge positive potential of the Jungle Rangers game.
DR. DANIEL AMEN: Here, we had developers, in a thoughtful way, develop a game to actually strengthen the connections in the brain. It's a very interesting term called "long-term potentiation." So, what that means is the connections between cells actually become stronger, and what we've found is when your brain is healthy, you're able to focus and regulate your emotion. You can be happy, driven, motivated, successful.
MALE ANNOUNCER: And when he studied a group of children before and after playing the Jungle Rangers game, Dr. Amen discovered a pattern. Jungle Rangers creates the kinds of measurable changes in the brain that are key to success.
Anna age 10 SELF REGULATION: +200%
Average Self Regulation Improvement 12% in 5 hours
DR. DANIEL AMEN: What we found was --
ON SCREEN: SELF REGULATION: +38%
Tiffany age 11
Average Self Regulation Improvement 12% in 5

Complaint

EXHIBIT C

hours

DR. DANIEL AMEN: -- their ability to regulate themselves --

ON SCREEN: SELF REGULATION: +105%

Chazz age 10

Average Self Regulation Improvement 12% in 5 hours

DR. DANIEL AMEN: -- so self-regulation and emotion --

ON SCREEN: EMOTION: +25%

Jackson age 11

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- statistically significantly --

ON SCREEN: EMOTION: +29%

Zach age 11

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- increased after the kids --

ON SCREEN: EMOTION: +350%

Isaac age 9

Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- played the game.

MALE ANNOUNCER: Does that mean kids who play Jungle Rangers are more likely to focus and succeed?

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DR. DANIEL AMEN: Well, success for me is you have a goal and you have an ability to stay on track in order to reach your goal.

ON SCREEN: Anna

age 10

Individual Result - your child may not be as successful

ANNA: In school, I have noticed that I can focus better.

ON SCREEN: Kristin

Anna's Mom

Individual Result - your child may not be as successful

KRISTIN: We had the best parent-teacher conference that we've ever had.

ON SCREEN: www.ifocusSystem.com

ANNA: I just notice a lot of improvement.

KRISTIN: I've been happy with the results. I've been happy with how she's felt about it.

ANNA: I have more confidence in myself.

ON SCREEN: Confidence

Improvement

Better Performance

www.ifocusSystem.com

MALE ANNOUNCER: Confidence, improvement,

Complaint

EXHIBIT C

better school performance.

ON SCREEN: Science Fun

MALE ANNOUNCER: With the ifocus system, this innovative combination of fun and science really does make a difference.

ON SCREEN: JUNGLE RANGERS

www.ifocusSystem.com

FEMALE ANNOUNCER: Like it did for Isaac.

ON SCREEN: Alitza

Issac's Mom

Individual Result - your child may not be as successful

ALITZA: The teacher actually has told me that this couple weeks, she's noticed big, big change.

FEMALE ANNOUNCER: Now, instead of spending hours on homework, Isaac is able to stay on task.

ALITZA: Oh, my gosh, this game is amazing, 100 percent recommended. And he likes that, he enjoys it, and that's what makes me very happy.

FEMALE ANNOUNCER: Parents and teachers know that ability to stay on task --

ON SCREEN: Focus

Succeed

www.ifocusSystem.com

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FEMALE ANNOUNCER: -- to focus and pay attention in class today can help your child to succeed in life tomorrow.

ON SCREEN: Jane Marshall
Teacher www.ifocusSystem.com

JANE MARSHALL: They need to train their brain so your brain knows what it feels like to focus.

MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System is an amazing, innovative combination of sophisticated science and challenging fun, designed to strengthen children's ability to pay attention. The result, kids who play Jungle Rangers know what it feels like to --

ON SCREEN: Focus Succeed
www.ifocusSystem.com

MALE ANNOUNCER: -- focus and succeed at home, at school and even in sports.

ON SCREEN: Daniel Amen, M.D.
Brain Imaging Specialist
www.ifocusSystem.com

DR. DANIEL AMEN: So, I think any kid will benefit from this, and the reason I say that is I love the approach. It's a brain training exercise. None of it's hard. I mean, that's sort of the exciting thing. None of it's hard and it can give you a big benefit. And

Complaint

EXHIBIT C

as a parent, you feel confident --

ON SCREEN: This is a paid advertisement for the ifocus System

DR. DANIEL AMEN: -- that this is helping my child and not hurting my child.

ON SCREEN: Colleen
Michael and Nelson's Mom

COLLEEN: I could see the improvement in him.

ON SCREEN: Susan
Forrester's Mom

SUSAN: Things come easier.

ON SCREEN: Kristin
Anna's Mom

KRISTIN: She's been better at being a self-starter.

ON SCREEN: Connie
Landon's Mom

CONNIE: He was able to follow directions a lot better.

ON SCREEN: Garth
Zak and Zane's Dad

GARTH: The fact that he came home and wanted to do his homework.

ON SCREEN: Marissa
Chazz's Mom

Complaint

EXHIBIT C

CHAZZ: When I come home from work, his chores are done.

ON SCREEN: Adell
Tiffany's Mom

ADELL: I definitely would recommend it.

ON SCREEN: Jackson age 11 THINKING: +105%
Average Thinking Improvement 4% in 5 hours
Anna age 10 SELF REGULATION: +200%
Average Self Regulation Improvement 12% in 5 hours
Zach age 11 SUSTAINED ATTENTION: +250%
Average Sustained Attention Improvement 14% in 5 hours
Chazz age 10 SELF REGULATION: +105%
Average Self Regulation Improvement 12% in 5 hours
Isaac age 9 EMOTION: +305%
Average Emotional Improvement 28% in 5 hours
Tiffany age 11 EMOTION: +75%
Average Emotional Improvement 8% in 5 hours
Forrester age 10 THINKING: +95%
Average Thinking Improvement 4% in 5 hours

FEMALE ANNOUNCER: Seeing the difference Jungle Rangers makes for children and parents is what motivates ifocus found John Able.

Complaint

EXHIBIT C

EXHIBIT C

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ON SCREEN: John Able
Parent, ifocus Founder
JOHN ABLE: I've been driven completely by the thought that I'd help kids.
FEMALE ANNOUNCER: John has six children of his own, so parent to parent he knows how difficult it can be to help a child who's struggling.
ON SCREEN: John Able
Parent, ifocus Founder
JOHN ABLE: I learned through trial and error and 31 years of parenting. I call them arrows in your quiver or tools in your toolbox. The more tools you have, the better parenting you can do.
ON SCREEN: Powerful BRAIN TRAINING
FEMALE ANNOUNCER: John knows the ifocus Jungle Rangers game can give you a powerful new parenting tool, one that can help your children to --
ON SCREEN: Focus Succeed
FEMALE ANNOUNCER: -- focus and succeed.
ON SCREEN: Julie
Zach's Mom
JULIE: The game has -- is teaching my boys how to focus and how to filter our distractions.
ON SCREEN: Colleen
Michael and Nelson's Mom

Complaint

EXHIBIT C

COLLEEN: To have a product like this is exciting for me.

ON SCREEN: Connie
Jacquelyn's Mom

CONNIE: And this was so easy, too. It was just, you know, let them go play and they enjoyed it. So, it was a good thing.

MALE ANNOUNCER: It's a good thing that just got better. Now, you can experience the same innovative game thousands of families all over the country have already discovered with the ifocus system, because ifocus is giving you an unheard of promise, a parent to parent guarantee that gives you up to six months to use Jungle Rangers in your home.

ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
IMPROVE:
FOCUS
ATTENTION
MEMORY
SCHOOL WORK
SELF ESTEEM

MALE ANNOUNCER: Yes, six full months to put the ifocus Jungle Rangers brain training system to the

Complaint

EXHIBIT C

test and truly discover its ultimate potential for you and your child or your money back.

JOHN ABLE: That's the kind of company we are. We're a human company, very human.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: The fact that children's lives are changed is important to me.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

Entire ifocus BRAIN TRAINING SYSTEM

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Right now, through this extraordinary and exclusive offer, you can get the entire ifocus Jungle Rangers brain training system --

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

INCLUDES JUNGLE RANGERS GAMES

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: -- including all nine Jungle Rangers games, and find out for yourself how effective it

Complaint

EXHIBIT C

really is by simply trying it for a full 30 days for just $14.95.

ON SCREEN: CALL or Click TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: Just call or click and order right now and we'll send you the ifocus Jungle Rangers brain training system --

ON SCREEN: Product information shown above

JUNGLE RANGERS BRAIN TRAINING SYSTEM

MALE ANNOUNCER: -- with everything your child needs to success --

ON SCREEN: Product information shown above

JUNGLE RANGERS GAME CD

MALE ANNOUNCER: -- the Jungle Rangers game CD --

ON SCREEN: Product information shown above

PARENT DASHBOARD

MALE ANNOUNCER: -- including the exclusive parent dashboard tracker.

ON SCREEN: Product information shown above

Taffie

Complaint

EXHIBIT C

Trista's Mom
MONITOR PROGRESS
TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.
ON SCREEN: Product information shown above
Jennifer
Kaida's Mom
JENNIFER: It helps you be able to track what he's doing, his progress.
TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.
ON SCREEN: Product information shown above
Science Behind the Game AUDIO CD
MALE ANNOUNCER: You'll also receive this in-depth parent audio CD that explains the science behind this groundbreaking program --
ON SCREEN: Product information shown above
Focus on Behavior
HANDBOOK + AUDIO CD
MALE ANNOUNCER: -- plus this Focus on Behavior handbook and audio CD. It helps both child and parent to understand and recognize good and bad behavior patterns --
ON SCREEN: Product information shown above

Complaint

EXHIBIT C

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Plus Additional BONUS EXTRAS!

MALE ANNOUNCER: -- and even more bonus items, all yours included at no extra cost.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

Entire ifocus BRAIN TRAINING SYSTEM

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: You get this entire system with everything you see here to simply try for a full month for just $14.95.

ON SCREEN: CALL in the next 6 minutes!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

FREE SHIPPING & HANDLING

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: And it gets even better. Call and order in the next six minutes and we'll ship this total and complete breakthrough system with all the extras and included bonus items right to your door for free. That's right, absolutely free shipping and handling. Call and order right away.

Complaint

EXHIBIT C

UNIDENTIFIED FEMALE: I would say that it is a game that gives you results.

ON SCREEN: Product information shown above Individual Result - your child may not be as successful

UNIDENTIFIED FEMALE: And this was the first time -- well, he got all As and one A minus.

ON SCREEN: CALL or Click TO ORDER NOW!

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

NOT AVAILABLE AT SCHOOLS!

CALL NOW www.ifocusSystem.com

MALE ANNOUNCER: The ifocus Jungle Rangers brain training system for attention is not available in stores or schools, it's only available online or through this exclusive television offer.

So, make the commitment now to help your child reach his or her potential. Call now or click on ifocusSystem.com.

ON SCREEN: Order Now

PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

Complaint

EXHIBIT C

ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Focus Succeed
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: And, remember, with the ifocus system and our exclusive parent to parent promise, your child will focus and succeed or your money back. Order now.
UNIDENTIFIED FEMALE: 100 percent recommended.
CHILD: The best thing about Jungle Rangers is everything.
ON SCREEN: CALL or Click TO ORDER NOW!
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW www.ifocusSystem.com
MALE ANNOUNCER: The preceding has been a paid presentation for the ifocus Jungle Rangers Brain Training System, brought to you by Focus Education.
ON SCREEN: ifocus
ON SCREEN: The preceding was a paid presentation for the ifocus Jungle Rangers Brain Training

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EXHIBIT C

System brought to you by Focus Education

(The recording was concluded.)

Complaint

EXHIBIT C

C E R T I F I C A T I O N O F T Y P I S T

MATTER NUMBER: 1223153
CASE TITLE: iFOCUS EDUCATION, LLC
TAPING DATE: NOVEMBER 21, 2012
TRANSCRIPTION DATE: NOVEMBER 13, 2013

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: NOVEMBER 13, 2013

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

Complaint

EXHIBIT D

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1223153
TITLE iFOCUS EDUCATION, LLC
DATE RECORDED: JUNE 28, 2013
TRANSCRIBED: NOVEMBER 12, 2013

PAGES 1 THROUGH 63

JUNGLE RANGERS BRAIN TRAINING SYSTEM
IFOCUS EDUCATION
INFOMERCIAL (IFV11)

Complaint

EXHIBIT D

FEDERAL TRADE COMMISSION

I N D E X

RECORDING:	PAGE:
Jungle Rangers Infomercial	3

Complaint

EXHIBIT D

FEDERAL TRADE COMMISSION

In the Matter of:)
iFocus Education, LLC) Matter No. 1223153
)
----------)
June 28, 2013

The following transcript was produced from a CD-Rom provided to For The Record, Inc. on October 24, 2013.

Complaint

EXHIBIT D

P R O C E E D I N G S

- - - - -

JUNGLE RANGERS INFOMERCIAL

ON SCREEN: HAVAS EDGE

FOCUS Education LLC

IFOCUS V11

Closed Captioned

412881

28:30

06-28-2013

-

-

1-800-624-0737

ON SCREEN: ifocus

The following is a paid presentation for the ifocus Jungle Rangers Brain Training System brought to you by Focus Education.

MALE ANNOUNCER: The following is a paid presentation for the ifocus Jungle Rangers Brain Training System, brought to you by Focus Education.

ON SCREEN: HOW FAR BEHIND?

MALE ANNOUNCER: How far behind will your child be when school starts in the fall, a month, two months? It's an annual problem experts call the summer brain drain.

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EXHIBIT D

ON SCREEN: SUMMER BRAIN DRAIN
ON SCREEN: Kelly Arnold
Teacher
KELLY ARNOLD: The first couple months of the school year is spent reteaching a lot of information.
ON SCREEN: SUMMER BRAIN DRAIN
MALE ANNOUNCER: That's because over the summer, school is the last thing on a kid's mind, and it does affect their brain.
ON SCREEN: KIDS CAN'T FOCUS
MALE ANNOUNCER: Their focusing muscles become rusty. It's harder for them to sit and pay attention, and even more disturbing...
ON SCREEN: Kelly Arnold
Teacher
KELLY ARNOLD: They forget what they've learned.
MALE ANNOUNCER: But what if there was a way to fight that summer brain drain --
ON SCREEN: FIGHT
Summer Brain Drain
MALE ANNOUNCER: -- by sharpening your child's memory and attention skills so that the very first day of class he or she is alert --
ON SCREEN: Alert

Complaint

EXHIBIT D

READY TO LEARN!
MALE ANNOUNCER: -- on task and ready to learn?
Well, now you can. Introducing the ifocus Jungle Rangers Brain Training System.
ON SCREEN: BRAIN TRAINING SYSTEM
MALE ANNOUNCER: What looks like a simple computer game is really much more.
ON SCREEN: CUTTING EDGE SCIENCE
MALE ANNOUNCER: You're actually looking at cutting edge science --
ON SCREEN: MEMORY AND ATTENTION EXERCISES
MALE ANNOUNCER: -- a series of proven memory and attention brain training exercises integrated into this --
ON SCREEN: Fun
CHALLENGING GAME!
MALE ANNOUNCER: -- fun, challenging game, every one of them designed to help ensure kids --
ON SCREEN: SHARP AND FOCUSED
MALE ANNOUNCER: -- stay sharp and focused over the brain draining summer.
ON SCREEN: Julie
Zach's Mom
JULIE: My kids love to play video games and this is a great way to strengthen their brain. For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXHIBIT D

ON SCREEN: Taffie
Trista's Mom
TAFFIE: And it settles them in and it helps them to learn to focus.
ON SCREEN: Denise
Seth's Mom
DENISE: He says, mom, I can focus.
ON SCREEN: JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Ages 6-12
MALE ANNOUNCER: Rated E for everyone and created especially for kids aged 6 to 12. The ifocus Jungle Rangers System is designed to --
ON SCREEN: DEVELOP Brain Muscle
MALE ANNOUNCER: -- develop brain muscle and --
ON SCREEN: STRENGTHENS Neuron Connections
MALE ANNOUNCER: -- strengthens critical neuron connections. That can give kids who play the game over the summer an advantage when school starts in the fall.
ON SCREEN: Tiffany
age 11
TIFFANY: From the game, it teaches me to remember things.
ON SCREEN: Forrester
age 10

Complaint

EXHIBIT D

FORRESTER: I always just say "focus."
ON SCREEN: Cami Individual Result
age 11 Your child may not be as successful.
CAMI: When I played Stump Jump and when I had my first homework after I did Stump Jump, I'm like, wow, I've actually memorized all the things my teacher has told me.
ON SCREEN: Nelson
age 12
NELSON: By the first couple days I was like, okay, what made that change? And then I thought maybe it was Jungle Rangers and I really think it was.
ON SCREEN: Award winning
MALE ANNOUNCER: The award-winning ifocus Jungle Rangers system helped these kids the way it can help yours, with the same series of proven --
ON SCREEN: BRAIN TRAINING EXERCISES
Neuropsychologists
Therapists
Scientists
JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
MALE ANNOUNCER: -- brain training techniques that neuropsychologists, therapists and scientists have used for years -- For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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ON SCREEN: Strengthens FOCUSING MUSCLE!
MALE ANNOUNCER: -- to strengthen memory and attention muscles.
ON SCREEN: Research has shown self-regulation is far more important than IQ
MALE ANNOUNCER: And studies say that ability to pay attention, to sit and focus can be even more important to a child's academic success than a high IQ. And the more kids play the ifocus Jungle Rangers game over the summer, the stronger those memory and attention muscles can become. That can mean an advantage when school starts in the falls.
ON SCREEN: Robin Dury
Teacher of the Year
ROBIN DURY: ifocus would be great for parents to have their kids use during the summertime.
ON SCREEN: Kelly Arnold
Teacher
KELLY ARNOLD: We want them to get out and exercise and play, but we also want them to continue to exercise their brains so that when they start the school year next year, they're, you know, right where they left off.
ON SCREEN: Ready to Learn!
MALE ANNOUNCER: Kids who play Jungle Rangers

Complaint

EXHIBIT D

are sharp, primed, and ready to learn.
ON SCREEN: Award winning ifocus Game Designer
MALE ANNOUNCER: Award-winning game designer
Jason Leon says that's exactly what the game was designed
to do.
ON SCREEN: Game Adapts
TO PLAYER!
JASON LEON: Each and every game is adaptive,
so it's actually designed to scale up in difficulty --
ON SCREEN: KEEPS BRAIN WORKING!
JASON LEON: -- so that it keeps your brain
energy up as high as it possibly can.
ON SCREEN: Jason Leon
Constantly Challenges You to Improve
JASON LEON: That's one of the aspects that
sets our game apart from other games is that it's
constantly challenging you to get better.
ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS
CHILD: Pretty challenging.
CHILD: A little easy, a little hard.
CHILD: You have to memorize a pattern in order
to go on to the next level.
CHILD: And you do all this fun stuff.
ON SCREEN: Jason Leon
ifocus Game Developer

Complaint

EXHIBIT D

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11

JASON LEON: Well, we made it really approachable for them. You're going to become a Jungle Ranger.

ON SCREEN: JUNGLE RANGERS

GAME: Good day, I need your help.

ON SCREEN: Jason Leon

ifocus Game Developer

JASON LEON: We worked directly with a neuro therapist that would tell us what was supposed to be in and why it was supposed to be in. Oftentimes, when folks try and mix these two worlds, they forget that you've got to make it fun first. So, it was kind of this convergence of science and fun.

ON SCREEN: Science: BRAIN TRAINING TECHNIQUES

MALE ANNOUNCER: The science is using effective brain training techniques --

ON SCREEN: Fun: EASY GAME!

MALE ANNOUNCER: -- and the fun is the Jungle Rangers adventure.

ON SCREEN: 9 ADVANCING Games

MALE ANNOUNCER: Players advance through nine games --

ON SCREEN: 3 DIFFERENT Worlds

MALE ANNOUNCER: -- in three different worlds, all of which include exercises --

Complaint

EXHIBIT D

ON SCREEN: GAMES IMPROVE
Focus, Concentration, Memory
MALE ANNOUNCER: -- designed to improve focus, concentration and memory.
ON SCREEN: SPAN SEQUENCES
REMEMBER AND RECALL
FILTER DISTRACTIONS
IMPROVE COMPREHENSION
MALE ANNOUNCER: Like these span sequences, which ask players to remember complex information, even while distracted, which is so important in math and reading comprehension.
ON SCREEN: CONTINUOUS PERFORMANCE
PAY ATTENTION
LEARN PATIENCE
FOCUS
MALE ANNOUNCER: Continuous performance games are all about paying attention and learning patience. Research shows kids learn to stay alert and to really focus on what's going on, even at times when they'd normally zone out.
ON SCREEN: N-BACK
HOLD INFORMATION
UPDATE INFORMATION
REMEMBER AND FOCUS

Complaint

EXHIBIT D

MALE ANNOUNCER: And N-Back requires players to hold information and to update that information, adding new levels of difficulty is practice for real life, helping kids to remember what they need to do and helping them to retain what they learn.

ON SCREEN: Kim Sinclair

Teacher Aide

KIM SINCLAIR: Jungle Rangers helps children be successful by allowing them to repeat different patterns and the patterns that they repeat are difficult and challenging. And the more that they can do that, the longer they can stay on that, then the better their brains will connect and be successful in other things as well.

MALE ANNOUNCER: Bottom line, kids who play Jungle Rangers, especially over the summer when so many simply forget --

ON SCREEN: Strengthens THEIR FOCUS

MALE ANNOUNCER: -- what it feels like to learn and remember, can be attentive and focused --

ON SCREEN: Alert

READY TO LEARN!

MALE ANNOUNCER: -- ready to learn the very first day class begins in the fall.

Here's something you should know, ifocus is a

Complaint

EXHIBIT D

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14

proud partner of the National PTA.

ON SCREEN: National Member Benefits Provider of PTA

MALE ANNOUNCER: It's a huge thumbs-up for the millions of parents and teachers who are all about helping kids to learn.

ON SCREEN: Amazing RESULTS

MALE ANNOUNCER: But parents can tell you, the benefits of this extraordinary game flow well beyond the classroom.

ON SCREEN: Marissa
Chazz's Mom

MARISSA: It's helped a lot at the house even, not just at school. His behavior with his chores, helping out.

ON SCREEN: Colleen
Michael and Nelson's Mom

COLLEEN: I see a lot more focus, a lot more motivation.

ON SCREEN: Kristin
Anna's Mom

KRISTIN: She seems to be trying harder to want to do what I ask.

ON SCREEN: Daniel Amen, M.D.
ifocus Scientific Advisor

Complaint

EXHIBIT D

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MALE ANNOUNCER: That doesn't surprise Dr. Daniel Amen. He's a leading expert who's written dozens of books about how the brain works. And when Dr. Amen studied kids who played ifocus Jungle Rangers, what he discovered was fascinating.

ON SCREEN: Daniel Amen, M.D.
ifocus Scientific Advisor

DR. DANIEL AMEN: So, what we did is we did a very sophisticated neuropsychological assessment of a big group of kids before and then after they played the game.

ON SCREEN: EMOTION: +25%
Jackson age 11
Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: And it was actually --

ON SCREEN: EMOTION: +29%
Zach age 11
Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- very exciting to find in the areas of --

ON SCREEN: EMOTION: +350%
Isaac age 9
Average Emotional Improvement 28% in 5 hours

DR. DANIEL AMEN: -- emotion and --

ON SCREEN: SELF REGULATION: +25%
Anna age 10

Complaint

EXHIBIT D

Average Self Regulation Improvement 12% in 5 hours

DR. DANIEL AMEN: -- self-regulation that --

ON SCREEN: SELF REGULATION: +38%

Tiffany age 11

Average Self Regulation Improvement 12% in 5 hours

DR. DANIEL AMEN: -- their scores --

ON SCREEN: SELF REGULATION: +105%

Chazz age 10

Average Self Regulation Improvement 12% in 5 hours

DR. DANIEL AMEN: -- improved significantly.

ON SCREEN: Daniel Amen, M.D.

Self Regulation Secret to Success

DR. DANIEL AMEN: Self-regulation is really one of the secrets to long-term success.

The brain is so interesting. It has many different abilities. So, the ability to regulate itself comes from the front part of your brain.

ON SCREEN: Focus

Forethought

Judgement

Impulse Control

DR. DANIEL AMEN: It helps you with things like

Complaint

EXHIBIT D

focus and forethought, judgment, impulse control.

ON SCREEN: Daniel Amen, M.D.

Evidence ifocus Helps Self Regulation

DR. DANIEL AMEN: And it's very exciting. With ifocus, there, in fact, is evidence that it helps them, especially in those areas of self-regulation and emotion.

ON SCREEN: Self-Regulation Abilities, Beyond Intelligence, Play Major Role in Early Achievement

MALE ANNOUNCER: And, remember, studies say self-regulation, the ability to sit still and focus --

ON SCREEN: academic success

MALE ANNOUNCER: -- can be a more powerful predictor of academic success than even your child's IQ.

ON SCREEN: This is a paid advertisement for the ifocus System

MALE ANNOUNCER: So, simply by adding Jungle Rangers to play time during the summer, your child can build the kinds of connections in the brain so important --

ON SCREEN: SUCCESS

MALE ANNOUNCER: -- for success in school and beyond.

ON SCREEN: ifocus

ON SCREEN: HOW FAR BEHIND?

MALE ANNOUNCER: How far behind will your child

Complaint

EXHIBIT D

be when school starts in the fall, a month, two months? It's an annual problem experts call --

ON SCREEN: SUMMER BRAIN DRAIN

MALE ANNOUNCER: -- the summer brain drain.

ON SCREEN: Robin Dury
Teacher of the Year

ROBIN DURY: We do testing at the end of the year and the beginning of the year and you'll see a lot of kids drop between June and September.

ON SCREEN: Kelly Arnold
Teacher

KELLY ARNOLD: Because of all the information that they've lost over the summer. So, it's the same test, it's just because of that two-month, three-month gap, they're performing a lot worse.

ON SCREEN: FIGHT
Summer Brain Drain

MALE ANNOUNCER: But, now, there's a brand new way to help fight summer brain drain. Give your child an advantage when school starts in the fall, and it's as easy as playing --

ON SCREEN: Fun
CHALLENGING GAME!

MALE ANNOUNCER: -- a fun, challenging computer game called Jungle Rangers. Kids love it.

Complaint

EXHIBIT D

ON SCREEN: JUNGLE RANGERS
GAME: Jungle Rangers.
ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS
CHILD: It was really fun.
CHILD: It's like a puzzle.
CHILD: It's fun.
CHILD: It's just an awesome game.
MALE ANNOUNCER: Imagine how you'll feel seeing your child --
ON SCREEN: Focus Succeed
MALE ANNOUNCER: -- focus and success simply by having fun.
ON SCREEN: JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Ages 6-12
MALE ANNOUNCER: Rated E for everyone and created especially for children aged 6 to 12. The ifocus Jungle Rangers system has won more than a dozen awards for its innovative approach and --
ON SCREEN: National Member Benefits Provider of PTA
MALE ANNOUNCER: -- proudly partners with the National PTA to benefit its millions of parent and teacher members.
ON SCREEN: Julie

Complaint

EXHIBIT D

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Zach's Mom
JULIE: This is a great way to strengthen their brain, which is their biggest asset in life.
MALE ANNOUNCER: Now, it's your turn to experience what thousands of families all over the country have already discovered with the award-winning innovative ifocus system.
ON SCREEN: Alitza
Isaac's Mom
ALITZA: I would say that it's a game that gives you results.
ON SCREEN: Kelly Individual Result
Cami and Kemp's Mom
Your child may not be as successful
KELLY: And this was the first time -- well, he got all As and one A minus.
ON SCREEN: Jackson age 11 THINKING: +105%
Average Thinking Improvement 4% in 5 hours
Anna age 10 SELF REGULATION: +200%
Average Self Regulation Improvement 12% in 5 hours
Zach age 11 SUSTAINED ATTENTION: +250%
Average Sustained Attention Improvement 14% in 5 hours
Chazz age 10 SELF REGULATION: +105% For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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EXHIBIT D

Average Self Regulation Improvement 12% in 5 hours

Isaac age 9 EMOTION: +305%

Average Emotional Improvement 28% in 5 hours

Tiffany age 11 EMOTION: +75%

Average Emotional Improvement 8% in 5 hours

Forrester age 10 THINKING: +95%

Average Thinking Improvement 4% in 5 hours

MALE ANNOUNCER: And seeing kids like yours succeed simply by playing this powerful innovative game is what motivates ifocus founder John Able.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: I've been driven completely by the thought that I'd help kids.

MALE ANNOUNCER: John has six children of his own, so parent to parent he knows the value of a product that can give your child an advantage.

ON SCREEN: John Able

Parent, ifocus Founder

JOHN ABLE: I call them -- I call them arrows in your quiver or tools in your toolbox. The more tools you have, the better parenting you can do.

MALE ANNOUNCER: And John wants every parent to experience the power of the ifocus Jungle Rangers Brain

Complaint

EXHIBIT D

Training System, so he's making you an incredible parent to parent promise.

ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
IMPROVE:
FOCUS
ATTENTION
MEMORY
SCHOOL WORK
SELF ESTEEM

MALE ANNOUNCER: Order now, put ifocus to the test in your own home. Take six months, yes, six full months to put the ifocus system to the test and truly discover its ultimate potential for you and your children or your money back.

JOHN ABLE: That's the kind of company we are. We're a human company. Very human. The fact that children's lives are changed is important to me.

ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE

MALE ANNOUNCER: And with his personal parent to parent promise, you have a money back guarantee. Your child will be --

Complaint

EXHIBIT D

ON SCREEN: Focused
On Task
Attentive
MALE ANNOUNCER: -- focused, on task, attentive or your money back.
ON SCREEN: Order Now
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
JUNGLE RANGERS
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: Order right now and try ifocus for only $14.95.
ON SCREEN: Product Information shown above
BRAIN TRAINING SYSTEM
MALE ANNOUNCER: We'll send you the ifocus Jungle Rangers Brain Training System --
ON SCREEN: Product Information shown above
FIGHT Summer Brain Drain
MALE ANNOUNCER: -- with everything your child needs to stay sharp and focused over the summer.
ON SCREEN: Product Information shown above
INCLUDES 9 JUNGLE RANGERS GAMES
GAME CD

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EXHIBIT D

MALE ANNOUNCER: Of course, you'll get the incredible Jungle Rangers game CD.

ON SCREEN: Product Information shown above

First 500 Orders

FREE BONUS

FREE

Science Behind the Game AUDIO CD

MALE ANNOUNCER: But the first 500 orders also receive this terrific bonus, an in-depth parent audio CD detailing the science behind the groundbreaking ifocus program.

ON SCREEN: Product Information shown above

FREE

There's More

Focus on Behavior

HANDBOOK + AUDIO CD

MALE ANNOUNCER: And there's more. Learn and recognize good and bad behavioral problems with this free Focus on Behavior handbook and accompanying audio CD.

ON SCREEN: Product Information shown above

FREE

Plus Additional BONUS EXTRAS!

MALE ANNOUNCER: Plus these additional Jungle Rangers extras, all at absolutely no extra cost.

Complaint

EXHIBIT D

EXHIBIT D

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ON SCREEN: Product Information shown above
PARENT DASHBOARD
MALE ANNOUNCER: And look at this, with our exclusive parent dashboard tracker, you'll be able to watch your child progress through all nine Jungle Rangers brain training games.
ON SCREEN: Production Information shown above
Taffie
Trista's Mom
PARENT'S DASHBOARD
MONITOR PROGRESS
TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.
ON SCREEN: Production Information shown above
Jennifer
Kaida's Mom
JENNIFER: It helps you be able to track what he's doing, his progress.
TAFFIE: And it tells you exactly what part of the game they've been playing and for how long.
ON SCREEN: CALL OR Click
TO ORDER NOW!
ifocus
$14.95 PLUS s&h For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

EXHIBIT D

30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW 1-800-624-0737 www.JungleRangers.com
Entire ifocus BRAIN TRAINING SYSTEM
MALE ANNOUNCER: Call or click to order now and we'll send you this entire system with everything you see here to simply try for a full month in your own home for just $14.95.
ON SCREEN: Product Information Shown Above
And It Gets Better!
CALL in the next 18 MINUTES!
FREE SHIPPING & HANDLING
MALE ANNOUNCER: And it gets even better. Order in the next 18 minutes and we'll ship this total and complete breakthrough system, including all the free extras and bonus items right to your door for free. That's right, absolutely free shipping and handling when you call and order right away.
ON SCREEN: Product Information Shown Above
Brandon Sportel
Teacher
BRANDON SPORTEL: I think it's important for my students to play Jungle Rangers over the summer so we keep those neurons firing.
ON SCREEN: Product Information Shown Above For

Complaint

EXHIBIT D

Kelly Arnold
Teacher
KELLY ARNOLD: I definitely think that using Jungle Rangers over the summer would be very beneficial for kids.
ON SCREEN: ifocus
$14.95 PLUS s&h
30 DAY TRIAL
EXCLUSIVE TV OFFER
NOT AVAILABLE IN STORES!
CALL NOW 1-800-624-0737 www.JungleRangers.com
MALE ANNOUNCER: The ifocus Jungle Rangers brain training system is not available in stores. It's only available online or through this exclusive television offer. So, call or click on JungleRangers.com. Make the commitment right now to help your child's brain stay sharp and alert over the summer.
ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
ifocus
$14.95 PLUS s&h
30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW 1-800-624-0737 www.JungleRangers.com

Complaint

EXHIBIT D

MALE ANNOUNCER: And, remember, with the ifocus system and our exclusive parent to parent promise, your child will be focused --

ON SCREEN: Production information shown above

Focus

Succeed

Order Now

MALE ANNOUNCER: -- on task and ready to succeed in the fall or your money back. Order right now.

ON SCREEN: ifocus

$14.95 PLUS s&h

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW 1-800-624-0737 www.JungleRangers.com

UNIDENTIFIED FEMALE: 100 percent recommend it.

CHILD: The best thing about Jungle Rangers is everything.

ON SCREEN: CALL or Click

TO ORDER NOW!

ifocus

$14.95 PLUS s&h

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW 1-800-624-0737 www.JungleRangers.com

MALE ANNOUNCER: Call 1-800-624-0737 for the

Complaint

EXHIBIT D

ifocus system. That's 1-800-624-0737. Call now, 1-800-624-0737.

ON SCREEN: IS YOUR CHILD READY TO LEARN?

MALE ANNOUNCER: Will your child be ready to learn when school starts again in the fall? Studies prove it.

ON SCREEN: child's brain shrink

students return to school after a long summer vacation, they've lost one to three months worth of learning.

MALE ANNOUNCER: Over the summer, kids become rusty. Their memory and attention muscles weaken.

ON SCREEN: BORED

DISTRACTED

DISRUPTIVE

MALE ANNOUNCER: That can mean they're bored in class, easily distracted and sometimes disruptive.

ON SCREEN: 1-800-624-0737

www.JungleRangers.com

TAFFIE: Every parent-teacher conference it's always --

ON SCREEN: Taffie 1-800-624-0737

Trista's Mom www.JungleRangers.com

TAFFIE: -- you know, she's a little chatterbox, we have a hard time keeping her in her seat.

Complaint

EXHIBIT D

ON SCREEN: Denise 1-800-624-0737
Seth's Mom www.JungleRangers.com
DENISE: Every single day I was getting calls from the teacher or he was getting sent to the office.
ON SCREEN: Gwen 1-800-624-0737
Carter's Grandmother www.JungleRangers.com
GWEN: Text messages about, you know, the classroom behaviors.
ON SCREEN: Robin Dury 1-800-624-0737
Teacher of the Year www.JungleRangers.com
ROBIN DURY: I see it, plain as day, those kids are so distracted that really keeps them behind, and the longer they go in school, the further behind they get.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: We knew that since teachers have a front row to students with summer attention and focus problems, they would be the toughest critics of the ifocus Jungle Rangers system. And we were right.
ON SCREEN: Robin Dury 1-800-624-0737
Teacher of the Year www.JungleRangers.com
ROBIN DURY: I had never heard of something that actually builds your focus.
ON SCREEN: Brandon Sportel 1-800-624-0737
Teacher www.JungleRangers.com

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BRANDON SPORTEL: My reaction was, can a video game do this?

MALE ANNOUNCER: So, we asked several elementary school teachers to incorporate the game into their weekly schedule --

ON SCREEN: Honest Feedback

1-800-624-0737

www.JungleRangers.com

MALE ANNOUNCER: -- and to give us their honest feedback about what they noticed.

ON SCREEN: Barbara Shaw 1-800-624-0737

Computer Teacher www.JungleRangers.com

BARBARA SHAW: I'm kind of shocked. I've been trying to talk to them a little bit, but I'm their distraction. So, they don't want to talk to me right now. They just want to focus on what they're doing.

ON SCREEN: Intense

FOCUS AND CONCENTRATION

MALE ANNOUNCER: That intense focus and concentration didn't end when the computers were turned off.

ON SCREEN: Positive Changes

MALE ANNOUNCER: Teachers quickly saw the positive changes Jungle Rangers made, even for the most distracted students.

Complaint

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ON SCREEN: 1-800-624-0737
www.JungleRangers.com
LAVONNE RIGGS: I have seen a vast improvement.
ON SCREEN: Lavonne Riggs 1-800-624-0737
Class is Motivated and Focus
www.JungleRangers.com
LAVONNE RIGGS: This class seems to be motivated and focused and the only thing we're doing differently is Jungle Rangers.
ON SCREEN: Kelly Arnold 1-800-624-0737
Definitely Recommend Jungle Rangers
www.JungleRangers.com
KELLY ARNOLD: I definitely recommend it. I've already recommended it to several teachers at my school and other parents.
ON SCREEN: Barbara Shaw 1-800-624-0737
Engaging Their Brains
www.JungleRangers.com
BARBARA SHAW: They're actually learning something and having to engage different parts of their brain, but they're having a good time doing it.
ON SCREEN: Focus Succeed
1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: And teachers say engaging For

Complaint

EXHIBIT D

different parts of the brain, making new connections is exactly what will help students to focus and succeed in the classroom, especially during those critical first few months of the school year when so many are already behind.

ON SCREEN: Lori Jensen 1-800-624-0737
Principal, 30 Years in Education
www.JungleRangers.com

LORI JENSEN: Because you can't really teach a child to think. Being able to use the Jungle Rangers and having the students actually learn how to think through a problem of how to make those choices and how to think for themselves.

ON SCREEN: Jane Marshall 1-800-624-0737
Teacher www.JungleRangers.com

JANE MARSHALL: And my observation of the program, from what I've seen, is that it is trying to create more branches in the brain for those higher level thinking skills.

ON SCREEN: HIGHER LEVEL THINKING SKILLS
THINK THROUGH PROBLEMS
FILTER OUT DISTRACTIONS
Focus
Absorb
Remember

Complaint

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MALE ANNOUNCER: Higher level thinking skills, the ability to think through a problem, to filter out distractions, focus on the task at hand, to absorb and remember important information.

ON SCREEN: Focus
AND MEMORY MUSCLES
1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: Kids who play Jungle Rangers flex their focus and memory muscle. That's a critical advantage, especially over the summer when so many students lose focus.

ON SCREEN: Kelly Arnold 1-800-624-0737
Teacher www.JungleRangers.com

KELLY ARNOLD: We want to continue to have them exercise their brain over the summer so that, you know, those neurons are continuing to fire so that when they start the school year next year, they're, you know, right where they left off.

ON SCREEN: 1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: And keeping their brain exercised, ready to learn is easy and fun --

ON SCREEN: Fun:
EASY GAME!

Complaint

EXHIBIT D

1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: -- with the Jungle Rangers game because, plain and simple, kids love playing it.
ON SCREEN: Kids Love
JUNGLE RANGERS
1-800-624-0737
www.JungleRangers.com
CHILD: You get to jump on logs.
CHILD: I'm talking to a man in a frog costume.
CHILD: I would play it every day.
CHILD: And I'm a trainee Jungle Ranger. This game is really fun.
CHILD: This is the funnest game on earth.
MALE ANNOUNCER: Kids love playing ifocus Jungle Rangers. Parents, teachers and even the kids love the results. It's one reason ifocus has partnered with the National PTA --
ON SCREEN: National Member Benefits Provider of PTA
MALE ANNOUNCER: -- to benefit its millions of parent and teacher members.
ON SCREEN: Kelly Arnold 1-800-624-0737
Teacher www.JungleRangers.com
KELLY ARNOLD: The PTA is a very big deal. For

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ON SCREEN: Robin Dury 1-800-624-0737
Teacher of the Year www.JungleRangers.com
ROBIN DURY: It really shows me, as a teacher, that, hey, this is a product that I would be really interested in looking at.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: From teachers who tried the ifocus Jungle Rangers system in their own classrooms to the parents who see the --
ON SCREEN: Incredible RESULTS
MALE ANNOUNCER: -- incredible results, we hear it over and over again.
ON SCREEN: Attentive
Focused
On Task
MALE ANNOUNCER: Kids who play Jungle Rangers are attentive, focused and able to stay on task. And, remember, it's that ability to stay focused that studies --
ON SCREEN: Self-regulation key to academic success
directly related to academic performance
MALE ANNOUNCER: -- say can be even more important than IQ when it comes to success in the

Complaint

EXHIBIT D

classroom.

ON SCREEN: Brandon Sportel
Jungle Rangers Makes a Difference
BRANDON SPORTEL: So, Jungle Rangers is really important because if we can even get 10, 15, 20, 25 more minutes out of a student attentive-wise and focus, that can make all the difference.
ON SCREEN: Jennifer 1-800-624-0737
Kaida's Mom www.JungleRangers.com
JENNIFER: I really didn't expect to see that big of a change that quickly.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
BRANDON SPORTEL: I did not expect the overwhelming response from the parents that this game made a difference in their kids' lives.
ON SCREEN: Alitza 1-800-624-0737
Issac's Mom www.JungleRangers.com
ALITZA: Oh, my gosh, this game is amazing, 100 percent recommend it. And he likes that, he enjoys it. And that's what makes me very happy.
ON SCREEN: Gwen 1-800-624-0737
Carter's Grandmother www.JungleRangers.com
GWEN: As a grandmother, yes, I would

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EXHIBIT D

definitely recommend Jungle Rangers to other parents.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
BRANDON SPORTEL: I'm totally convinced.
ON SCREEN: Carter 1-800-624-0737
I Concentrate More www.JungleRangers.com
CARTER: I kind of feel the same, just I concentrate more.
ON SCREEN: Cami 1-800-624-0737
I Focus More www.JungleRangers.com
CAMI: And I focus more on my homework.
ON SCREEN: C.J. 1-800-624-0737
You Just Remember www.JungleRangers.com
C.J.: And you just remember a bunch of things.
ON SCREEN: Nelson 1-800-624-0737
It Makes Your Brain Work www.JungleRangers.com
NELSON: It makes your brain work.
ON SCREEN: Lindsey 1-800-624-0737
It's Just Fun www.JungleRangers.com
LINDSEY: It's just fun.
ON SCREEN: This is a paid advertisement for the ifocus System
UNIDENTIFIED MALE: This is one thing that I'm very glad my wife and I decided to do. I think it's been beneficial for our boys. Thank you. That's about what I

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EXHIBIT D

want to say. Thank you for ifocus.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: Right now, through this extraordinary and exclusive offer, you can get the entire ifocus Jungle Rangers Brain Training System --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
INCLUDES 9 JUNGLE RANGERS GAMES
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: -- including all nine Jungle Rangers games. Find out for yourself how effective it really is by simply trying it for a full 30 days for just $14.95.
ON SCREEN: Order Now
ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER

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Entire ifocus BRAIN TRAINING SYSTEM
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: Order right now and we'll send you the ifocus Jungle Rangers brain training system --
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
FIGHT Summer Brain Drain
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: -- with everything your child needs to stay sharp and focused over the summer and ready to learn when school begins in the fall.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
JUNGLE RANGERS GAME CD
CALL NOW 1-800-624-0737 www.junglerangers.com
MALE ANNOUNCER: Of course, you'll get the Jungle Rangers Game CD.
ON SCREEN: Product Information shown above
First 500 Orders
FREE BONUS
FREE

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Science Behind the Game AUDIO CD
MALE ANNOUNCER: But the first 500 orders will also receive this important bonus, an in-depth parent audio CD detailing the science behind the groundbreaking ifocus program.
ON SCREEN: Product Information shown above
FREE
There's More
Focus on Behavior
HANDBOOK + AUDIO CD
MALE ANNOUNCER: And there's more. You'll learn to recognize good and bad behavioral problems with this free focus on behavior handbook and accompanying audio CD --
ON SCREEN: Product Information shown above
FREE
Plus Additional BONUS EXTRAS!
MALE ANNOUNCER: -- plus these additional Jungle Rangers extras all at absolutely no extra cost.
ON SCREEN: CALL OR Click
TO ORDER NOW!
ifocus
$14.95 PLUS s&h
30 DAY TRIAL
EXCLUSIVE TV OFFER For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

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CALL NOW 1-800-624-0737 www.JungleRangers.com
MALE ANNOUNCER: Call or click to order now and we'll send you this entire system with everything you see here to simply try for a full month in your own home for just $14.95.
ON SCREEN: Product Information Shown Above
And It Gets Better!
CALL in the next 18 MINUTES!
FREE SHIPPING & HANDLING
MALE ANNOUNCER: And it gets even better. Order in the next 10 minutes and we'll ship this total and complete breakthrough system, including all the free extras and bonus items, right to your door for free. That's right, absolutely free shipping and handling when you call and order right away.
ON SCREEN: Product information shown above
NOT AVAILABLE IN STORES!
MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System is not available in stores. It's only available online or through this exclusive television offer. Call or click on JungleRangers.com and make the commitment now --
ON SCREEN: Product information shown above
FIGHT Summer Brain Drain
MALE ANNOUNCER: -- to keep your child's brain

Complaint

EXHIBIT D

sharp and alert over the summer.

ON SCREEN: PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

ifocus

$14.95 PLUS s&h

30 DAY TRIAL

EXCLUSIVE TV OFFER

Focus

Succeed

CALL NOW 1-800-624-0737 www.JungleRangers.com

MALE ANNOUNCER: And, remember, with the ifocus system and our exclusive parent to parent promise, your child will be focused, on task and ready to succeed in the fall or your money back. Order now.

ON SCREEN: CALL or Click

PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

ifocus

$14.95 PLUS s&h

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW 1-800-624-0737 www.JungleRangers.com

MALE ANNOUNCER: Call 1-800-624-0737 for the

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EXHIBIT D

ifocus system. That's 1-800-624-0737. Call now, 1-800-624-0737.

MALE ANNOUNCER: Over the summer break --

ON SCREEN: CAN'T FOCUS

CAN'T PAY ATTENTION

MALE ANNOUNCER: -- school is the last thing on a kid's mind, and it literally does affect their brain. Their focusing muscles become rusty. It's harder for them to sit and pay attention.

ON SCREEN: SUMMER BRAIN DRAIN

MALE ANNOUNCER: Teachers call it the summer brain drain. They see it in kids who just can't seem to catch up after the summer break.

ON SCREEN: Brandon Sportel

Teacher

BRANDON SPORTEL: I think the toughest call that a teacher has to make to a parent is that their child is failing.

MALE ANNOUNCER: But, now, you can help ensure your child stays --

ON SCREEN: FIGHT

Summer Brain Drain

MALE ANNOUNCER: -- sharp and focused over the summer so once school begins in the fall, he or she is --

ON SCREEN: Alert

Complaint

EXHIBIT D

READY TO LEARN!

MALE ANNOUNCER: -- alert and ready to learn with the ifocus Jungle Rangers Brain Training System. Parents, teachers and experts love the ifocus approach, awarding it top honors from more than a dozen highly prestigious organizations.

BRANDON SPORTEL: Jungle Rangers did everything right.

DR. DANIEL AMEN: Here, we had developers, in a thoughtful way --

ON SCREEN: Daniel Amen, M.D.
ifocus Scientific Advisor
1-800-624-0737
www.JungleRangers.com

DR. DANIEL AMEN: -- develop a game to actually strengthen the connections in the brain.

ON SCREEN: 1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: Brain specialists and ifocus scientific advisor, Dr. Daniel Amen, is impressed with the way the ifocus system works. He saw results from kids who played Jungle Rangers for only a few hours.

DR. DANIEL AMEN: It's a very interesting term called "long-term potentiation." So, what that means is the connections between cells --

Complaint

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ON SCREEN: CONNECTIONS BECOME STRONGER
DR. DANIEL AMEN: -- actually become stronger.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: And when he studied a group of children before and after playing the Jungle Rangers game, Dr. Amen discovered a pattern. Jungle Rangers creates the kinds of measurable changes in the brain that are key to success.
ON SCREEN: SELF REGULATION: +25%
Anna age 10
Average Self Regulation Improvement 12% in 5 hours
DR. DANIEL AMEN: What we found was their ability to --
ON SCREEN: SELF REGULATION: +38%
Tiffany age 11
Average Self Regulation Improvement 12% in 5 hours
DR. DANIEL AMEN: -- regulate themselves, so self-regulation --
ON SCREEN: SELF REGULATION: +105%
Chazz age 10
Average Self Regulation Improvement 12% in 5 hours

Complaint

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DR. DANIEL AMEN: -- and emotion --
ON SCREEN: EMOTION: +25%
Jackson age 11
Average Emotional Improvement 28% in 5 hours
DR. DANIEL AMEN: -- statistically significantly, increased --
ON SCREEN: EMOTION: +29%
Zach age 11
Average Emotional Improvement 28% in 5 hours
DR. DANIEL AMEN: -- after the kids --
ON SCREEN: EMOTION: +350%
Isaac age 9
Average Emotional Improvement 28% in 5 hours
DR. DANIEL AMEN: -- played the game.
ON SCREEN: Self-Regulation Supports Student Learning and Achievement
MALE ANNOUNCER: And, remember, studies say it's self-regulation, not necessarily IQ, that helps ensure academic success.
ON SCREEN: Anna Individual Result
age 10 Your child may not be as successful.
ANNA: In school, I have noticed that I can focus better.
ON SCREEN: Kristin Individual Result
Anna's Mom Your child may not be as successful.

Complaint

EXHIBIT D

KRISTIN: We had the best parent-teacher conference that we've ever had.

ON SCREEN: 1-800-624-0737
www.JungleRangers.com

ANNA: I just notice a lot of improvement.

KRISTIN: I've been happy with the results. I've been happy with how she's felt about it.

ANNA: I have more confidence in myself.

ON SCREEN: Confidence
Improvement
Better Performance
1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: Confidence, improvement, better school performance. With the ifocus system, we hear it over and over again.

ON SCREEN: Science Fun
1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: This innovative combination of challenging fun and sophisticated science really does make a difference --

ON SCREEN: JUNGLE RANGERS
1-800-624-0737
www.JungleRangers.com

Complaint

EXHIBIT D

MALE ANNOUNCER: -- keeping young brains sharp and focused, especially over the summer when so many kids suffer --

ON SCREEN: SUMMER BRAIN DRAIN
1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: -- from summer brain drain.

Even so, pediatric nurse and mother of nine, Taffie Evans, was very skeptical about the ifocus Jungle Rangers system.

ON SCREEN: Taffie 1-800-624-0737
Trista's Mom www.JungleRangers.com

TAFFIE: I think video games are a waste of time. TV and video games, they just suck the life out of children.

ON SCREEN: 1-800-624-0737
www.JungleRangers.com

MALE ANNOUNCER: Her daughter Trista is a bubbly six-year-old who's very bright.

ON SCREEN: Trista 1-800-624-0737
age 6 www.JungleRangers.com

TRISTA: I'm good at math. I'm good at almost everything at school but spelling.

MALE ANNOUNCER: But Trista was having problems at school.

Complaint

EXHIBIT D

ON SCREEN: 1-800-624-0737
www.JungleRangers.com
TAFFIE: Every parent-teacher conference it's always, you know, she's a little chatterbox, we have a hard time keeping her in her seat.
MALE ANNOUNCER: That was before Trista started playing the ifocus Jungle Rangers game.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
TAFFIE: So, we went to this parent-teacher conference this last time. She said, I don't know what you're doing at home, but you need to keep it up because it's helping her.
MALE ANNOUNCER: Playing Jungle Rangers really has made a difference for Trista.
TAFFIE: I would recommend ifocus to anyone who's having trouble keeping their children's attention. Like I said before, I was completely skeptical.
ON SCREEN: Taffie 1-800-624-0737
Pediatric Nurse www.JungleRangers.com
TAFFIE: I honestly and truly did not think it was going to work for my children. And, now, I'm a believer.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com

Complaint

EXHIBIT D

TRISTA: It does help me pay attention.
ON SCREEN: Daniel Amen, M.D. 1-800-624-0737
Brain Imaging Specialist
www.JungleRangers.com
DR. DANIEL AMEN: So, I think any kid will benefit from this, and the reason I say that is I love the approach.
ON SCREEN: 1-800-624-0737
www.JungleRangers.com
DR. DANIEL AMEN: It's a brain training exercise. None of it's hard. I mean, that's sort of the exciting thing. None of it's hard. And it can give you a big benefit. And as a parent, you feel confident that --
ON SCREEN: This is a paid advertisement for the ifocus System.
DR. DANIEL AMEN: -- this is helping my child and not hurting my child.
ON SCREEN: Colleen
Michael and Nelson's Mom
COLLEEN: I could see the improvement in him.
ON SCREEN: Susan 1-800-624-0737
Forrester's Mom www.JungleRangers.com
SUSAN: Things come easier.
ON SCREEN: Kristin 1-800-624-0737

Complaint

EXHIBIT D

Anna's Mom www.JungleRangers.com
KRISTIN: She's been better at being a self-starter.
ON SCREEN: Connie 1-800-624-0737
Landon's Mom www.JungleRangers.com
CONNIE: He was able to follow directions a lot better.
ON SCREEN: Garth 1-800-624-0737
Zak and Zane's Dad www.JungleRangers.com
GARTH: The fact that he came home and wanted to do his homework.
ON SCREEN: Marissa 1-800-624-0737
Chazz's Mom www.JungleRangers.com
MARISSA: When I come home from work, his chores are done.
ON SCREEN: Adell 1-800-624-0737
Tiffany's Mom www.JungleRangers.com
ADELL: I definitely would recommend it.
ON SCREEN: You've Seen It
You've Heard It
Attentive Focused On Task
1-800-624-0737
www.JungleRangers.com
MALE ANNOUNCER: You've seen it, you've heard it. Kids who play Jungle Rangers are attentive, focused

Complaint

EXHIBIT D

and able to stay on task.

ON SCREEN: Research has shown self-regulation is far more important than IQ

MALE ANNOUNCER: And, remember, it's that ability to stay focused that studies say is even more important than IQ when it comes to success in the classroom. Don't wait another second to help ensure your child is focused and prepared to learn once school begins again in the fall.

ON SCREEN: Final Opportunity TO ORDER

MALE ANNOUNCER: This is your final opportunity to order the incredible ifocus Brain Training System, the brand new way to help --

ON SCREEN: FIGHT

Summer Brain Drain

MALE ANNOUNCER: -- fight summer brain drain. And it's as easy as having your child play a --

ON SCREEN: Fun

CHALLENGING COMPUTER GAME

MALE ANNOUNCER: -- fun, challenging computer game called Jungle Rangers. Kids love it.

ON SCREEN: JUNGLE RANGERS

GAME: Jungle Rangers.

ON SCREEN: FIRST TIME PLAYERS! JUNGLE RANGERS

CHILD: It is really fun.

Complaint

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CHILD: It's like a puzzle.
CHILD: It's fun.
CHILD: It's just an awesome game.
MALE ANNOUNCER: Imagine how you'll feel seeing your child focus and succeed simply by having fun.
ON SCREEN: JUNGLE RANGERS
EVERYONE E CONTENT RATED BY ESRB
Ages 6-12
MALE ANNOUNCER: Rated E for everyone and created especially for children aged 6 to 12, the ifocus Jungle Rangers system has won more than a dozen awards for its innovative approach and proudly partners --
ON SCREEN: National Member Benefits Provider of PTA
MALE ANNOUNCER: -- with the National PTA to benefit its millions of parent and teacher members.
ON SCREEN: Julie
Zach's Mom
JULIE: This is a great way to strengthen their brain which is their biggest asset in life.
MALE ANNOUNCER: Now, it's your turn to experience what thousands of families all over the country have already discovered with the award-winning innovative ifocus system.
UNIDENTIFIED FEMALE: I would say that it's a

Complaint

EXHIBIT D

game that gives you results.
ON SCREEN: Individual Result
Your child may not be as successful.
UNIDENTIFIED FEMALE: And this was the first time -- well, he got all As and one A minus.
ON SCREEN: Jackson age 11 THINKING: +105%
Average Thinking Improvement 4% in 5 hours
Anna age 10 SELF REGULATION: +200%
Average Self Regulation Improvement 12% in 5 hours
Zach age 11 SUSTAINED ATTENTION: +250%
Average Sustained Attention Improvement 14% in 5 hours
Chazz age 10 SELF REGULATION: +105%
Average Self Regulation Improvement 12% in 5 hours
Isaac age 9 EMOTION: +305%
Average Emotional Improvement 28% in 5 hours
Tiffany age 11 EMOTION: +75%
Average Emotional Improvement 8% in 5 hours
Forrester age 10 THINKING: +95%
Average Thinking Improvement 4% in 5 hours
MALE ANNOUNCER: And seeing kids like yours succeed simply by playing this powerful innovative game is what motivates ifocus founder John Able. For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

EXHIBIT D

ON SCREEN: John Able
Parent, ifocus Founder
JOHN ABLE: I've been driven completely by the thought that I'd help kids.
MALE ANNOUNCER: John has six children of his own, so parent to parent he knows the value of a product that can give your child an advantage.
ON SCREEN: John Able
Parent, ifocus Founder
JOHN ABLE: I call them -- I call them arrows in your quiver or tools in your toolbox. The more tools you have, the better parenting you can do.
MALE ANNOUNCER: And John wants every parent to experience the power of the ifocus Jungle Rangers Brain Training System, so he's making you an incredible parent to parent promise.
ON SCREEN: PARENT TO PARENT PROMISE
6 MONTHS
100% MONEY BACK GUARANTEE
IMPROVE:
FOCUS
ATTENTION
MEMORY
SCHOOL WORK
SELF ESTEEM

Complaint

EXHIBIT D

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MALE ANNOUNCER: Order now, put ifocus to the test in your own home. Take six months, yes, six full months to put the ifocus system to the test and truly discover its ultimate potential for you and your children or your money back.

JOHN ABLE: That's the kind of company we are. We're a human company. Very human. The fact that children's lives are changed is important to me.

ON SCREEN: PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

MALE ANNOUNCER: And with his personal parent to parent promise, you have a money back guarantee. Your child will be focused, on task, attentive or your money back.

ON SCREEN: Order Now

ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

BRAIN TRAINING SYSTEM

FIGHT

Summer Brain Drain

CALL NOW 1-800-624-0737 www.junglerangers.com

MALE ANNOUNCER: Order right now and try ifocus

Complaint

EXHIBIT D

for only $14.95. We'll send you the ifocus Jungle Rangers Brain Training System with everything your child needs to stay sharp and focused over the summer.

ON SCREEN: Product Information shown above

INCLUDES 9 JUNGLE RANGERS GAMES

GAME CD

MALE ANNOUNCER: Of course, you'll get the incredible Jungle Rangers game CD.

ON SCREEN: Product Information shown above

First 500 Orders

FREE BONUS

FREE

Science Behind the Game AUDIO CD

MALE ANNOUNCER: But the first 500 orders also receive this terrific bonus, an in-depth parent audio CD detailing the science behind the groundbreaking ifocus program.

ON SCREEN: Product Information shown above

FREE

There's More

Focus on Behavior

HANDBOOK + AUDIO CD

MALE ANNOUNCER: And there's more. Learn and recognize good and bad behavioral problems with this free Focus on Behavior handbook and accompanying audio CD.

Complaint

EXHIBIT D

ON SCREEN: Product Information shown above
FREE
Plus Additional BONUS EXTRAS!
MALE ANNOUNCER: Plus these additional Jungle Rangers extras, all at absolutely no extra cost.
ON SCREEN: Product Information shown above
PARENT DASHBOARD
MALE ANNOUNCER: And look at this, with our exclusive parent dashboard tracker, you'll be able to watch your child progress through all nine Jungle Rangers brain training games.
ON SCREEN: Production Information shown above
Taffie
Trista's Mom
PARENT'S DASHBOARD
MONITOR PROGRESS
TAFFIE: Well, the dashboard explains to the parent how much time they have spent in what -- in which areas.
ON SCREEN: Production Information shown above
Jennifer
Kaida's Mom
JENNIFER: It helps you be able to track what he's doing, his progress.
TAFFIE: And it tells you exactly what part of

Complaint

EXHIBIT D

the game they've been playing and for how long.

ON SCREEN: CALL OR Click

TO ORDER NOW!

ifocus

$14.95 PLUS s&h

30 DAY TRIAL

EXCLUSIVE TV OFFER

CALL NOW 1-800-624-0737 www.JungleRangers.com

Entire ifocus BRAIN TRAINING SYSTEM

MALE ANNOUNCER: Call or click to order now and we'll send you this entire system with everything you see here to simply try for a full month in your own home for just $14.95.

ON SCREEN: Product Information Shown Above

CALL in the next 6 MINUTES!

FREE SHIPPING & HANDLING

MALE ANNOUNCER: And it gets even better. Order in the next six minutes and we'll ship this total and complete breakthrough system, including all the free extras and bonus items right to your door for free. That's right, absolutely free shipping and handling, but only when you call and order right away.

ON SCREEN: Product Information Shown Above

Brandon Sportel

Teacher For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

EXHIBIT D

BRANDON SPORTEL: I think it's important for my students to play Jungle Rangers over the summer, so we keep those neurons firing.

ON SCREEN: Product Information Shown Above

Kelly Arnold

Teacher

KELLY ARNOLD: I definitely think that using Jungle Rangers over the summer would be very beneficial for kids.

ON SCREEN: ifocus

$14.95 PLUS S&H

30 DAY TRIAL

EXCLUSIVE TV OFFER

NOT AVAILABLE IN STORES!

CALL NOW 1-800-624-0737 www.junglerangers.com

MALE ANNOUNCER: The ifocus Jungle Rangers Brain Training System is not available in stores. It's only available online or through this exclusive television offer. So, call or click on Jungle Rangers.com. Make the commitment right now to help keep your child's brain sharp and alert over the summer.

ON SCREEN: Product information shown above

PARENT TO PARENT PROMISE

6 MONTHS

100% MONEY BACK GUARANTEE

Complaint

EXHIBIT D

Focus
Succeed
MALE ANNOUNCER: And, remember, with the ifocus system and our exclusive parent to parent promise, your child will be focused, on task and ready to succeed in the fall or your money back. Order right now.
ON SCREEN: ifocus
$14.95 PLUS S&H
30 DAY TRIAL
EXCLUSIVE TV OFFER
CALL NOW 1-800-624-0737 www.junglerangers.com
UNIDENTIFIED FEMALE: 100 percent recommend it.
CHILD: The best thing about Jungle Rangers is everything.
MALE ANNOUNCER: Call 1-800-624-0737 for the ifocus system. That's 1-800-624-0737. Call now, 1-800-624-0737.
ON SCREEN: The preceding was a paid presentation for the ifocus Jungle Rangers Brian Training System brought to you by Focus Education
MALE ANNOUNCER: The preceding has been a paid presentation for the ifocus Jungle Rangers Brain Training System, brought to you by Focus Education.
(The video was concluded.)

Complaint

EXHIBIT D

C E R T I F I C A T I O N O F T Y P I S T

MATTER NUMBER: 1223153
CASE TITLE: IFOCUS EDUCATION, LLC
TAPING DATE: JUNE 28, 2013
TRANSCRIPTION DATE: NOVEMBER 12, 2013

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: NOVEMBER 12, 2013

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

Complaint

EXHIBIT E

ifocus™ FAQ's

How do I know if this will work for my child?

Because it's based upon years of research, data, and experience from leading doctors and scientists in their fields of expertise. Because it's been tested by a nationally recognized specialist in Child Psychiatry and Brain Imaging. Because it's worked for so many children and helped so many families. All of that points to it improving the lives of children and families. ifocus truly provides a holistic approach to improving focus, attention, and memory in your child. And as a parent, you are free to get as involved with your child's improvement as you like. The game provides your child with a platform for improvement in focus, attention, and memory that they can do all on their own. But the additional materials are a great way for you, the parent, to get involved in your child's improvement through cognitive behavioral strategies, fitness programs, and nutritional guidelines—all geared toward helping your child FILTER, FOCUS, ABSORB, and REMEMBER.

Feel free to review some of our product testimonials here

Will I need to do this with my child?

As a parent, you can choose to get as involved as you would like, but even with minimal involvement, you will see positive results in your child's ability to focus, pay attention, and remember.

The Jungle Rangers computer game is a component of the ifocus system designed specifically for children to do on their own. Simply by playing the computer game, new pathways in their brain are being created so that results in your child's behavior will become obvious within a few weeks of playing. To see results within a few weeks, we recommend playing for at least 30 minutes a day, 5 days a week.

If you, as the parent, did want to get more involved, the additional materials in the ifocus system enable the parent to take a holistic approach to their child's improvement in focus and attention. These materials are like a toolbox for the parent so that you can enhance your child's improvement through cognitive behavioral strategies, fitness programs, and nutritional guidelines—all geared toward helping your child FILTER, FOCUS, ABSORB, and REMEMBER.

What if I don't see the results I want?

In case you do not see the results you want, we offer a deep and honest 6-month Parent-To-Parent Promise: Within 6 months you will (1) actually notice improvements in your child's behavior day-to-day and in their performance at school and (2) be able to measure their progress on our Jungle

EXHIBIT E (1)

Complaint

EXHIBIT E

Rangers Dashboard—or your money-back. We absolutely guarantee this product.

How long and how often should my child be playing Jungle Rangers?

The more time your child plays the more improvement you will see. Focus Education recommends at a minimum 20 minutes 3 times per week, but 30 minutes 5 times per week is better. The aim is for your child to receive at least 12 to 20 total hours to get the benefit of game play as it relates to their focus and attention. If they want to keep going after that, great, and there is about 45 hours of gameplay in Jungle Rangers. Of course, the game is designed so they can continue to play for many more hours to have additional gains in focus and attention, win additional trophies and garner further achievements. Although parts of the game can be a struggle, it is not always how well you do in each of the tasks but the amount of time, focus and attention your child has given to the tasks. You can track the hours of game play in the dashboard.

Will this help with ADD or AD/HD?

While the ifocus system can help any child improve their focus and attention, much of its design was based upon cognitive training for children with impairments including AD/HD, so it will be highly beneficial for them.

What about Austism, Asperger's, or other issues?

We have not tested the ifocus system on children with any issues beyond AD/HD, however we believe if your child has the ability to play a computer game, ifocus and Jungle Rangers is likely to benefit them.

What about Medications?

Focus Education does not take a position either for or against medications. The decision about medications for your child is something between your family and your doctor. The ifocus System and Jungle Rangers are not necessarily designed to replace medication.

Will my child's improvements from ifocus/Jungle Rangers last or will they fade?

Research shows that once neuro pathways have been opened or strengthened they do not recede unless there is either a disease or until the onset of issues later with aging.

What if the game is too easy for my child? Or what if the game is too difficult?

The game technology has been designed to automatically adjust itself to the level of difficulty at which the player can succeed and then slowly challenges the player to higher levels of focus and attention. To avoid frustration, the game will come back down to a lower level when necessary. Initially, it may take the game "brain" 10 to 30 minutes to learn the player and adjust to the appropriate level.

What is the purpose of the Dashboard?

The Dashboard keeps a record of how much time your child has played the game and tracks your child's results.

If you have already purchased the ifocus System, which includes the Jungle Rangers game, please refer to the pop-up information boxes and the About sections to learn more about each of the tasks reflected in the Dashboard. To visit the Dashboard, select "Dashboard" from the home screen of the Jungle Rangers game. If the game is already started, restart the game, select "Dashboard" with the arrows. Select the player with your mouse.

What if my child becomes frustrated because they are having difficulty progressing to different lands within the Jungle Rangers game?

Some children can experience some difficulty in moving on to different lands in the Jungle Rangers game if they have not played a sufficient amount of time in each game. This is completely normal, especially when a child is just starting out. If your child is becoming frustrated because they are unable to explore the different lands and new games, we have some suggestions.

In the first land of "Arboria" there are 3 games, each of which has time restrictions before the player can move on to the next land. "Big Rock," where the games become more interesting and a little more difficult. The land of "Spite Factory" continues this progression. The scale at the top of the game gives a rough idea of how close your child is to moving on to a new land.

If you go to the Dashboard, you will be given an exact count of how much time your child has played in each game and can figure out how much is left in each game. To visit the Dashboard, restart the game, select "Dashboard" with the arrows. Select the player with your mouse. The Dashboard will give you a total amount of time your child has played in each of the three games as well as each individual task.

In "Arboria" the time requirements are as follows:

Stump Jump (Span Task) requires a player to play a minimum of 45 minutes before moving on in the game.
Dasha's Dojo (N-back Task) requires a player to play a minimum of 30 minutes before moving on in the game.
Books Crooks (CPT) requires a player either complete the game with a high accuracy (90%) or spend a minimum of 30 minutes playing the game.

EXHIBIT E (2)

Complaint

EXHIBIT E

In "Big Rock" the time requirements are as follows:

Rock Hopper (Span Task) requires a player to play a minimum of 60 minutes before moving on in the game.
Headimoff Pass (CPT) requires a player either complete the game with a high accuracy (80%) or spend a minimum of 45 minutes playing the game.
Perch's Peak (N-back Task) requires a player to play a minimum of 45 minutes before moving on in the game.
In "Spite Factory" the time requirements are as follows:

Industrial Intrusion (Span Task) requires a player to play a minimum of 90 minutes before moving on in the game.
Conveyor Conflict (CPT) requires a player either complete the game with a high accuracy (70%) or spend a minimum of 45 minutes playing the game.
Dr. Bearhead's Office (N-back Task) requires a player to play a minimum of 90 minutes before moving on in the game.

What is a "Span Task"?

Working Memory Span Tasks require increasingly greater abilities to hold more information in mind during a short period of time and to be able to reorganize and manipulate that information as needed. Working memory has considerable effects on reading and mathematics skills.

More specifically, working memory (WM) refers to the process of temporary (short-term) storage and management of information. While similar to the idea of 'short-term memory', WM typically conveys an additional emphasis on the active manipulation of the information being held in mind. Similar to RAM memory in a computer (versus hard drive memory), this type of memory is important as it is felt to be important in activities such as guiding goal-directed thoughts or behaviors. WM is typically considered a 'limited capacity' specialized subsystem, distinct from actual perception, and with specific capacity for both visual and auditory information. Research models and studies point to the importance of WM for several cognitive abilities, including logical reasoning and problem-solving. Some researchers have suggested that WM is a bit like the 'gas' for the cognitive 'engine' required for many abilities. Research studies have found it to be crucial for school readiness and academic achievement (such as aspects of reading comprehension & mathematics). Likewise, many developmental and acquired disorders are associated with lower WM ability. Research suggests that improvements can be made in WM with specific cognitive exercises aiming to increase this important capacity. The 'span tasks' in Jungle Rangers provides such exercises to enhance WM. Improvements in WM have been related to increases in a number of abilities, including intellectual ability.

What is an "N-Back Task"?

N-Back tasks require sustained working memory use over a longer period of time than is typical in a Working Memory Task. It requires continuous attention to the task, ability to hold greater amounts of information in memory, and to continuously update the relevant information being maintained, while monitoring one's performance.

These tasks require that an individual monitor a number of stimuli (objects, sounds, places/positions) on a screen) and respond if the 'current' event in the sequence is the same as that which occurred 'n' (where 'n' is a number) before it. That is, for a 1-back task, if the event the same as the one that occurred just previously (1 before it), your child would respond (by hitting the space bar or up key). Likewise, on a 2-back task, if the event presented is the same as the one that occurred 2 events before it in the sequence, your child would respond. These n-back tasks place demands on your child's ability to hold the task-related information as well as continuously update it in their minds. Research suggests that training on these types of tasks increases both Working Memory abilities and attention skills.

What is a "CPT"?

Continuous Performance Tasks require a high level of attention and concentration. The task demands are to attend and respond to particular target objects, while ignoring other objects (distractors). Sustaining attention on this task is challenging for many children, especially those with attention issues.

Sustained attention is considered a primary element or component in current neuropsychological models of attention. Most people can easily relate to sustained attention as part of their everyday experience. For example, instructions from a parent or teacher to 'pay attention' are essentially efforts to get a child to sustain their attention to the task at hand. Sustained attention is influenced many things. First it requires some elementary processes of sensory selective attention, ability to remember the reason you are attending, and a level mental control. Selective attention depends on a relatively stable attentional capacity, enabling adequate focus over time. Attention training is based on the finding that attentional abilities can be improved by activating attention through a stimulus drill approach. The repeated stimulation of attentional systems via graded attention exercises appears to facilitate changes in attention capacity. Most attention training programs assume that aspects of cognition can be isolated and discretely targeted with training exercises including functions related to sustaining attention over time (vigilance), shifting attention, speed of processing, and screening out distractions. The CPT tasks in Jungle Rangers are exercises designed to increase your child's capacity to attend for greater and greater durations of time, to be less distracted by irrelevant information, and increase their reaction time and accuracy of response. The exercises are designed to require higher levels of attention, and to keep this high level of attention sustained for longer and longer periods of time during the game. Better performance is indicated by longer sustained durations of game play at higher accuracy rates.

Are there video instructions?

Yes. Every game begins with a video instruction, hosted by one of the Jungle Rangers. If your child needs to re-visit these instructions, they can be viewed multiple times in the Movie Theater located in the world of Arboria on the ground level.

What is the significance of the Map, and how do I review it?

At any point during the game, your child can use the "M" key on the keyboard to see which lands have been unlocked. This is also a fast and easy way to warp to the different worlds without having to walk through each of the worlds to get where you need to be. Each of the lands represents an exciting story-based platform for your child to complete different types of task-based challenges.

What is the significance of the Monkey Shrine (Trophy Room)?

EXHIBIT E (3)

Complaint

EXHIBIT E

As your child plays the game, he or she will unlock trophies that are held in the Monkey Shrine. Your child will be able to see what trophies have been won and which ones are left to conquer.

Does the game play from the CD or do I have to install anything?

The CD provided is the game installation CD. Once you have installed the components onto your computer, the game will be played from your computer, giving you optimal performance. However, the CD is required to be in the CD drive as the key to unlocking the ability to play the game, every time your child plays.

How do I install the game?

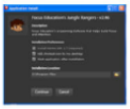
MAC or PC:

Quit or Exit all Programs

Insert the Jungle Rangers Game disc into the CD Drive

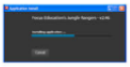
After a few moments, if the game does not automatically begin installing as shown above, please double-click your CD drive, then double-click on the "WIN" or "MAC" folder, then double-click on "Jungle Rangers Installer"

Click "Install" button.



Choose Preferences and Location or just click "Continue" button to let the game be installed in the default Programs folder.

Click "I Agree" button.



Game will begin installing.

When I put the disc in the computer, nothing happens.

If your computer has two disc drives, please make sure you have put the game in the CD drive and not the DVD drive.

Try opening up "My Computer" and finding the CD Drive. Confirm the drive says "Jungle Rangers Installation CD". Double click the CD. Then double-click the WIN folder. Find the red icon called Jungle Rangers Installer and double-click. This should begin the installation.

What are the minimum system requirements for the Jungle Rangers Game

PC: Intel Pentium 4 2 GHz or faster with 1 GB Ram

EXHIBIT E (4)

Complaint

EXHIBIT E

Operating System: Microsoft Windows XP Home, Professional, or Tablet PC edition with Service Pack 2 or 3 (including 64 bit editions), Windows Server 2003, Windows Vista Home Premium, Business, Ultimate, or Enterprise (including 64 bit editions) with Service Pack 1, or Windows 7 (including 64 bit editions)

Mac: Intel Core Duo 1.83GHz or faster with 1 GB Ram

Operating System: Mac OS 10.4, 10.5, 10.6 (Snow Leopard), or Mac OSX (Lion)

Can I install the game on multiple computers?

Yes, you can install the game on multiple computers, however, the CD is required to be in your CD drive in order to play the game. So, you may install it on a home computer and a laptop, for example, but the original CD must be in the computer that the game is being played on.

Is it possible to resize the game window to full screen?

Yes. If would like to resize the game window, or have the game in full screen, you can change your screen resolution in the computer. For Windows, please refer to your Control Panel for Display Properties. For Mac, please refer to your System Preferences.

Why do I get this Adobe Air Updater pop-up?

Every now and then, the game may pause and a message box will appear alerting you that an update to Adobe AIR is ready to be installed.

How many players can play Jungle Rangers at the same time?

Only one person can play Jungle Rangers at a time, but you can log up to 5 player profiles in the game, and keep their data in the dashboard in order to track each player's individual improvements. In order to add another player beyond 5, you will have to delete a player profile to add another.

Why did the program lock up during playing?

Jungle Rangers has been programmed to the highest standards of reliability, but occasionally computers just "get tired" or "confused" and any program can lock up.

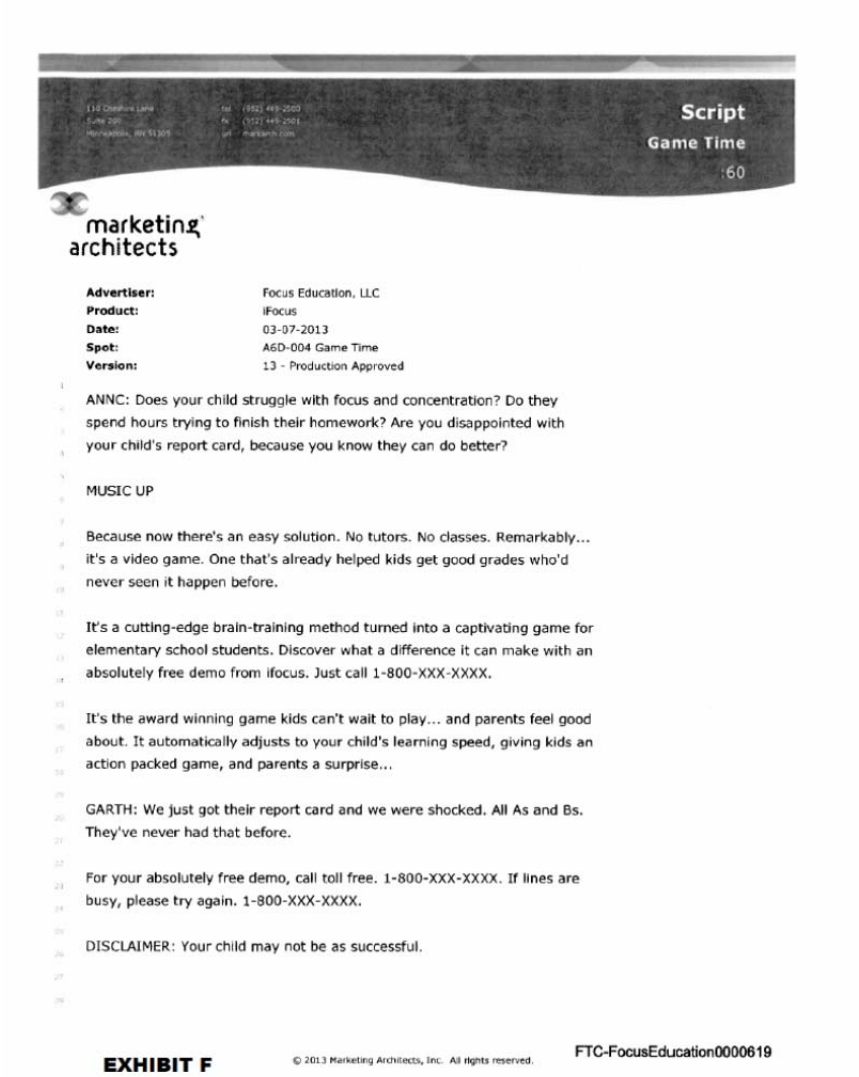
Press CONTROL+ALT+DELETE and a task manager window will appear. Find the Jungle Rangers program. If it says "not responding" then press "end task" to stop the program and clear the problem.

PS: This works for all programs when they lock up your computer!

Clear Distractions
Improve Memory
Absorb More Information
Develop Higher Levels of Focus & Attention

Complaint

EXHIBIT F



Script
Game Time
:60

marketing architects

Advertiser: Focus Education, LLC
Product: iFocus
Date: 03-07-2013
Spot: A6D-004 Game Time
Version: 13 - Production Approved

ANNC: Does your child struggle with focus and concentration? Do they spend hours trying to finish their homework? Are you disappointed with your child's report card, because you know they can do better?

MUSIC UP

Because now there's an easy solution. No tutors. No classes. Remarkably... it's a video game. One that's already helped kids get good grades who'd never seen it happen before.

It's a cutting-edge brain-training method turned into a captivating game for elementary school students. Discover what a difference it can make with an absolutely free demo from ifocus. Just call 1-800-XXX-XXXX.

It's the award winning game kids can't wait to play... and parents feel good about. It automatically adjusts to your child's learning speed, giving kids an action packed game, and parents a surprise...

GARTH: We just got their report card and we were shocked. All As and Bs. They've never had that before.

For your absolutely free demo, call toll free. 1-800-XXX-XXXX. If lines are busy, please try again. 1-800-XXX-XXXX.

DISCLAIMER: Your child may not be as successful.

EXHIBIT F

FTC-FocusEducation0000619

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement") that includes: a statement that the agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true; and waivers and other provisions as required by the Commission's Rules; and

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

1a. Respondent Focus Education, LLC ("Focus Education") is a Texas limited liability company with its principal office or place of business in Houston, Texas.

1b. Respondent Michael Apstein is the co-founder and Chief Executive Officer of Focus Education. Individually or in concert with others, he formulates,

directs, or controls the policies, acts, or practices of Focus Education.

1c. Respondent John Able is the co-founder and Chief Financial Officer of Focus Education. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Focus Education.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Focus Education, LLC, a limited liability company, its successors and assigns, and officers; Michael Apstein, individually and as an officer of Focus Education, LLC; John Able, individually and as an officer of Focus Education, LLC.

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

3. "Covered Product" shall mean any product, program, device, or service that purports to alter the brain's structure or function, improve cognitive abilities, behavior or academic performance, or treat or lessen the symptoms of cognitive abnormalities or disorders, including Attention Deficit Hyperactivity Disorder ("ADHD").

4. "ifocus System" means the Jungle Rangers computer software and any related kits, accessories, or supplies.

5. "Reliably Reported," for a human clinical test or study ("test"), means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

6. The term "including" in this order shall mean "without limitation."

7. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the ifocus System or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, illustration, or trademark, that such product or component thereof:

A. improves children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD; or

B. causes permanent improvements in children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD,

unless the representation is non-misleading and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence to substantiate that the representation is true.

For purposes of this Part, competent and reliable scientific evidence shall consist of human clinical testing of such product that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant field, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing shall be (1) randomized, double-blind, and adequately controlled; and (2) conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of such testing as described in Part IV must be available for inspection and production to the Commission.

II.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, illustration, or trademark, other than representations covered under Part I of this order, about the benefits, performance, or efficacy of any Covered Product, unless the representation is non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by qualified persons; (2) that are generally accepted in the profession to yield accurate and reliable results; and (3) as to which, when they are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as

relevant to an assessment of such testing as set forth in Part IV are available for inspection and production to the Commission.

III.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or that the benefits of any Covered Product are scientifically proven.

IV.

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which respondents rely to substantiate any claim covered by this order, respondents shall secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including, but not necessarily limited to:

A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;

B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;

C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source

documents for such data; any data dictionaries; and any case report forms;

D. All documents referring or relating to any statistical analysis of any test data, including, but not limited to, any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

Provided, however, the preceding preservation requirement shall not apply to a Reliably Reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by: (1) any respondent; (2) any respondent's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any respondent; (4) any person or entity affiliated with or acting on behalf of any respondent; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product.

For any test conducted, controlled, or sponsored, in whole or in part, by respondents, respondents must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures shall be documented in writing and shall contain administrative, technical, and physical safeguards appropriate to respondent Focus Education's size and complexity, the nature and scope of respondent Focus Education's activities, and the sensitivity of the personal information collected from or about the participants.

V.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

VI.

IT IS FURTHER ORDERED that respondents shall, for five (5) years, deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Acknowledgment by electronic mail or similar means will be deemed a signature for purposes of this order. Respondents shall deliver this order to current personnel within thirty (30) days after date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent Focus Education, LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address.

Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Focus Education, LLC, FTC File No. 122 3153.

VIII.

IT IS FURTHER ORDERED that respondents John Able and Michael Apstein, for a period of ten (10) years after the date of issuance of the order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment, which may affect their compliance obligations arising under this order. 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. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate reports.

X.

This order will terminate on April 8, 2035, or twenty (20) years from the most recent date that the United States or the

Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Focus Education, LLC ("Focus Education"), Chief Executive Officer, Michael Apstein, and Chief Financial Officer, John Able ("Respondents").

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

This matter involves Focus Education's advertising for the ifocus System, which included the Jungle Rangers computer game and comic book, and information on children's behavior, exercise, and diet. The Commission's complaint alleges that the Respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act by making false or unsubstantiated representations that playing the ifocus System's Jungle Rangers computer game improves children's focus, memory, attention, behavior, and/or school performance, including in children with ADHD, and that these improvements were permanent. The complaint also alleges that Respondents violated Sections 5(a) and 12 by making false representations that scientific studies prove these claims.

The proposed order includes injunctive relief that prohibits these alleged violations and fences in similar and related violations. For purposes of the order, "Covered Product" means any product, program, device, or service that purports to alter the brain's structure or function, improve cognitive abilities, behavior, or academic performance, or treat or lessen the symptoms of cognitive abnormalities or disorders, including ADHD.

Part I of the Order prohibits the Respondents from making any representation that the ifocus System or any substantially

similar product improves children's cognitive abilities, behavior, or academic performance, including in children with ADHD unless any such representation is non-misleading and the Respondents possess and rely upon competent and reliable scientific evidence. For purposes of this Part, competent and reliable scientific evidence is defined as "human clinical testing of such product that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant field, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing shall be (1) randomized, double-blind, and adequately controlled; and (2) conducted by researchers qualified by training and experience to conduct such testing." In addition, competent and reliable scientific evidence is subject to the preservation requirements set forth in Part IV.

Part II is a fencing-in provision. It prohibits the Respondents from making any claim about the benefits, performance, or efficacy of any Covered Product unless the claim is non-misleading and the Respondents possess competent and reliable scientific evidence that is sufficient in quality and quantity, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, Covered Product is defined as any product, program, device, or service that purports to alter the brain's structure or function, improve cognitive abilities, behavior, or academic performance, or treat or lessen the symptoms of cognitive abnormalities or disorders, including ADHD. Competent and reliable scientific evidence means "tests, analyses, research, or studies (1) that have been conducted and evaluated in an objective manner by qualified persons; (2) that are generally accepted in the profession to yield accurate and reliable results; and (3) as to which, when they are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth Part IV are available for inspection and production to the Commission."

Part III prohibits the Respondents from misrepresenting, in relation to the advertising of any Covered Product, (1) the results of any test, study, or research; or (2) that the benefits of any such Covered Product are scientifically proven.

Part IV requires the Respondents, for human clinical tests or studies, to secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test. There is an exception for a "Reliably Reported" test, defined as a test published in a peer-reviewed journal that was not conducted, controlled, or sponsored by Respondents, affiliates, or others in the manufacturing and supply chain. Also, the published report must provide sufficient information about the test for experts in the relevant field to assess the reliability of the results.

Part V contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through III of the order.

Parts VI through IX of the proposed order require Respondents to: deliver a copy of the order to principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure, discontinuance of current business or employment, or affiliation with any new business or employment that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part X provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

AMERIFREIGHT, INC. AND MARIUS LEHMANN

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

Docket No. C-4518; File No. 142 3249
Complaint, April 13, 2015 – Decision, April 13, 2015

This consent order addresses allegations that AmeriFreight, Inc. and Marius Lehmann, an officer for AmeriFreight (collectively "Respondents"), misrepresented their services to consumers. AmeriFright is an automobile shipment broker that arranges automobile shipments through third-party freight carriers. The complaint alleges that AmeriFreight misled consumers by posting online reviews of satisfied customers as unbiased, but failing to disclose that AmeriFreight compensated the reviewers with discounts and incentives. The consent order requires the Respondents to clearly and prominently disclose a material connection, if one exists, between the person providing the endorsement and Respondents, when using an endorsement to advertise any product or service.

Participants

For the *Commission: Victor DeFrancis.*

For the *Respondents: P. Justin Thraikill, Miller & Brown, P.C.*

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that AmeriFreight, Inc. and Marius Lehmann (collectively, "Respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent AmeriFreight, Inc. is a Georgia corporation with its principal office or place of business at 417 Dividend Drive #D, Peachtree City, GA 30269.

2. Respondent Marius Lehmann is the owner, officer, and principal shareholder of AmeriFreight, Inc. Individually or in concert with others, he controlled and participated in the acts and practices of AmeriFreight, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of AmeriFreight.

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

4. Respondents have advertised, offered for sale, and sold automobile shipment brokerage services to consumers. Specifically, Respondents arrange shipment of consumers' cars through third-party freight carriers.

5. Respondents claim, on the home page of AmeriFreight's website, www.amerifreight.net, that AmeriFreight has "more highly ranked ratings and reviews than any other company in the automobile transportation business." (Exhibit A).

6. Respondents provide potential customers with written price quotes that also refer to their online reviews:

> DON'T TRUST JUST ANYONE, ONLY TRUST THE BEST
> Google us "bbb top rated car shipping"
> You don't have to believe us, our customers say it all

(Exhibit B).

7. Respondents provide consumers with a discount of $50 off the cost of AmeriFreight's services (the "online review discount") if consumers agree to review AmeriFreight's services online. Respondents first disclose full written details regarding the online review discount by including them within the consumers' written sales quote and order confirmation form. If consumers do not want to review AmeriFreight's services, Respondents increase the cost of those services by $50:

> E [ ] I understand that the cost for shipping my vehicle already includes an INSTANT DISCOUNT of $50 based

> on my commitment to write a review on the independent website
> www.transport reviews.com within 7 days after vehicle delivery. If I fail to leave a review within 7 days from delivery of my vehicle, I agree to be billed an additional $50.
>
> F [ ] I prefer NOT to leave a review. I hereby confirm that an additional $50 will be added to my order as the rate in this order already includes the discounted rate.

(Exhibit C).

8. Respondents have provided consumers with written information entitled "Conditions for receiving a discount on reviews." In this document, Respondents inform consumers that if they leave an online review, they will be automatically entered into a $100 monthly "Best Monthly Review Award" for the most "creative 'Subject Title'" as well as "informative content." (Exhibit D).

9. After consumers' vehicles have been shipped, Respondents have contacted consumers via telephone and email to remind them of their obligation to complete their online reviews in order to receive the online review discount and qualify for the $100 "Best Monthly Review Award." Respondents' follow-up email correspondence states:

> You received an upfront discount because you promised to leave me at least 2 reviews. For me to close your order, I will need your assistance. Please read ALL the information below before leaving your reviews.
>
> Be sure to leave a creative subject line and informative content in your review for a good chance to get $100 cash back on your order.
>
> * * *
>
> [O]ver and above the discount you have already received, you also have an excellent chance to receive another $100 for leaving your review at transportreviews.com. Every

> month, the review with the most captivating subject line and best content will receive $100 . . . . So be creative and try to make your review stand out for viewers to read!

(Exhibit E) (emphasis in original).

10. Respondents have not directed consumers to disclose in their online reviews either that they have been compensated $50 to post an online review or that they are eligible to receive an additional $100 if Respondents select a consumer's review for the "Best Monthly Review Award."

11. Respondents have informed consumers that they "reserve the right to retrospectively bill a customer or charge the credit card on record in case a customer fails to leave the review" pursuant to their agreement. (Exhibit D).

12. A majority of the online reviews of AmeriFreight's services fail to disclose that the endorsers were compensated $50 to post the online review or that they were eligible to receive an additional $100 if selected for the "Best Monthly Review Award."

13. Through the means described in Paragraphs 5 through 12, Respondents have represented, directly or indirectly, expressly or by implication, that AmeriFreight's high ratings or top rankings are based upon the unbiased reviews of customers.

14. In truth and in fact, AmeriFreight's high ratings or top rankings are not based upon the unbiased reviews of customers. Respondents incentivize customers to post positive reviews through $50 discounts and chances to win an additional $100. Therefore, the representation set forth in Paragraph 13 was, and is, false or misleading.

15. Through the means described in Paragraphs 5 through 12, Respondents have represented, directly or indirectly, expressly or by implication, that customers who have posted online reviews of Respondents' automobile shipment brokerage services are satisfied users of those services who have voluntarily posted online reviews. Respondents have failed to disclose, or disclose adequately, that customers who have reviewed Respondents' services were compensated in connection with their endorsement,

and were offered incentives, such as possible additional monetary compensation, to provide an endorsement. These facts would be material to prospective consumer purchasers of Respondents' services. The failure to disclose this material information, in light of the representation made, was, and is, a deceptive practice.

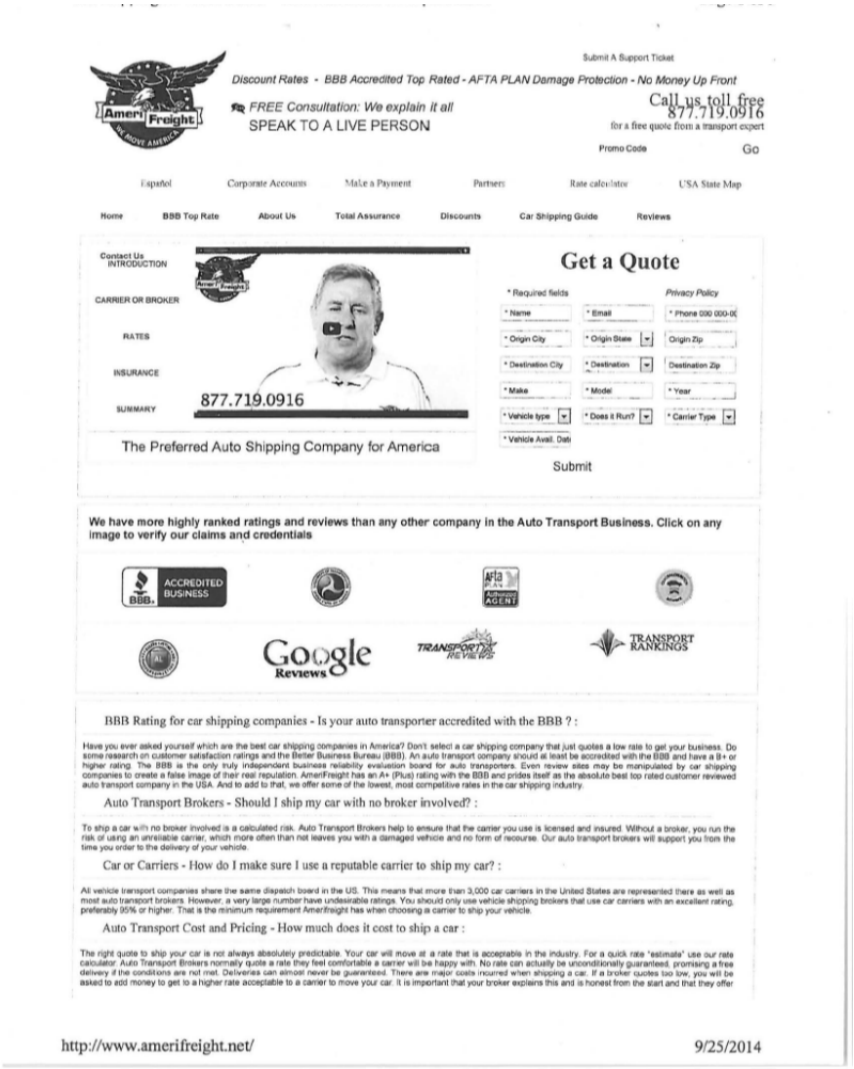
16. The acts and practices of Respondents as alleged in this Complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this thirteenth day of April, 2015, has issued this Complaint against respondents.

By the Commission.

Complaint

EXHIBIT A



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* Destination City | * Destination | Destination Zip
* Make | * Model | * Year
* Vehicle type | * Does it Run? | * Carrier Type
* Vehicle Avail. Date

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BBB Rating for car shipping companies - Is your auto transporter accredited with the BBB ? :

Have you ever asked yourself which are the best car shipping companies in America? Don't select a car shipping company that just quotes a low rate to get your business. Do some research on customer satisfaction ratings and the Better Business Bureau (BBB). An auto transport company should at least be accredited with the BBB and have a B+ or higher rating. The BBB is the only truly independent business reliability evaluation board for auto transporters. Even review sites may be manipulated by car shipping companies to create a false image of their real reputation. AmeriFreight has an A+ (Plus) rating with the BBB and prides itself as the absolute best top rated customer reviewed auto transport company in the USA. And to add to that, we offer some of the lowest, most competitive rates in the car shipping industry.

Auto Transport Brokers - Should I ship my car with no broker involved? :

To ship a car with no broker involved is a calculated risk. Auto Transport Brokers help to ensure that the carrier you use is licensed and insured. Without a broker, you run the risk of using an unreliable carrier, which more often than not leaves you with a damaged vehicle and no form of recourse. Our auto transport brokers will support you from the time you order to the delivery of your vehicle.

Car or Carriers - How do I make sure I use a reputable carrier to ship my car? :

All vehicle transport companies share the same dispatch board in the US. This means that more than 3,000 car carriers in the United States are represented there as well as most auto transport brokers. However, a very large number have undesirable ratings. You should only use vehicle shipping brokers that use car carriers with an excellent rating, preferably 95% or higher. That is the minimum requirement AmeriFreight has when choosing a carrier to ship your vehicle.

Auto Transport Cost and Pricing - How much does it cost to ship a car :

The right quote to ship your car is not always absolutely predictable. Your car will move at a rate that is acceptable in the industry. For a quick rate 'estimate' use our rate calculator. Auto Transport Brokers normally quote a rate they feel comfortable a carrier will be happy with. No rate can actually be unconditionally guaranteed, promising a free delivery if the conditions are not met. Deliveries can almost never be guaranteed. There are major costs incurred when shipping a car. If a broker quotes too low, you will be asked to add money to get to a higher rate acceptable to a carrier to move your car. It is important that your broker explains this and is honest from the start and that they offer

http://www.amerifreight.net/ 9/25/2014

Complaint

EXHIBIT B

9/8/2014 AmeriFreight Mail - AmeriFreight Car Shipping Quote for test test

AmeriFreight Car Shipping Quote for test test

AmeriFreight - Sondee <s.fong@amerifreight.net> Mon, Sep 8, 2014 at 8:20 AM
To: s.fong@amerifreight.net

Your Auto Transport Quote from AmeriFreight

Office hours - Mon - Fri: 9 am to 10 pm EST, Saturdays: 10 am to 5 pm EST

Phone: 770-486-1010

Your Economy Saver Quote from AmeriFreight

(Be sure to claim your $50 discount)

ASK YOUR AGENT ABOUT THE AFTA GAP COVERAGE PLAN FOR ABSOLUTE PEACE OF MIND WHEN SHIPPING YOUR VEHICLE
(The AFta PLAN is only offered by a select number of authorized transport companies)

DON'T TRUST JUST ANYONE, ONLY TRUST THE BEST
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We are the professionals. NO ONE compares
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"Such incredible service at such discounted rates? Unbelievable."
"The best part of AmeriFreight is that they provide a sort of 'security blanket' so that I don't get stuck with a terrible carrier with no one to help me out. Get the AFta insurance"
"AmeriFreight made an extra effort to ensure that I understood the process"
"Superior way to ship!"
"AmeriFreight Under Promised and Over Delivered!!!!"

(Click on any link below to verify our claims and view our credentials)
Top 5 STAR rated at www.transportreviews.com
Highest 5 STAR rated at www.transportrankings.com
Google review rating " Extraordinary to perfection "
A" rating with the BBB - AmeriFreight
"A+" rating with AFta Plan Gap Protection Authorized Agent
Highest Index at www.carmoversdirectory.com

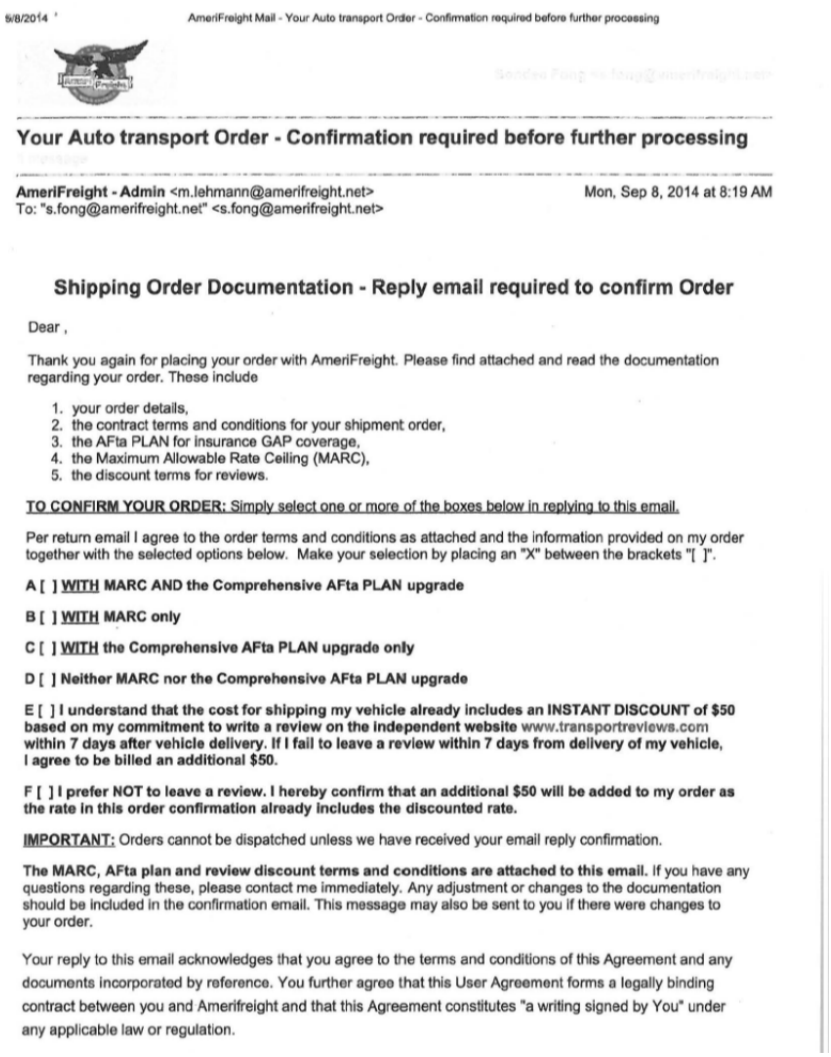
Please call your Shipping Agent, Sondee direct at 6786083120, to confirm or discuss your quote.

CUSTOMER DETAILS			
Customer Name	test	Quote Reference Number	940058417-HY
Origin City	Peachtree City	Destination City	Fayetteville
Origin State and zip	GA, 30269	Destination State and zip	GA, 30214
Phone #		Email	s.fong@amerifreight.net

https://mail.google.com/mail/u/0/?ui=2&ik=7c31230483&view=pt&search=inbox&th=1485535a4c34165d 1/2

Complaint

EXHIBIT C



5/8/2014 AmeriFreight Mail - Your Auto transport Order - Confirmation required before further processing

Your Auto transport Order - Confirmation required before further processing

AmeriFreight - Admin <m.lehmann@amerifreight.net> Mon, Sep 8, 2014 at 8:19 AM
To: "s.fong@amerifreight.net" <s.fong@amerifreight.net>

Shipping Order Documentation - Reply email required to confirm Order

Dear ,

Thank you again for placing your order with AmeriFreight. Please find attached and read the documentation regarding your order. These include

1. your order details,
2. the contract terms and conditions for your shipment order,
3. the AFta PLAN for insurance GAP coverage,
4. the Maximum Allowable Rate Ceiling (MARC),
5. the discount terms for reviews.

TO CONFIRM YOUR ORDER: Simply select one or more of the boxes below in replying to this email.

Per return email I agree to the order terms and conditions as attached and the information provided on my order together with the selected options below. Make your selection by placing an "X" between the brackets "[ ]".

A [ ] WITH MARC AND the Comprehensive AFta PLAN upgrade

B [ ] WITH MARC only

C [ ] WITH the Comprehensive AFta PLAN upgrade only

D [ ] Neither MARC nor the Comprehensive AFta PLAN upgrade

E [ ] I understand that the cost for shipping my vehicle already includes an INSTANT DISCOUNT of $50 based on my commitment to write a review on the independent website www.transportreviews.com **within 7 days after vehicle delivery. If I fail to leave a review within 7 days from delivery of my vehicle, I agree to be billed an additional $50.**

F [ ] I prefer NOT to leave a review. I hereby confirm that an additional $50 will be added to my order as the rate in this order confirmation already includes the discounted rate.

IMPORTANT: Orders cannot be dispatched unless we have received your email reply confirmation.

The MARC, AFta plan and review discount terms and conditions are attached to this email. If you have any questions regarding these, please contact me immediately. Any adjustment or changes to the documentation should be included in the confirmation email. This message may also be sent to you if there were changes to your order.

Your reply to this email acknowledges that you agree to the terms and conditions of this Agreement and any documents incorporated by reference. You further agree that this User Agreement forms a legally binding contract between you and Amerifreight and that this Agreement constitutes "a writing signed by You" under any applicable law or regulation.

Complaint

EXHIBIT D

Conditions for receiving a discount on reviews

AmeriFreight Customer option - E

I herby agree that I will leave a fair review on the service of AmeriFreight within seven days from delivery that will qualify me for receiving an instant discount of $50

- By accepting the option E " **I herby agree that I will leave a fair review on the service of AmeriFreight within seven days from delivery that will qualify me for receiving an instant discount of $50**" on the order reply email, customer agrees to leave a review upon which AmeriFreight will allow a discount to the amount of $50 on the total shipment amount. Customer agrees that s/he will ensure that the review is confirmed by responding by return email form the review website. Failing to do so will prevent the review to be made visible for public viewing and will not qualify as a posted review. Spam folders need to be searched if no confirmation email is received.
- A fair review implies that customer will base the review mainly on the services of AmeriFreight acting as an agent on behalf of customer to arrange and assign a carrier to ship the customer's vehicle. Errors and/or damage caused by carriers should not be considered in the review. Instead a seperate review can and should be left regarding the carrier's services in such a case. A fair review does not indicate that a customer is required to leave a positive only review.
- If customer leaves a review s/he will be entered into a $100 monthly "Best Monthly Review Award" competition for the most creative "Subject Title" for the review as well as informative content. Payment will be made within 90 days of the date on which the review was placed. AmeriFreight reserves the right to publish monthly reviews on the internet or for media use where needed to promote and advance our services to customers and visitors.
- The main purpose of a review is to assist AmeriFreight to receive honest feedback from the customer's shipping experience for quality improvement and provide visitors an objective report whereby they can make an informed decision to use our services or not.
- A review discount's purpose is to compensate customers for the time doing the review and doing business with AmeriFreight.
- The review discount will act as an additional discount to any other discount received such as student, first responders, senior citizens etc.
- It is expected that the customer will consciously and in good faith follow up on doing a review after the delivery of a vehicle. A link with the review site/s will be sent by a freight agent after the delivery was made. The review has to be done within 7 (seven) days after receipt of the delivery. Addional reviews at other sites will be much appreciated. Links are provided in the email.
- The final order amount that appears on the order form already includes the instant discount as agreed upon with the Freight Agent. Any additional increases in rates that may necessitate a timely shipment has no relevance to the discounts agreed upon prior to the acceptance of the order. Should customer decide to opt out from doing a review and the decision was made before the vehicle is dispatched the shipping rate will be increased by $50.00 and will be charged in addition to the deposit amount upon dispatch.
- AmeriFreight reserves the right to retrospectively bill a customer or charge the credit card on record in case a customer fails to leave the review within the terms of this agreement. It may also result in reporting a delinquincy to collection agencies for compensation if a customer defaults on this agreement.

Complaint

EXHIBIT E

9/8/2014 AmeriFreight Mail - AmeriFreight Order 940057333-JU. Delivery Confirmation Requirements

AmeriFreight Order 940057333-JU. Delivery Confirmation Requirements

AmeriFreight - Admin <m.lehmann@amerifreight.net> Mon, Sep 8, 2014 at 11:57 AM
To: "s.fong@amerifreight.net" <s.fong@amerifreight.net>

You received an upfront discount because you promised to leave me at least 2 reviews. For me to close your order, I will need your assistance.
Please read ALL the information below before leaving your reviews.

Be sure to leave a creative subject line and informative content in your review for a good chance to get $100 cash back on your order.

Dear ,

Thank you again for choosing AmeriFreight to transport your vehicle. It has been my pleasure assisting you through the process, and I hope that I was able to make your shipping experience as informative and smooth as possible.

During the review process, you will have the opportunity to rate from poor to excellent. I hope my performance have been of such that you can give me an excellent rating, especially the OVERALL rating. **An excellent overall rating will translate to 5 stars**. Anything less will reflect badly on my monthly performance review.

If the carrier that has shipped your vehicle did not deliver as promised, I would be grateful if you could rate them seperately. Even though we do take some responsibility in selecting the top 5% of all carriers, we sometimes have difculty in addressing issues with them, as they are a separate company and unforseen things do happen. That can be done on the same review website by searching for at http://transportreviews.com/company/. If the name is not found there, you can create the company name yourself.

Below are the instructions to leave your reviews. You will also have a chance to receive another $100 cash back. It is easy and very possible.
Please read the instructions carefully.

, over and above the discount you have already received, **you also have an excellent chance to receive another $100 for leaving your review at transportreviews.com. Every month**, the review with the **most captivating subject line and best content** will receive $100. This is not a lottery or lucky draw. You can win based on your originality of the title (subject) and content of your review. **So be creative and try to make your review stand out for viewers to read!** See our past reviews of the month here: http://www.amerifreight.net/customer-reviews

, as a reminder, **Reviews are my report cards.** If I get anything less than **excellent – 5 stars,** it will impact my performance for promotions and job retention severely. It is seldom that things go 100% all of the time. I know sometimes there may be small irritations, but I trust you will see past that in my overall performance. If you plan to leave anything less than excellent or 5 stars, please contact me to allow me the opportunity to try and fix where I fell short.

You can click on the following link to begin the review process:

http://transportreviews.com/addreview/survey.asp?intCompanyID=946

Your order number is: 940057333-JU

Please select at least one other options for posting a review. You are welcome to leave as many reviews at other sites as well.

1. Angie' List
2. Google reviews
3. Reviews on Yelp

We try to keep our standards high. Please trust us with the BBB with your Facebook or Twitter account.

Sincerely,

Admin
AmeriFreight
770 486 1010 ext 110
[u_email

This email message, and any attachments to it, may contain information that is proprietary, privileged, confidential and/or exempt from disclosure under applicable law. This communication is intended only for the use of the individual or entity to whom or which it is addressed. If you are not the intended recipient, you are hereby notified that disclosure, copying, distribution or the taking of any action in reliance on the contents of this communication is strictly prohibited and may be subject to legal restriction or sanction. If you have received this communication in error, please notify the sender immediately by reply email and delete or destroy all copies of this message and any accompanying documents.

We are open M-F 9am -10pm EST

Terms_for_Review_940057333-JU.html
5K

DECISION AND ORDER

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

The Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement") that includes: a statement that the agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true; and waivers and other provisions as required by the Commission's Rules; and

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

1a. Respondent AmeriFreight, Inc. ("AmeriFreight") is a Georgia corporation with its principal office or place of business at 417 Dividend Drive #D, Peachtree City, GA 30269.

1b. Respondent Marius Lehmann is an officer and director of the corporate Respondent, with his principal office or place of business at 417 Dividend Drive #D, Peachtree City, GA 30269.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondents" shall mean AmeriFreight, Inc., a corporation, its successors and assigns and its officers; Marius Lehmann, individually, and as an officer of the corporation; and each of the above's agents, representatives, and employees.

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

3. "Material connection" shall mean any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

4. "Endorsement" shall mean as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.

5. "Person" shall mean a natural person, an organization, or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

6. "Clearly and prominently" shall mean:

   a. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type,

size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

b. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

c. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax, and in the same language as the predominant language that is used in the communication, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

7. The term "including" in this order shall mean "without limitation."

8. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that such products or services are highly rated or top-ranked based on unbiased customers reviews or that their customer reviews are unbiased.

II.

IT IS ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, by means of an endorsement of such product or service, shall clearly and prominently disclose a material connection, if one exists, between the person providing the endorsement and Respondents.

III.

IT IS FURTHER ORDERED that Respondent AmeriFreight, and its successors and assigns, and Respondent Lehmann shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. Any documents that comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any endorsement made by Respondents, or on behalf of Respondents, and any responses to those complaints or inquiries;

C. 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 which in any way relate to the requirements, provisions, terms of this order, and all reports submitted to the Commission pursuant to this order;

D. Any documents that contradict, qualify, or call into question Respondents' compliance with this order; and

E. All acknowledgments of receipt of this order obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that Respondent AmeriFreight, and its successors and assigns, and Respondent Lehmann, for a period of ten (10) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each person a signed and dated statement acknowledging receipt of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that Respondent AmeriFreight, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or related entity 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, the Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line AmeriFreight, Inc., *et al.*, File No. 142-3249. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov

VI.

IT IS FURTHER ORDERED that Respondent Lehmann, for a period of five (5) 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 Lehmann's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line AmeriFreight, Inc. *et al.*, File No. 142-3249. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that Respondent AmeriFreight, and its successors and assigns, and Respondent Lehmann, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of

receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VIII.

This order will terminate on April 13, 2035, 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 Respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from AmeriFreight, Inc. ("AmeriFreight") and Marius Lehmann, an officer of AmeriFreight ("Respondents").

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

AmeriFreight is an automobile shipment broker – that is, it arranges shipment of consumers' automobiles through third-party freight carriers. This matter involves AmeriFreight's online advertising for those services. The Commission's complaint alleges that the Respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that AmeriFreight was a highly rated or top-ranked automobile shipment broker based on its customers' unbiased reviews. The complaint also alleges that AmeriFreight failed to disclose that it paid consumers to post reviews.

The proposed order includes injunctive relief that prohibits these alleged violations and fences in similar and related violations.

Part I of the Order prohibits the Respondents from misrepresenting that their products or services are highly rated or top-ranked based on unbiased customer reviews or that their customer reviews are unbiased.

Part II of the Order requires the Respondents, when using an endorsement to advertise any product or service, to clearly and prominently disclose a material connection, if one exists, between the person providing the endorsement and Respondents.

Part III contains recordkeeping requirements for advertisements and other documents relevant to the order.

Parts IV through VII of the proposed order require Respondents to: deliver a copy of the order to principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure, discontinuance of current business or employment, or affiliation with any new business or employment that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part VIII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

IMPAX LABORATORIES, INC., ROUNDTABLE HEALTHCARE PARTNERS II, L.P. AND TOWER HOLDINGS, INC.

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

Docket No. C-4511; File No. 151 0011
Complaint, March 5, 2015 – Decision, April 22, 2015

The consent order addresses the $700 million acquisition by Impax Laboratories of CorePharma LLC. The complaint alleges that the acquisition would substantially lessen the number of suppliers in the markets for generic pilocarpine and generic ursodiol tablets. Pilocarpine tablets are prescription drugs used to treat dry mouth, and generic ursodiol tablets are used to treat biliary cirrhosis. According to the complaint, there are currently only two suppliers in the market for generic pilocarpine tablets, and Impax and CorePharma are the only likely new entrants into this market in the near future. The complaint further alleges that the acquisition would reduce the number of suppliers for generic ursodiol tablets from four to three. As the generic ursodiol market has recently experienced supply shortages and CorePharma is one of a limited number of firms likely to enter the generic ursodiol market in the near future, the complaint alleges that acquisition would greatly diminish competition among generic ursodiol suppliers. Under the consent order, the parties are required to divest all of CorePharma's rights and assets to generic pilocarpine and ursodiol tablets to Perrigo Company plc ("Perrigo"). Additionally, the consent order requires Impax and CorePharma to provide transitional services and take all actions that are necessary for Perrigo to obtain FDA approval to manufacture and market generic pilocarpine and ursodiol tablets.

Participants

For the *Commission: Jennifer Lee, Christina Perez,* and *David Von Nirschl.*

For the *Respondents: William Diaz, Jon Dubrow*, and *Raymond A. Jacobsen, Jr., McDermott Will & Emery*; and *Ken Glazer* and *Marc E. Raven, Sidley Austin 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 Impax Laboratories, Inc. ("Impax"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Tower Holdings, Inc. ("Tower") and Lineage Therapeutics Inc. ("Lineage"), subsidiaries of Respondent RoundTable Healthcare Partners II, L.P. ("RoundTable"), all of which are corporations or partnerships 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 Impax is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters located at 30831 Huntwood Avenue, Hayward, California 94544.

2. Respondent RoundTable is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters located at 272 E. Deerpath Road, Suite #350, Lake Forest, Illinois 60045. Lineage, a subsidiary of Respondent RoundTable, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters located at 2 Walnut Grove Drive, Suite 190, Horsham, Pennsylvania 19044.

3. Respondent Tower is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters located at 215 Wood Avenue, Middlesex, New Jersey 08846. CorePharma, L.L.C. ("CorePharma"), a subsidiary of Respondent Tower, is a corporation organized, existing, and doing business under and by

virtue of the laws of the States of Delaware with its headquarters located at 215 Wood Avenue, Middlesex, New Jersey 08846.

4. 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

5. Pursuant to a Stock Purchase Agreement executed October 8, 2014, by and among Tower, Lineage, RoundTable and Impax, Impax proposes to acquire 100% of the outstanding voting securities of Tower and Lineage from RoundTable in a transaction valued at approximately $700 million (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following pharmaceutical products:

a. generic 5 mg pilocarpine hydrochloride tablets; and

b. generic ursodiol tablets.

7. 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

8. Generic pilocarpine is used to treat dry mouth. The market for generic 5 mg pilocarpine hydrochloride tablets is highly concentrated with only two current suppliers—Lannett Company, Inc. and Actavis plc. ("Actavis"). While neither Impax nor CorePharma is currently marketing the product, each holds an

approved Abbreviated New Drug Application ("ANDA") to market generic 5 mg pilocarpine hydrochloride tablets in the United States. Both companies are well positioned to enter the generic 5 mg pilocarpine hydrochloride market, sell the product, and are expected to enter the market in the near future. No other suppliers are expected to enter this market in time to prevent the competitive harm likely to result from the Acquisition.

9. Generic ursodiol tablets are used to treat primary biliary cirrhosis of the liver. Four firms—Impax, Actavis, Par Pharmaceutical Companies, Inc. and Glenmark Pharmaceuticals Limited—currently supply generic ursodiol tablets in this concentrated market. This market has recently experienced supply shortages that have created an imbalance between supply and demand. CorePharma is developing generic ursodiol, is one of a limited number of firms with an ANDA under review by the U.S. Food and Drug Administration ("FDA"), and is the next likely entrant to enter the market within the near future No suppliers, other than CorePharma, are expected to enter this market in time to prevent the competitive harm likely to result from the Acquisition. Thus, the Acquisition would likely reduce the number of future suppliers of generic ursodiol tablets from five to four.

V. ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 6 and 7 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be 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.

VI. EFFECTS OF THE ACQUISITION

11. 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

FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. By eliminating future competition between Impax and CorePharma in the market for generic 5 mg pilocarpine hydrochloride tablets, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of either Impax's or CorePharma's product; and (2) increasing the likelihood that the combined entity would delay, reduce, or eliminate the substantial additional price competition that would have resulted from both Impax and CorePharma supplying this product.

b. By eliminating future competition between Impax and CorePharma in the market for generic ursodiol, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of CorePharma's products; and (2) increasing the likelihood that the combined entity would delay, reduce, or eliminate the substantial additional price competition that would have resulted from an additional supplier of this product.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of March, 2015, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Impax Laboratories, Inc. ("Impax") of the voting securities of Respondent Tower Holdings, Inc. ("Tower") and Lineage Therapeutics, Inc. ("Lineage") from Respondent RoundTable Healthcare Partners II, LP ("RoundTable") (Impax, Tower, and RoundTable hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Impax is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 30831 Huntwood Avenue, Hayward, California 94544.

2. Respondent RoundTable is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 272 E. Deerpath Road, Suite 350, Lake Forest, Illinois 60045.

3. Respondent Tower is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 215 Wood Avenue, Middlesex, New Jersey 08846.

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

ORDER

I.

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

A. "Impax" means: Impax Laboratories, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Impax Laboratories, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Impax shall include Tower and Lineage.

B. "RoundTable" means: RoundTable Healthcare Partners II, L.P., its directors, officers, general

partners, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by RoundTable Healthcare Partners II, L.P, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Tower" means: Tower Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tower Holdings, Inc. (including, without limitation, CorePharma LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Impax, RoundTable, and Tower, individually and collectively; *provided however*, that from the later to occur of (i) the Closing Date, or (ii) the Acquisition Date, the term "Respondents" shall mean Impax and Tower, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or,

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

G. "Acquisition" means Respondent Impax's acquisition of, among other things, the voting securities of Tower

pursuant to a Stock Purchase Agreement dated October 8, 2014, by and among Tower, Lineage Therapeutics Inc., RoundTable, and Impax.

H. "Acquisition Date" means the date on which Respondents close on the Acquisition.

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 Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

J. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 *et seq*., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between a Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

K. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.

L. "Categorized Assets" means the following assets related to the Divestiture Product(s):

1. all rights to all of the Applications related to the Divestiture Product(s);

2. all Product Intellectual Property related to the Divestiture Product(s) that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the Divestiture Product(s);

4. all Product Manufacturing Technology related to the Divestiture Product(s) that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the Divestiture Product(s);

6. all Product Scientific and Regulatory Material related to the Divestiture Product(s);

7. all Website(s) owned, operated, or controlled by a Respondent related exclusively to the Divestiture Product(s);

8. the content related exclusively to the Divestiture Product(s) that is displayed on any Website owned, operated, or controlled by a Respondent that is not dedicated exclusively to the Divestiture Product(s);

9. a list of all of the NDC Numbers related to the Divestiture Product(s), and rights, to the extent permitted by Law:

    a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of the Divestiture Product(s) except for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;

b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) except for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and except as may be required by applicable Law;

c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondents of any such cross-referencing that is discovered by a Respondent);

d. to seek cross-referencing from a customer of the Respondents' NDC Numbers related to such Divestiture Product with the Acquirer's NDC Numbers related to such Divestiture Product;

e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product except for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and except as may be required by applicable Law and except as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and,

f. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondents prior to such notification(s) being disseminated to the customer(s);

10. all Product Development Reports related to the Divestiture Product(s);

11. at the option of the Acquirer of the Divestiture Product(s), all Product Assumed Contracts related to the Divestiture Product(s) (copies to be provided to that Acquirer on or before the Closing Date);

12. all patient registries related to the Divestiture Product(s), and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the Divestiture Product(s) (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. a list of all customers and targeted customers for the Divestiture Product(s) and a listing of the net sales (in either units or dollars) of the Divestiture Product(s) to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the Divestiture Product(s) on behalf of the High Volume Account and his or her business contact information;

14. for each Divestiture Product that is on the market as of the Closing Date:

    a. a list of the inventory levels (weeks of supply) for each customer (i.e., retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and,

    b. anticipated reorder dates for each customer as of the Closing Date;

15. at the option of the Acquirer of the Divestiture Product(s) 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 related to the Divestiture Product(s);

16. copies of all unfilled customer purchase orders for the Divestiture Product(s), if marketed, as of the Closing Date, to be provided to the Acquirer of the Divestiture Product(s) not later than five (5) days after the Closing Date;

17. at the option of the Acquirer of the Divestiture Product(s), all unfilled customer purchase orders for the Divestiture Product(s) if marketed; and,

18. all of the specified Respondent's books, records, and files directly related to the foregoing;

provided, however, that the term "Categorized Assets" excludes: (i) documents relating to any Respondent's general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with particularity the Divestiture Product(s); (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the Divestiture Product(s) by the Interim Monitor (if one is appointed) or the Acquirer of the Divestiture Products; (iv) information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, however, that, in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the Divestiture Product(s) and to the Retained Products or Businesses of any Respondent and cannot be

segregated in a manner that preserves the usefulness of the information as it relates to the Divestiture Product(s); 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 of the Divestiture Product(s), the Respondents 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 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 the Retained Products.

M. "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.

N. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

O. "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 Divestiture Product Assets to an Acquirer pursuant to this Order.

P. "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 Divestiture 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 Divestiture Product(s);

2. information specifically excluded from the Divestiture Product Assets conveyed to that Acquirer;

3. 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 Divestiture Product(s) or that is exclusively related to the Retained Products; and,

4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

Q. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

R. "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 an Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee; *provided, however,* that, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

S. "Divestiture Product(s)" means the Ursodiol Products and the Pilocarpine Products, individually and collectively.

T. "Divestiture Product Assets" means the Ursodiol Product Assets and the Pilocarpine Product Assets, individually and collectively.

U. "Divestiture Product Divestiture Agreement(s)" means the following: the Asset Purchase Agreement by and among, Impax Laboratories, Inc., and Elan Pharma International Ltd., dated as of February 13, 2015, and all amendments, exhibits, attachments, agreements, and schedules related thereto. This agreement is contained in Non-Public Appendix I.

V. "Divestiture 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 Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by the Respondent specified in the definition of the particular Divestiture Product(s):

1. to research and Develop the Divestiture Products for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Divestiture Products within the Geographic Territory;

3. to import or export the Divestiture Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the Divestiture Products in the Geographic Territory; and,

4. to have the Divestiture Products made anywhere in the world for distribution or sale within, or import into the Geographic Territory;

provided, however, that, for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by a Respondent specified in the definition of the particular Divestiture Product(s) 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.

W. "Divestiture Product Releasee(s)" means the following Persons:

1. the Acquirer for the assets related to a particular Divestiture Product;

2. any Person controlled by or under common control with that Acquirer; and,

3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Divestiture Products.

X. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

Y. "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. The term "Domain Name" excludes any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

Z. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

AA. "Elan" means Elan Pharma International Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Ireland, with its headquarters address located at Treasury Building, Lower Grand Canal Street, Dublin, Ireland. Elan Pharma International Ltd. includes Perrigo Co., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its business address located at 515 Eastern Avenue, Allegan, Michigan 19010.

BB. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

CC. "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.

DD. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the Geographic Territory from a Respondent was, or is projected to be, among the top twenty highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the

proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date; or (iv) the end of the last quarter following the Acquisition Date or the Closing Date.

EE. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

FF. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

GG. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

HH. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

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

JJ. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

KK. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

LL. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (except where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-

part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

MM. "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.

NN. "Pilocarpine Product(s)" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Tower (CorePharma LLC) pursuant to ANDA No. 076746, and any supplements, amendments, or revisions to that Application.

OO. "Pilocarpine Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Respondent Tower (CorePharma LLC) related to each of the Pilocarpine Products, to the extent legally transferable, including, without limitation, the Categorized Assets, as such assets and rights are in existence as of the date the Respondents sign the Agreement Containing Consent Orders in this matter and as are required to be maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date.

PP. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

QQ. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing,

packaging, marketing, sale, storage or transport of a Product within the Geographic Territory, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

RR. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer of the particular Divestiture Product(s) on or before the Closing Date for the particular assets related to such Divestiture Product(s) and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to any Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, any Divestiture Product from a Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of any Divestiture Product;

3. relating to any Clinical Trials involving any Divestiture Product;

4. with universities or other research institutions for the use of any Divestiture Product in scientific research;

5. relating to the particularized marketing of any Divestiture Product or educational matters relating solely to any Divestiture Product(s);

6. pursuant to which a Third Party manufactures any Divestiture Product on behalf of the Respondent;

7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of any Divestiture Product on behalf of the Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Divestiture Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the Divestiture Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the Divestiture Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Product to the Respondent including, but not limited to, consultation arrangements; and/or,

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the Divestiture Product or the Business related to such Divestiture Product;

provided, however, that, where any such contract or agreement also relates to a Retained Product(s), the Respondent shall assign the Acquirer of the particular Divestiture Product(s) all such rights under the contract or agreement as are related to the Divestiture Product(s) acquired by that Acquirer, but concurrently

may retain similar rights for the purposes of the Retained Product(s).

SS. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Divestiture Product or of any materials used in the research, Development, manufacture, marketing or sale of that Divestiture Product, including all copyrights in raw data relating to Clinical Trials of that 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, that Divestiture Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law) in connection with the acquisition of that Divestiture Product; 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 or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse

experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

TT. "Product Development Reports" means:

1. Pharmacokinetic study reports related to any Divestiture Product;

2. Bioavailability study reports (including reference listed drug information) related to any Divestiture Product;

3. Bioequivalence study reports (including reference listed drug information) related to any Divestiture Product;

4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to any Divestiture Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to any Divestiture Product;

7. currently used or planned product package inserts (including historical change of controls summaries) related to any Divestiture Product;

8. FDA approved patient circulars and information related to any Divestiture Product;

9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to any Divestiture Product;

10. summary of Product complaints from physicians related to any Divestiture Product;

11. summary of Product complaints from customers related to any Divestiture Product;

12. Product recall reports filed with the FDA related to any Divestiture Product, and all reports, studies and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities found in any Divestiture Product;

14. reports related to any Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce any Divestiture Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of any Divestiture Product;

16. analytical methods development records related to any Divestiture Product;

17. manufacturing batch records related to any Divestiture Product;

18. stability testing records related to any Divestiture Product;

19. change in control history related to any Divestiture Product; and

20. executed validation and qualification protocols and reports related to any Divestiture Product.

UU. "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;

4. Product Trade Dress;

5. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and,

6. rights to obtain and file for patents, trademarks, and copyrights and registrations related to any of the foregoing 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.

The term "Product Intellectual Property" excludes the corporate names or corporate trade dress of "Impax," "RoundTable," "Tower," "Lineage" or "CorePharma" or the related corporate or partnership logos thereof, or the corporate or partnership names or corporate or partnership trade dress of any other corporations, partnerships, or companies owned or controlled by any Respondent or the related corporate or partnership logos thereof, or general registered images or symbols by which Impax, RoundTable, Tower, Lineage or CorePharma, can be identified or defined.

VV. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to a Divestiture Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not

discontinued) NDA or ANDA 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 Divestiture Product and that the Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued) NDA or ANDA as of the Acquisition Date; and

3. for any Divestiture Product that is the subject of an ANDA, all Right(s) of Reference or Use that is either owned or controlled by, or has been granted or licensed to the Respondent that is related to the Drug Master File of an NDA of a Product that is the therapeutic equivalent (as that term is defined by the FDA) of any Divestiture Product.

WW. "Product Manufacturing Technology" means all of the following related to a Divestiture Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information

related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third Party for the particular Divestiture Product, at the Acquirer's (of the particular Divestiture Product(s)) option, all such equipment used to manufacture that Product.

XX. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of any Divestiture Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to any Divestiture Product.

YY. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

ZZ. "Product Trade Dress" means the current trade dress of a Product, including, but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

AAA. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

BBB. "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.

CCC. "Remedial Agreement(s)" means the following:

1. a Divestiture Product Divestiture Agreement; and/or

2. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order.

DDD. "Retained Product" means any Product(s) other than a Divestiture Product.

EEE. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application or to defend an Application, including the ability to make available the underlying raw data from the investigation for an FDA audit.

FFF. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, inter alia,

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer of those Divestiture Product(s) or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to any Divestiture Product that are acceptable to that 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 that Acquirer or its Manufacturing Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer of the particular Divestiture Product(s) or its Manufacturing Designee to:

   a. manufacture such Divestiture Product(s) in the quality and quantities achieved or planned to be achieved by the Respondent (as that Respondent is specified in the definition of the particular Divestiture Product(s)), or the manufacturer and/or developer of such Divestiture Product;

   b. obtain any Product Approvals necessary for that Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell any Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and,

   c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to any Divestiture Product.

GGG. "Third Party(ies)" means any non-governmental Person other than the following: the Respondents; or, the Acquirer of particular assets or rights pursuant to this Order.

HHH. "Ursodiol Product(s)" means the following: the Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Tower (CorePharma LLC) pursuant to ANDA No. 203439, and any supplements, amendments, or revisions to that Application.

III. "Ursodiol Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Respondent Tower (CorePharma LLC) related to each of the Ursodiol Products, to the extent legally transferable, including,

without limitation, the Categorized Assets, as such assets and rights are in existence as of the date the Respondents sign the Agreement Containing Consent Orders in this matter and as are required to be maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date.

JJJ. "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. The term "Website" excludes the following: (i) 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 (ii) content unrelated to any of the Divestiture Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to Elan pursuant to, and in accordance with, the Divestiture Product Divestiture 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 Elan or to reduce any obligations of Respondents under such agreements), and such agreement, if it becomes a Remedial Agreement related to the Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that, if Respondents have divested the Divestiture Product Assets to Elan 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 Elan is not an acceptable purchaser of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Elan, in whole or in part, as directed by the Commission, and shall divest the Divestiture Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that, if Respondents have divested the Divestiture Product Assets to Elan 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 Divestiture Product Assets to Elan (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 for the particular assets related to a Divestiture Product required to be divested pursuant to this Order, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest such assets to an Acquirer, and to permit that Acquirer to continue the Business related to the Divestiture Products;

provided, however, that Respondents may satisfy this requirement by certifying that the particular Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. Respondents shall:

1. submit to the Acquirer of the Divestiture Product(s), at Respondents' expense, all Confidential Business Information related to the Divestiture Product(s);

2. deliver all Confidential Business Information related to the Divestiture Product(s) 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, upon reasonable written notice and request, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products being acquired by that Acquirer 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 applicable Remedial Agreement; or,

   c. applicable Law;

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

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information that is exclusively related to the marketing or sales of the Divestiture Product(s) to the marketing or sales employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

7. institute procedures and requirements to ensure that the employees of each Respondent:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and,

   b. do not solicit, access or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose.

D. Respondents shall provide, or cause to be provided to each Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and,

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is

owned by a Third Party and licensed to any Respondent related to such Divestiture Product(s).

Respondents shall obtain all consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to the relevant Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

E. At the Acquirer's option, for a period of up to two (2) years following the Closing Date, Respondents shall provide technical assistance as set forth in the Technology Transfer Standards.

F. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information 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. 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 maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's

certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. At the request of an Acquirer, Respondents shall provide the requesting Acquirer with copies of all certifications sent to the Commission and all notifications and reminders sent to Respondents' personnel related to the Divestiture Assets acquired by that Acquirer.

G. For a period of one (1) year from the Closing Date, Respondents shall not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer of the Divestiture Product(s) or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with that Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

provided, however, that Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

H. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to the Divestiture Product(s) to an Acquirer,

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses related to that Divestiture Product;

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

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

   d. ensure the assets related to each Divestiture Product are provided to that Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business related to each Divestiture Product;

   e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and,

2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses related to that Divestiture Product.

I. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof; and/or,

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Products acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Products acquired by that Acquirer. Each Respondent shall also covenant to that Acquirer that, as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Products acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Products acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

J. 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 the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property, 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 Products acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Products acquired by that Acquirer.

K. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date related to particular Divestiture Product(s), and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Products acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Products acquired by that Acquirer, that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any

pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and/or,

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of that Respondent's outside counsel related to that Divestiture Product.

L. The purpose of the divestiture of the Divestiture Product 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 related to each Divestiture Product within the Geographic Territory;

2. to create a viable and effective competitor that is independent of Respondent Impax, and Tower in the Business related to each Divestiture Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

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

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing

Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product, until the earliest of: (i) the date the Acquirer of such Divestiture Product (or the Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture that Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents Impax, and Tower; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Divestiture Product; or (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from the Order Date 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 Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such

reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however*, that, beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph VII.B., and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in

commercial quantities, in a manner consistent with cGMP, independently of Respondents Impax and Tower.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

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

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Product

Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to 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 can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however,* that 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. 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 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,* that, 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 Interim 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 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 or access original documents provided to an Acquirer, except under circumstances where redacted documents or copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure such Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention

requirement of any applicable Government Entity, or any taxation requirements; or

B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

provided, however, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, however, that, pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if the 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 Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. Unless otherwise determined by the Commission, the Divestiture Product Divestiture Agreement shall become a Remedial Agreement on the Order Date.

E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any 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 to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the Order Date, and (i) every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A. through II.D., and (ii) every one hundred twenty (120) days thereafter until Respondents have fully complied with Paragraph II.E., Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondents shall submit at the same time a

copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with 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, and (ii) transitional services being provided by the Respondents to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at 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 Respondents shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of a Respondent;

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

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of 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 the 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 this Order shall terminate on April 22, 2025.

By the Commission.

NON-PUBLIC APPENDIX I
AGREEMENTS RELATED TO THE DIVESTITURES

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Impax Laboratories, Inc. ("Impax") of the voting securities of Respondent Tower Holdings, Inc. ("Tower") and Lineage Therapeutics, Inc. ("Lineage") from Respondent RoundTable Healthcare Partners II, LP ("RoundTable") (Impax, Tower, and RoundTable hereinafter collectively referred to as "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Impax is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 30831 Huntwood Avenue, Hayward, California 94544.

2. Respondent RoundTable is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 272 E. Deerpath Road, Suite 350, Lake Forest, Illinois 60045.

3. Respondent Tower is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 215 Wood Avenue, Middlesex, New Jersey 08846.

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

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and, when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Impax" means: Impax Laboratories, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Impax Laboratories, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Impax shall include Tower and Lineage.

B. "RoundTable" means: RoundTable Healthcare Partners II, L.P., its directors, officers, general partners, employees, agents, representatives, successors, and assigns; and its joint ventures,

subsidiaries, divisions, groups and affiliates in each case controlled by RoundTable Healthcare Partners II, L.P., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Tower" means: Tower Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tower Holdings, Inc. (including, without limitation, CorePharma LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Impax, RoundTable, and Tower, individually and collectively; *provided however*, that from the later to occur of (i) the Closing Date, or (ii) the Acquisition Date, the term "Respondents" shall mean Impax and Tower, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Decision and Order" means the:

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

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

G. "Divestiture Product Assets" means the Ursodiol Product Assets and the Pilocarpine Product Assets, individually and collectively.

H. "Divestiture Product Business(es)" means the Business of the Respondent (as that Respondent is specified in the particular definition of the Divestiture Product)

within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by that Respondent and the Divestiture Product Assets related to such Business to the extent such Divestiture Product Assets are owned by, controlled by, managed by, or licensed to, that Respondent.

I. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

J. "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 the Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.

B. Until Respondents fully transfer and deliver the Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the

related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the full economic marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets 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 by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets 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 Products for the relevant Divestiture Product's last fiscal year.

D. Pending divestiture of the Divestiture Product Assets, Respondents shall:

1. not use, directly or indirectly, any 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;

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 such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information that is exclusively related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

4. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and,

   b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. 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 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.

F. 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 maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. At the request of an Acquirer,

Respondents shall provide the requesting Acquirer with copies of all certifications sent to the Commission and all notifications and reminders sent to Respondents' personnel related to the Divestiture Assets acquired by that Acquirer.

G. Respondents 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.

H. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor

within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product, until the earliest of: (i) the date the Acquirer (or the Acquirer's Manufacturing Designee(s)) is approved by the

FDA to manufacture that Divestiture Product and able to manufacture that Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Divestiture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date 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 Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other

representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided, however,* that, beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and Order, and one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

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

M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are

complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by the Respondents 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 at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

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

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

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Impax Laboratories, Inc. ("Impax") that is designed to remedy the anticompetitive effects resulting from Impax's acquisition of Tower Holdings, Inc. ("Tower") and Lineage Therapeutics, Inc. ("Lineage") from RoundTable Healthcare Partners II, L.P. ("RoundTable"). As part of that transaction, Impax will acquire CorePharma, L.L.C. ("CorePharma"), a Tower subsidiary that manufactures and sells generic pharmaceuticals. Under the terms of the proposed Consent Agreement, the parties are required to divest all of CorePharma's rights and assets to generic 5 mg pilocarpine hydrochloride tablets ("pilocarpine tablets") and generic ursodiol tablets ("ursodiol tablets") to Perrigo Company plc ("Perrigo").

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, to make a final decision as to whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order ("Order").

Pursuant to a Stock Purchase Agreement executed on October 8, 2014, Impax will acquire 100% of the outstanding voting securities of Tower and Lineage from RoundTable in a transaction valued at approximately $700 million (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening future competition in the markets for generic pilocarpine and generic ursodiol tablets in the United States. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be eliminated by the Proposed Acquisition.

I. The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of future suppliers in the markets for generic pilocarpine tablets, which physicians prescribe to treat dry mouth, and generic ursodiol tablets, which physicians prescribe to treat biliary cirrhosis. Currently, there are only two suppliers of generic pilocarpine tablets—Lannett Company, Inc. and Actavis plc. Impax and CorePharma are the only likely new entrants into this market in the near future. In the market for generic ursodiol tablets, there are four current competitors, including Impax. This market has recently experienced supply shortages. CorePharma is one of a limited number of firms likely to enter the ursodiol market in the near future. Without a remedy, the Proposed Acquisition would eliminate CorePharma as an independent entrant into the markets for generic pilocarpine and generic ursodiol tablets, likely depriving customers of the significant cost savings that result when an additional generic supplier enters a concentrated market.

II. Entry

Entry into the markets for generic pilocarpine and generic ursodiol tablets would not be timely, likely, or sufficient in

magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including approval by the FDA, is costly and lengthy.

III. Effects

The Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating future competition that would otherwise have occurred if Impax and CorePharma remained independent. Market participants characterize generic pilocarpine and generic ursodiol tablets as commodities, and each market as one in which the number of generic suppliers has a direct impact on pricing. Customers and competitors have observed—and pricing data confirms—that the price of these generic pharmaceutical products decreases with new entry even after several other suppliers have entered the market. Further, customers generally believe that having at least four suppliers in each generic pharmaceutical market produces more competitive prices than if fewer suppliers are available to them.

The Proposed Acquisition would eliminate significant future competition between CorePharma and Impax. The evidence shows that anticompetitive effects are likely to result from the Proposed Acquisition due to the elimination of an additional independent competitor in the markets for generic pilocarpine and generic ursodiol tablets, which would have enabled customers to negotiate lower prices. Thus, absent a remedy, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for pilocarpine and ursodiol tablets.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets. Pursuant to the Consent Agreement and the Order, the parties are required to divest all of CorePharma's rights and assets related to pilocarpine and ursodiol tablets to Perrigo. Perrigo is a large and established generic pharmaceutical manufacturer with significant experience acquiring, integrating, manufacturing, and

marketing generic products. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the Proposed Acquisition is consummated.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Perrigo is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the parties to unwind the sale of rights to Perrigo and then divest the products to a Commission-approved acquirer within six months of the date the Order becomes final. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

The proposed Consent Agreement and Order contain several provisions to help ensure that the divestitures are successful. The Order requires that CorePharma transfer to Perrigo all confidential business information and requires that CorePharma and Impax take all actions that are necessary for Perrigo to obtain FDA approval to manufacture and market pilocarpine and ursodiol tablets.

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

NATIONAL PAYMENT NETWORK, INC.

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

Docket No. C-4521; File No. 132 3285
Complaint, May 4, 2015 – Decision, May 4, 2015

This consent order addresses allegations that National Payment Network ("NPN") deceptively advertised its add-on biweekly auto payments plans. NPN offers auto payment programs to consumers financing the purchase of a motor vehicle. According to the complaint, NPN advertised that consumers enrolling in its biweekly payment program would save money on their total payments, often specifying a certain amount of savings in interest. However, NPN failed to disclose hidden fees and failed to disclose the total amount of these fees. The complaint alleges that NPN's failure to disclose these facts is a deceptive practice in violation of Section 5 of the FTC Act. The order requires NPN to provide those eligible customers that participated in the biweekly payment program for at least 48 months with a full refund. The consent order further bars NPN from advertising any payment program unless it can substantiate any representations about its benefits, performance or efficacy.

Participants

For the *Commission: Daniel Dwyer, Bradley Elbein,* and *Ioana Rusu.*

For the *Respondent: Joel Winston, Hudson Cook LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Payment Network, Inc., a corporation, also known as NPN, Inc. ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent National Payment Network, Inc. is a California corporation, with its principal place of business at 1875 S. Grant Street, Suite 250, San Mateo, CA 94402.

2. Respondent has advertised, marketed, distributed, offered for sale, or sold a "Biweekly Payment Program" (hereinafter, the

"payment program") to consumers financing the purchase of automobiles throughout the United States.

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

BUSINESS PRACTICES

4. Since at least 2004 and until at least December 31, 2013, Respondent advertised, marketed, and sold its payment program through a network of authorized auto dealers. Respondent also advertised its payment program on its website, www.nationalpayment.net. Under the payment program, consumers make biweekly payments on their auto financing contract to the Respondent rather than to their financing entity (e.g., a finance company or a bank), and the Respondent makes monthly payments to the financing entity on the consumers' behalf. Respondent touts the savings the payment program will provide to consumers, but fails to disclose that the significant fees in connection with the program can offset any savings. Respondent also fails to disclose the total amount of these fees, which add up to more than $775 on a standard five-year auto financing contract.

ENROLLMENT IN RESPONDENT'S PROGRAM

5. Most consumers learned about Respondent's payment program at the automobile dealership, after they selected a vehicle to buy. When purchasing a vehicle, consumers sign the legal paperwork to close the transaction with the dealer's Financing and Insurance ("F&I") department. In many instances, an F&I employee offers other products and services that can be "added on" to the financing contract; these are commonly called "add-on products and services." Respondent's payment program was one such add-on service.

RESPONDENT'S PAYMENT STRUCTURE AND FEES

6. Under most auto financing contracts, consumers pay the financing entity a specific amount on a monthly basis. Under Respondent's payment program, Respondent debits money from a consumer's bank account on a biweekly basis. The first biweekly

debit is in the amount of one full monthly payment. Subsequent biweekly debits consist of half of the consumer's monthly payment, plus a processing fee. Respondent pays the financing entity on the consumer's behalf on a monthly basis.

7. Under a traditional monthly payment plan, consumers make 12 monthly payments each year to their financing entity. Under Respondent's payment program, consumers make 26 biweekly payments each year to the Respondent, which then makes a total of 13 monthly payments to the consumer's financing entity. Thus, under the payment program, consumers make one additional payment a year as compared to a traditional monthly payment plan.

8. Respondent's promotional materials tout the biweekly payment program's ability to save consumers money through these additional payments, but do not disclose that fees it charges in connection with the biweekly payment program can offset any savings. Specifically, Respondent charges at least three fees:

- Respondent charges every consumer a "Deferred Enrollment Fee" of $399. Respondent collects a portion of this fee from consumers during the first month of the contract. Respondent deducts the remainder of the enrollment fee from the extra payments made by consumers in the early years of the program by paying biweekly.

- In addition to the $399 enrollment fee, in many instances, Respondent charges a $25 "cancellation fee." Respondent has often charged consumers this fee even when they "cancelled" because they had completed Respondent's biweekly payment program or had finished paying off their financing contract.

- Respondent also adds a processing fee to every debit from consumers' banks accounts. The fee is currently $2.99 per debit, but has ranged from $1.95 up to $2.99 per debit in prior years. Over the life of a standard five-year auto financing contract, a $2.99 per-debit fee amounts to more than $350.

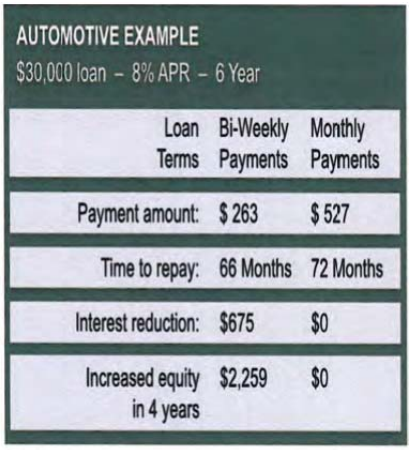
9. These fees total an average of $775 on a standard five-year auto financing contract. Nowhere does Respondent disclose this fact.

RESPONDENT'S SAVINGS CLAIMS

10. Respondent disseminated or caused to be disseminated brochures and videos promoting the payment program to consumers by providing such materials to the auto dealers that sell its payment program. Respondent also promoted its biweekly payment program on its website, www.nationalpayment.net.

11. Two of Respondent's brochures are attached as Exhibits A and B. The brochures both contain the following statements and depictions:

> "Our biweekly payment options have helped thousands of customer [sic] save money on their car loan and achieve their long-term financial goals."
>
> ....
>
> "Bi-Weekly payments can help you:
> - Save money on your loan
> - Match payments to paychecks
> - Simplify your budgeting
> - Pay off your loan faster"
>
> ....
>
> "PROGRAM BENEFITS
> - Save money on your loan
> - No up-front costs
> - Pay off your loan faster
> - No more writing or mailing checks
> - Minimize the impact of vehicle depreciation
> - Simplify your finances"
>
> ....



AUTOMOTIVE EXAMPLE

$30,000 loan – 8% APR – 6 Year

Loan Terms	Bi-Weekly Payments	Monthly Payments
Payment amount:	$ 263	$ 527
Time to repay:	66 Months	72 Months
Interest reduction:	$675	$0
Increased equity in 4 years	$2,259	$0

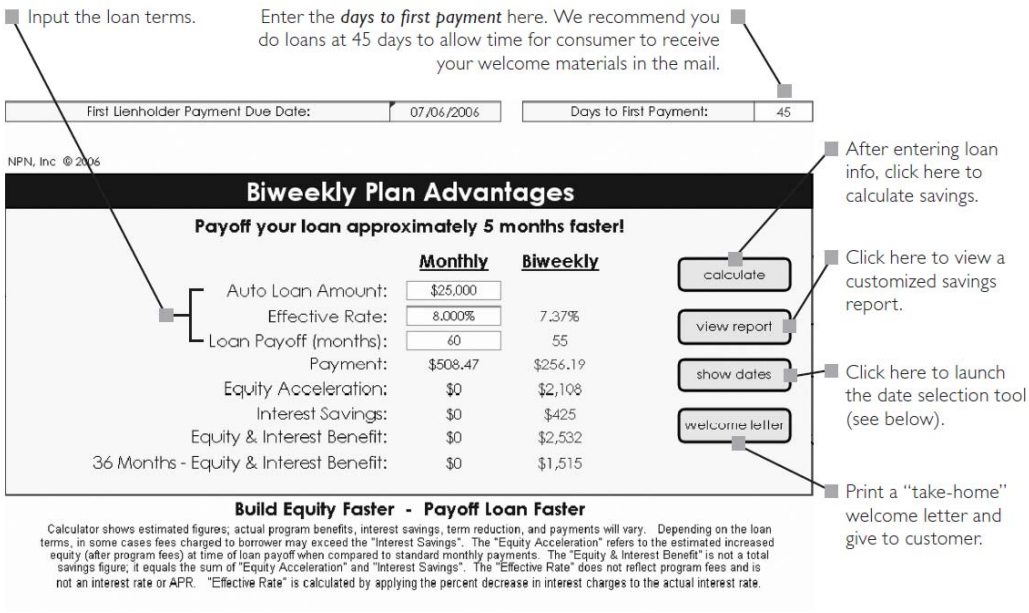
Thus, Respondent's advertising materials claimed that consumers who enrolled in the biweekly payment program would save money on their loans, and even demonstrated the specific amount of interest savings that a consumer could achieve under certain circumstances. Respondent failed to disclose, however, that in numerous instances, consumers would not achieve savings with Respondent's program due to Respondent's significant fees, amounting to more than $775 on the average contract. On the contrary, depending on consumers' principal amount, interest rate, and number of payments, in many instances consumers paid more money than they would have under a traditional monthly payment program.

12. In addition, Respondent provided auto dealers authorized to sell its biweekly payment program with marketing tools and other dealer training materials instructing dealers on how to market and sell Respondent's payment program. One such document is a Dealer Reference Guide, attached as Exhibit C. Respondent's Dealer Reference Guide repeatedly states that consumers will experience "reduced interest charges" by enrolling in the biweekly payment program without disclosing that numerous consumers do not experience savings overall and may even end up paying more than they would under a traditional monthly payment program. For example, Respondent represented the following:

SAVINGS EXAMPLES

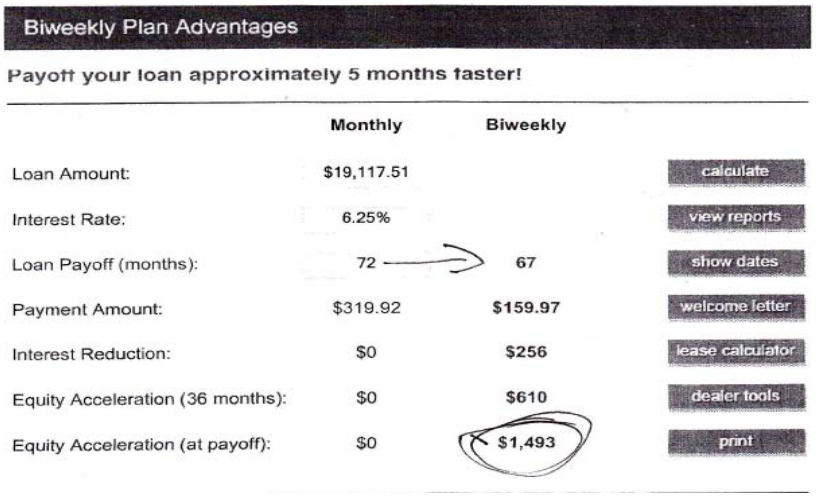
The Biweekly Payment Plan allows consumers to customize the way they make their payments. The result is a loan with reduced interest charges, a lower effective interest rate, a shorter term, and increased equity.

13. Respondent's reference guide also encouraged dealers to use Respondent's online calculator to show consumers how much they can save by enrolling in the biweekly payment program. Dealers were instructed to enter the customer's loan details into the calculator in order to "calculate savings" and generate a "customized savings report." The online calculator appears as follows in the reference guide:



Respondent's online calculator calculated the specific interest savings each consumer could achieve, but failed to disclose that the specific savings amount would be reduced or even offset by Respondent's significant fees. Only in the small print below the calculator did Respondent state, "Depending on the loan terms, in some cases fees charged to borrower may exceed the 'Interest Savings'."

14. Consumers enrolling in Respondent's biweekly payment program were presented with NPN biweekly calculator-generated savings calculations by auto dealers. For example, one consumer received a document labeled "NPN Biweekly Calculator," attached as Exhibit D. The document represents that the consumer will achieve an interest reduction of $256. Only in the small print below the calculator does Respondent disclose: "Interest Reduction is not a total savings figure; in some cases the fees charged to borrower may exceed the Interest Reduction."



FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I
FAILURE TO DISCLOSE MATERIAL INFORMATION ABOUT FEES

15. Through the means described in Paragraphs 10-14, Respondent has represented, expressly or by implication, that consumers who enroll in the biweekly payment program will save money.

16. When making the representation described in Paragraph 15, Respondent has failed to disclose or failed to disclose adequately that in many instances, consumers do not save any money due to Respondent's fees, which amount to hundreds of dollars.

17. These facts would be material to consumers in their decision to enroll in Respondent's biweekly payment program offered for sale in the advertisements. In light of the representation made, the failure to disclose this fact, or to disclose this fact adequately, was, and is, a deceptive practice.

COUNT II
FAILURE TO DISCLOSE PROGRAM EFFECTS

18. Through the means described in Paragraphs 10-14, Respondent has represented, expressly or by implication, that consumers who enroll in the biweekly payment program will save a specific amount in interest.

19. When making the representation described in Paragraph 18, Respondent has failed to disclose or failed to disclose adequately that numerous consumers do not achieve savings overall.

20. This fact would be material to consumers in their decision to enroll in Respondent's biweekly payment program offered for sale in the advertisements. In light of the representation made, the failure to disclose this fact, or to disclose this fact adequately, was, and is, a deceptive practice.

21. 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 FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this fourth day of May, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A

National Payment Network is one of the nation's leading administrators of loan acceleration programs. To date, NPN has successfully processed payments for approximately $4 billion in consumer loan values. Our biweekly payment options have helped thousands of customers save money on their car loan and achieve their long-term financial goals.

National Payment Network partners with some of the strongest financial institutions in the nation. These partnerships allow NPN to offer the most secure, accurate and reliable payment processing services available.

These processing partners professionally control the entire ACH process from initiation to settlement. Your funds are held and processed individually, ensuring full FDIC protection of your account. You can rest easy knowing that your payments are handled securely and accurately for the duration of your loan.

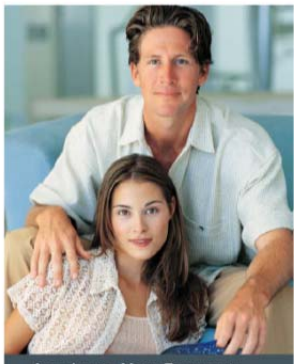
NATIONAL PAYMENT npnINC NETWORK

Who do I contact with questions about my account?

888.744.2977
support@nationalpayment.net

This brochure is a summary of the Bi-weekly Payment Option. Refer to the plan's Bi-weekly Agreement for further details, benefit descriptions, conditions, disclosures and limitations.
© 2010 National Payment Network, Inc.

NATIONAL PAYMENT npnINC NETWORK



Accelerate Your Payments. Accelerate Your Life.

Bi-Weekly payments can help you:

- Save money on your loan
- Match payments to paychecks
- Simplify your budgeting
- Pay off your loan faster

Ask your dealership how to enroll today!

BI-WEEKLY PAYMENT OPTION

Abi-weekly payment option allows you to simplify your finances and build equity in your vehicle.

Instead of making monthly payments, you will make a half payment every two weeks. This payment pattern will generate additional payments over time and accelerate the payoff of your loan or lease.

National Payment Network is the leading administrator of biweekly payment plans for the automotive industry. We also provide our customers the financial benefit and convenience of the program for mortgages, boats, RV's and student loans.

PROGRAM BENEFITS

- **Save money on your loan**
- **No up-front costs**
- **Payoff your loan faster**
- **No more writing or mailing checks**
- **Minimize the impact of vehicle depreciation**
- **Simplify your finances**

NATIONAL PAYMENT npnINC NETWORK

AUTOMOTIVE EXAMPLE
$30,000 loan – 6% APR – 6 Year

Loan Terms	Bi-Weekly Payments	Monthly Payments
Payment amount:	$ 263	$ 527
Time to repay:	66 Months	72 Months
Interest reduction:	$675	$0
Increased equity in 4 years	$2,259	$0

MORTGAGE ACCELERATION PROGRAM
$250,000 loan – 6% APR – 30 Years

Loan Terms	Bi-Weekly Payments	Monthly Payments
Payment amount:	$749	$1,499
Time to repay:	24 Yrs 7 Mo	30 Yrs
Eliminated payments:	5 Yrs 5 Mo	0 Months
Total Interest Paid	$228,438	$289,595
Savings in Interest	$61,158	$0

These examples are for illustrative purposes only. This brochure is a summary of the Bi-Weekly Payment program. Refer to the plan's Bi-Weekly Plan Agreement for further details, benefit descriptions, conditions, disclosures and limitations.

FREQUENTLY ASKED QUESTIONS

Q: What if I plan to sell or trade in my car early?
A: This payment option helps you pay off your loan or lease faster; ultimately improving your financial position when you trade-in or sell your vehicle.

Q: Are there additional benefits?
A: You can simplify your finances and budgeting with convenient, more frequent payments. Even better, all bi-weekly payments are electronic so you no longer have to write or mail checks.

Q: Is there a cost to enroll?
A: Yes, but there is no up-front cost to you. All program fees are simply deducted from the prepayments made while on the program.

Q: How does paying biweekly pay off my loan sooner?
A: By deducting half of your monthly payment every two weeks, you will gradually make extra payments on your vehicle. As a result, your loan or lease is typically paid off six or more months faster. Simply ask the dealership for your own detailed analysis.

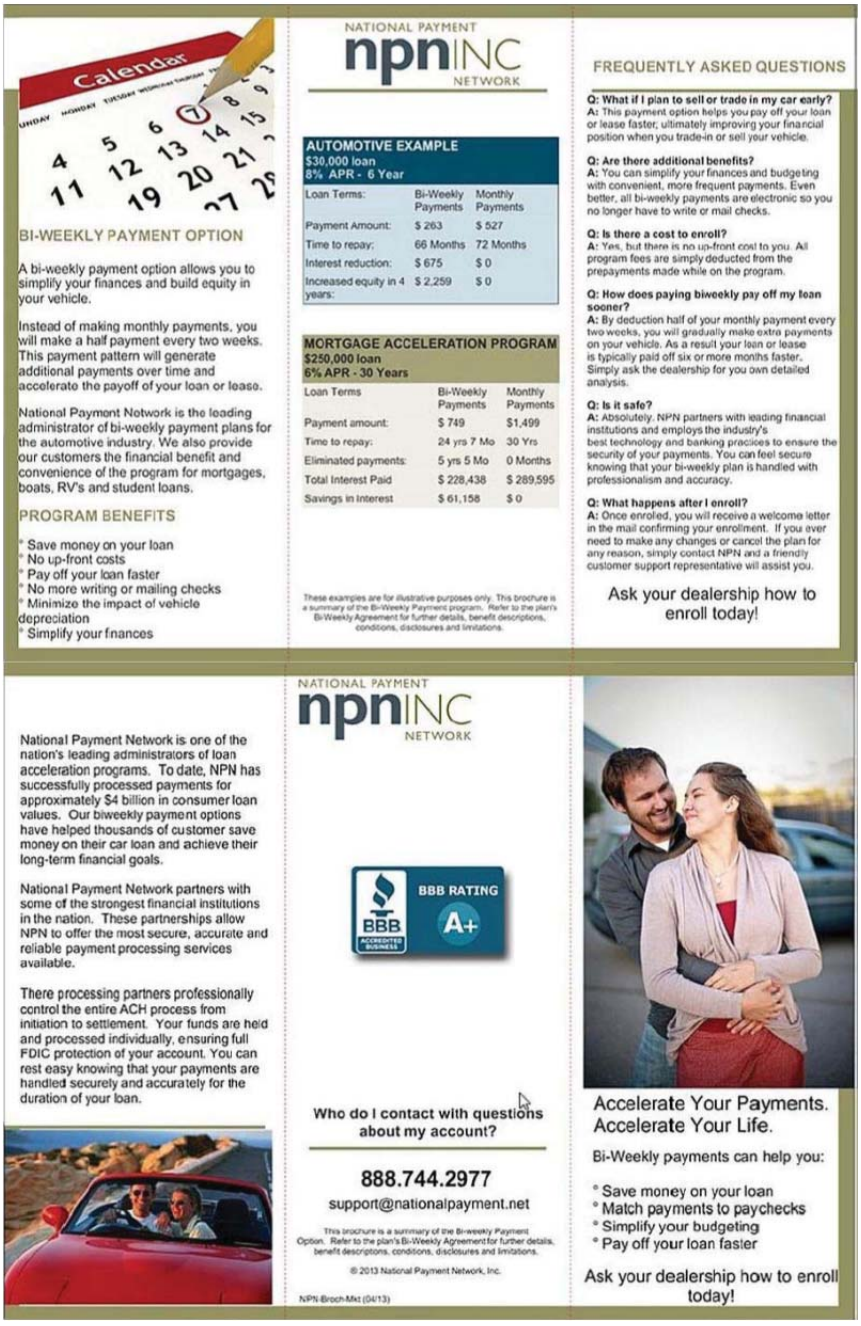
Q: Is it safe?
A: Absolutely. NPN partners with leading financial institutions and employs the industry's best technology and banking practices to ensure the security of your payments. You can feel secure knowing that your bi-weekly plan is handled with professionalism and accuracy.

Q: What happens after I enroll?
A: Once enrolled, you will receive a welcome letter in the mail confirming your enrollment. If you ever need to make any changes or cancel the plan for any reason, simply contact NPN and a friendly customer support representative will assist you.

Ask your dealership how to enroll today!

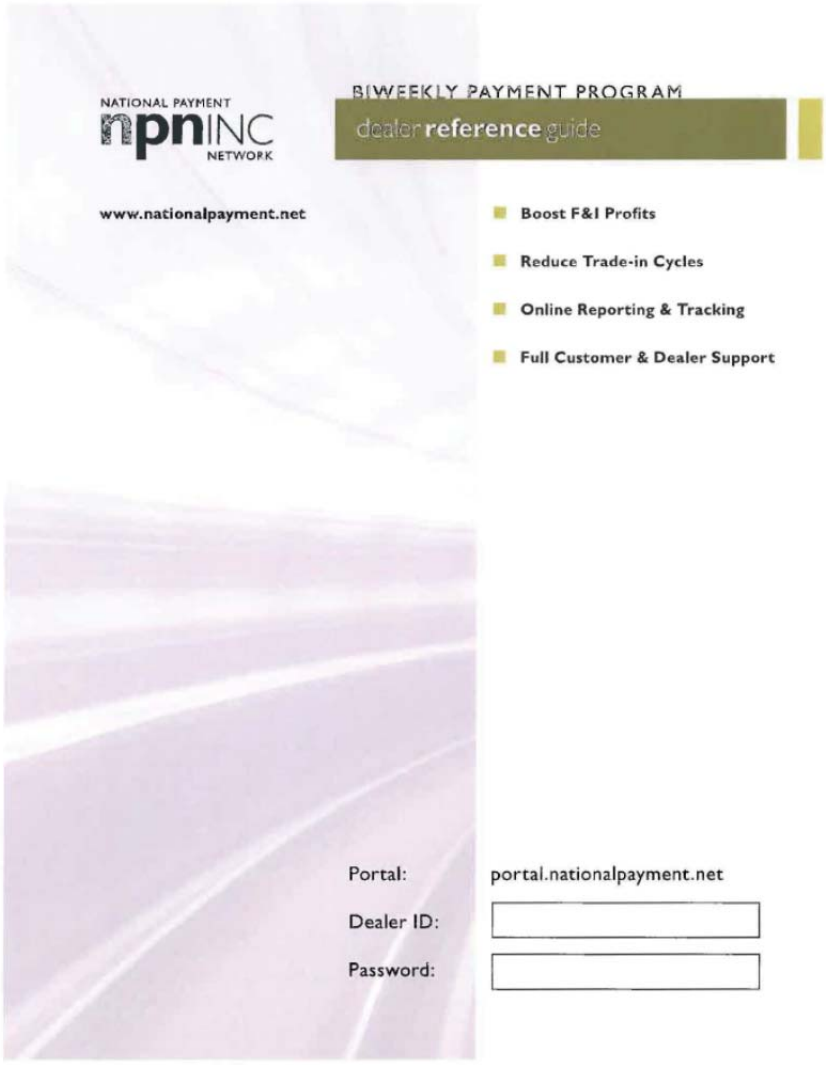
Complaint

EXHIBIT B



Complaint

EXHIBIT C



Complaint

EXHIBIT C

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Complaint

EXHIBIT C

PROGRAM OVERVIEW

The Biweekly Payment Plan is a financial service for consumers that helps them build equity in their vehicle and payoff their loan or lease faster. The concept is that consumers will pay half of their monthly loan payment every 2 weeks. These half payments are automatically debited from their bank accounts and can be easily customized to match the way they budget or the way they receive their pay checks. Because the debits occur biweekly (every 14 days), the consumer has 26 half debits each year (52 weeks per year = 26 half debits), or 13 monthly payment amounts in a 12 month period. These drafts are transferred to the lender on a monthly basis, and the extra payments are applied directly to the loan's principal balance. These extra payments accelerate the amortization of the loan, reduce interest charges, and eliminate between 4–8 months on a typical auto loan.

National Payment Network, Inc is one of the nation's largest providers of loan acceleration products for the automotive industry. To date, National Payment Network has successfully processed payments for roughly $3 billion in consumer loan values. Further, our processing partners guarantee that our clients are covered 100% for any funds improperly removed from their bank account while using these services.

Additionally, client security is a primary focus for National Payment Network, Inc. Our processing partners hold all client funds in secured, FDIC insured trust accounts with the nation's largest financial institutions and banks. All funds transferred are processed through the National Automated Clearing House under strict regulation of the Federal Reserve.

The key points regarding the biweekly program and how it works are listed below. Please review these items carefully as they have the potential to be misunderstood by the customer if not properly explained.

(1) Financial Service: The Biweekly Payment Plan does not change the customer's loan in any way. Rather, the Biweekly Payment Program is a financial service that works with the customer's existing loan. Enrollment in the program is based on information that is taken from the customer's Enrollment Form.

Complaint

EXHIBIT C

PROGRAM OVERVIEW (cont'd)

(2) Drafting Schedule: Debits are electronically drafted from the customer's bank account. This means the customer does not need to mail payments or send in payment coupons. Drafting always occurs every other Friday (every 14 days). The customer will be provided with a confirmation letter that reviews and confirms their drafting dates.

(3) Principal Payments: The biweekly drafting schedule generates 26 half payments each year; equal to 13 monthly payment amounts or 2 extra half payments. The extra half payments are sent to the lender (after the deferred service charge is collected) and applied to the loan's principal balance approximately every 6 months. This prepayment pattern accelerates the loan payoff, reduces interest charges, and increases the rate of equity build-up in the loan.

(4) Loan Payments: Payments are made on the customer's loan electronically or with a paper check. The customer may continue to receive monthly statements or payment coupons from the lender — however, the customer does not need to make any loan payments on their own.

(5) Program Fees: Customers pay a fee to enroll in the Biweekly Payment Program. This fee is deducted from the customer's prepayments until paid in full. Dealer commissions are paid as this fee is collected. In addition to the enrollment fee, consumers will pay a transaction fee of $1.95 for each debit. This fee is automatically added to each biweekly debit.

Complaint

EXHIBIT C

SELLING FEATURES

How It Works

NPN is the nation's leading administrator of biweekly payment programs. NPN partners directly with leading financial institutions, including Wells Fargo Bank and/or M&I Bank, to ensure the security of all consumer funds transfers.

The biweekly payment program is sold to customers directly through the F&I department at the time of purchase. Customers that enroll in the program will enjoy the following benefits:

- **Match the timing of the vehicle payments to their paycheck cycle.**
- **Payoff the loan faster and reduce interest charges.**
- **Build vehicle equity faster and improve their trade-in position.**
- **Smaller half payments every 2 weeks are easier to manage.**
- **Making half monthly payments every 2 weeks effectively makes 1 extra monthly payment each year (52 weeks per year = 26 half payments = 13 payments).**

Best of all there are no fees collected at the time of enrollment. Administration fees are built into the biweekly debits and paid over time.

Dealer Benefits

Need to make room in the deal to sell product?

Extend the loan term from 60 to 66 month and keep the payments the same. Then simply show the customer that by signing up for the biweekly payment plan the loan is still paid off in 60 months. This will create more revenue in the deal to sell the customer a warranty, gap policy, alarm, etc. The result is more profit for F&I and a happier customer.

Customer wants lower payments?

Simply extend the loan term from 60 to 66 months to lower the monthly payments. Next, use the biweekly calculator to show how the biweekly payment plan will have their 66 month loan paid off in 60 months. With this approach, the customer has manageable biweekly payments and the loan is still paid off in 60 months.

Complaint

EXHIBIT C

SELLING FEATURES (cont'd)

Looking to reduce your defaults?
With NPN's biweekly payment program, customers actually make their biweekly payments well before the funds are due to the lender. By helping customers make payments in advance, the biweekly program helps ensure that loans post on time and late payments are avoided.

Want a repeat retail customer sooner?
Because customers prepay their loan balance and accelerate their payoff, dealers see fewer negative-equity situations and can eliminate upside-down buyers. The biweekly payment program puts customers in a financial position to trade-in their vehicle sooner.

Want a repeat lease customer sooner?
Lease customers who sign up for the biweekly plan will satisfy the lease months earlier. This allows customers to come back and lease a new car several months sooner.

Want to make your advertising stand out from your competition?
Make your advertising stand out from your competition by offering lower biweekly payments. Quote a $225 biweekly payment instead of a $450 monthly payment.

Made no F&I profit on the Credit Union "one pay" deals?
With this program, dealers can make commissions on Credit Union and Banks "one pays" by selling them our biweekly program. Enter the customers loan information into our biweekly calculator and show the customer how they can build equity, reduce interest charges and pay off their loan sooner by signing up for the NPN biweekly payment program

Need a lower effective rate to close the deal?
Enter your best rate into our biweekly calculator and show your customer how the biweekly program can reduce interest charges and create a lower "effective rate". Although not an APR, this lower rate could beat your competition's rate and help close the deal. The "Effective Rate" is calculated by applying the percent decrease in interest charges to the actual interest rate.

Complaint

EXHIBIT C

SELLING FEATURES (cont'd)

The lower payments close!

For example, a $250 biweekly payment sounds more appealing than a $500 per month payment.

Customer wants a shorter loan term?

Simply keep the loan "as is". Then show the customer how they will pay off their vehicle faster, build equity more quickly, reduce the interest charges, and be in a better trade in position much sooner.

Complaint

EXHIBIT C

SAVINGS EXAMPLES

The Biweekly Payment Plan allows consumers to customize the way they make their payments. The result is a loan with reduced interest charges, a lower effective interest rate, a shorter term, and increased equity.

Example 1	Monthly	Biweekly
Auto Loan Amount:	$30,000	
Interest rate:	12%	
Loan Term (months):	60	**55**
Payment:	$670.67	**$335.34**
* Equity Acceleration:	$0	**$3,000**
36 Months — Equity Acceleration:	$0	**$1,600**

Example 2	Monthly	Biweekly
Auto Loan Amount:	$25,000	
Interest rate:	10%	
Loan Term (months):	72	**66**
Payment:	$465.08	**$232.54**
* Equity Acceleration:	$0	**$2,300**
36 Months — Equity Acceleration:	$0	**$1,000**

** Equity acceleration refers to the estimated increased equity at the time of loan payoff.*

Complaint

EXHIBIT C

CUSTOMER PRESENTATIONS

Customer Presentation 1

F&I Manager:
Ms. Customer, since you agree that our service agreement is obviously a valuable thing to have, shall we add it to your vehicle?

Customer:
I would really like the service agreement, but I just can't afford higher payments and I really do not want a loan for longer than 60 months.

F&I Manager:
I completely understand. What I think would make sense for you is a biweekly payment option. With this program, we slightly extend the term out to 66 months to lower your monthly payment amount. Then we can add the service contract and set you up with a biweekly payment option that will still payoff your loan in 60 months.

Customer:
Okay, if I can still have the loan paid off in 60 months, then that sounds great. I'd love to have the service agreement.

Simply extend the loan to a 66 month term while keeping the payment amount the same. Now include the service contract, and then sign up the customer for the Biweekly Payment Plan to reduce the term back down to 60 months. Finally, be sure to review the debit schedule and program fees. By offering the Biweekly Payment Plan to your customer, you were also able to easily up-sell a service contract.

Complaint

EXHIBIT C

CUSTOMER PRESENTATIONS (cont'd)

Customer Presentation 2

Simply place the retail installment agreement and biweekly enrollment form side by side and review the payment option as described below:

F&I Manager:
Mr. Customer, we have two payment options available for you today. You can have the loan paid off in 66 months, have your bank keep all the interest charges, and have no increased equity in your car. Or you can enroll in the biweekly payment option where you will see a half debit every 2 weeks — breaks it up to make it a bit easier to pay. Now with the biweekly payment option, you'll have loan paid on in 59 months, accelerate your equity build-up by $4,448. So would you like to pay the full 66 month term, or the 59 month term?

Be sure to review the debit schedule and program fees.

As you can see on the enrollment form, there is a per-debit fee and a start up fee for enrolling in the program. These fees are actually deducted from your payments so there's no up-front cost. And the equity acceleration of $4,448 is net of all the fees.

I want to point out one more thing. In order for the payment to get to your lender on time, they will debit a full payment on this date (refer to the enrollment form) and then your regular biweekly payments will start on this date here (again, refer to the enrollment form).

Congratulations! Please sign here and we'll also need a voided check to setup the automatic debits. They will be sending you a welcome packet in the mail that reviews all of this information for you.

Complaint

EXHIBIT C

ENROLLING CUSTOMERS

It important that you follow these steps to ensure proper enrollment in the Biweekly Payment Plan:

(1) Enter Customer Information:
During the customer's enrollment, you will be prompted to enter the customer's banking details (account number and routing number) and the program start dates.

(2) Review Program Details:
Review the debit dates with the customer and explain that they may still receive monthly statements or payment coupons; however they do not need to make the payments on their own. The biweekly plan will handle their payments for them. The statements or coupons they receive can simply be filed away.

(3) Review the Enrollment Fee:
Explain that although there is no up-front cost to enroll in the program, there is an enrollment fee that is deducted from the prepayments that are made while on the biweekly payment plan. Half of the first full debit is applied to this fee.

(4) Customer's Signature:
Make sure the customer signs section 5 of the Enrollment Form.

(5) Voided Check:
Be sure to include a voided check along with the Enrollment Form. The enrollment form and voided check are required to ensure proper processing.

(6) Fax Completed Form
Fax the completed enrollment form and voided check back to 310-943-2304.

Be sure to notify National Payment Network immediately if (1) loan information changes, (2) payment amount changes, or (3) customer is not approved. Please contact 888-744-2977 immediately and speak with a customer service representative.

Complaint

EXHIBIT C

CUSTOMER ENROLLMENT FORM

BIWEEKLY PLAN AGREEMENT

Enrollment Form and Automatic Debit Authorization

CUSTOMER SUPPORT

WHITE = fax to ADMINISTRATOR YELLOW = CUSTOMER

FAX WHITE COPY TO: 310-943-2304 or 413-778-2330

Complaint

EXHIBIT C

CUSTOMER WELCOME LETTER

confirmation

Biweekly Plan Processing Dept
PO Box 8025
Redondo Beach, CA 90277-8025

Biweekly Plan
*Please Review Information Carefully

1-888-744-2977

RE: **2006 Nissan Altima**
Kenneth Jones
1600 N Main Street
Anchorage, AK 00200

Your Client ID # 8045801

Dear Kenneth Jones,

Congratulations and welcome to the Biweekly Plan for your 2006 Nissan Altima. Please review the important information below. If you have any questions about your payments, please call 888-744-2977, 9am-5pm PST, M-F (toll free). *Please do not call the dealership where you purchased the vehicle, they will not have any information regarding your payments.*

What is the Biweekly Plan?
This is the customized payment option you requested for your new 2006 Nissan Altima. This payment option will build equity faster and reduce the term of the loan.

What do I need to do?
Once you receive your first payment coupon or loan statement, please fax a copy to our processing center at (310) 943-2304 (24 hrs/day, 7 days/week). Please write your Client ID number of 8045801 on the fax. This information is needed to help ensure your payments are processed correctly.

Do I still need to mail in payments?
No. Instead of mailing in monthly payments, funds will be drafted automatically from your bank account. **Your first full withdrawal will occur on 3/31/2006.** Your biweekly withdrawals for half of your monthly payment amount will then continue every other Friday. (See the enclosed withdrawal schedule).

Will I still receive monthly statements?
Yes. You will still receive monthly payment statements and/or payment coupons. However, once your plan begins you do not need to make these payments – we will handle that for you!

What if my loan changes or is paid off?
Please contact Customer Support if your loan changes in any way (for example: loan is paid off, refinanced, lender changes, payment amount changes, etc.)

Thank you again for enrolling your loan in the **Biweekly Plan.**

Customer Support
National Payment Network
Biweekly Plan Processing Dept
Ph: 1-888-744-2977 (9am-5pm PST, M-F, toll free)
FAX: 1-310-943-2304

Complaint

EXHIBIT C

OVERCOMING OBJECTIONS

The following is a collection of the most common customer objections. The responses provided are proven, effective ways to overcome these objections.

Could I just mail in extra payments to my loan by myself?
You could, but the reason the Biweekly Payment Program is so successful, is that it provides a structured, disciplined way to prepay your loan. Most people have every intention of prepaying their loan, but never follow through. In fact, without this payment option, less than 3% of Americans say they will pay off their loan faster, and less than 1% actually does.

Why is there a transaction fee of $1.95 added to each debit?
This fee covers the cost of processing your biweekly payments. They also perform extensive verification on your account to make sure that your payments are posting to your loan properly.

Are the automatic withdrawals from my bank account safe?
The institutions that debit funds from your bank account are trusted financial companies that have processed billion of dollars in automated funds transfers worldwide.

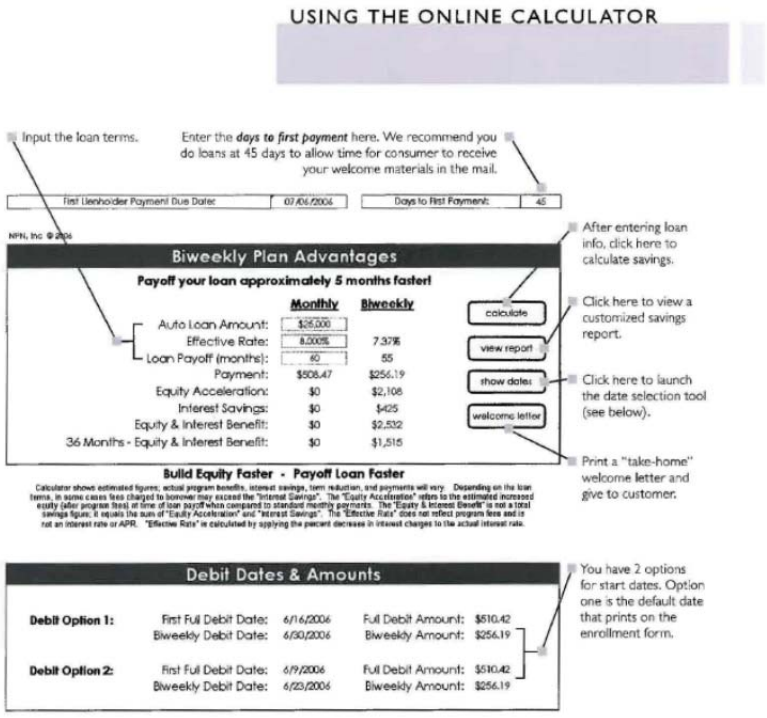
How does the program pay off my loan faster?
With the biweekly payment plan, they will debit half of your monthly payment amount every 2 weeks. Because the debits go through every 2 weeks, there are actually 26 half payments each year. This is equal to 13 monthly payment amounts. In short, this means you'll be prepaying an extra half payment to your principal balance about every 6 months. This prepayment pattern is what pays off your loan faster, reduces the interest charges, and builds your equity more quickly.

Can I payoff my loan even faster? And eliminate even more interest charges?
Absolutely. Simply call the toll free customer support number and ask them to increase your payment amounts. You can increase and decrease your payment amounts any time, free of charge. You can also send in extra payments on your own whenever you'd like.

What if I need to stop the program or change my payment dates?
No problem. Simply call the toll free customer support number and they can make those changes for your right over the phone. Changing your payment dates or canceling the program is extremely simple.

Complaint

EXHIBIT C



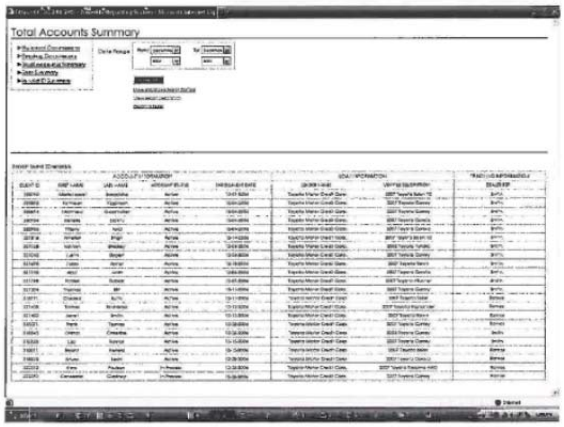
Complaint

EXHIBIT C

USING THE ONLINE REPORTING TOOLS

The Online Reporting tools allow dealers to easily track enrollment activity and commission payments. Simply select the appropriate report to view revenue that was earned in a prior month, a forecast of pending commissions, and a total account summary of all accounts that have been enrolled.

The most important report is the ***Error Summary*** report. This report shows all enrollments that were submitted with incorrect enrollment forms. For example, enrollment forms that are missing bank account information or social security numbers will show up in this report. Simply contact customer support to provide the missing information so that the enrollment form can be properly processed.



Complaint

EXHIBIT D

NATIONAL PAYMENT
npnINC NETWORK

I have been informed of the benefits of the Biweekly Plan.
However, I DO NOT wish to take advantage of the program at this time.
Signature: _____

First monthly payment due to Lender: 04/24/2008	Deal date: 03/10/2008	Days to First Payment: 45

Biweekly Plan Advantages

Payoff your loan approximately 5 months faster!

	Monthly	Biweekly	
Loan Amount:	$19,117.51		calculate
Interest Rate:	6.25%		view reports
Loan Payoff (months):	72	67	show dates
Payment Amount:	$319.92	$159.97	welcome letter
Interest Reduction:	$0	$256	lease calculator
Equity Acceleration (36 months):	$0	$610	dealer tools
Equity Acceleration (at payoff):	$0	$1,493	print

Debit Dates & Amounts

Debit Option 1: First Full Debit Date: 04/04/2008 Full Debit Amount: $321.87

Complaint

EXHIBIT D

	Biweekly Debit Date:	04/18/2008	Biweekly Amount:	$161.92
Debit Option 2:	First Full Debit Date:	03/28/2008	Full Debit Amount:	$321.87
	Biweekly Debit Date:	04/11/2008	Biweekly Amount:	$161.92

Build Equity Faster - Payoff Loan Faster

Important Terms and Definitions: The purpose of this program is to accelerate the loan or lease payoff. This calculator shows estimated figures; actual program benefits, interest reduction, loan payoff (months), payment amounts, and other figures will vary. Interest Reduction is not a total savings figure; in some cases the fees charged to borrower may exceed the Interest Reduction. Consumer is responsible for ensuring lender applies any loan prepayments to principal balance to create interest reduction. Equity Acceleration is not a total savings figure; it refers to the estimated difference in loan balance when compared to standard monthly payments.

DECISION AND ORDER

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

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

The parties, having agreed that the complaint may be used in construing the terms of the order and that no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of this order; and

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

1. Respondent, National Payment Network, Inc., also known as NPN, Inc. is a California corporation, with

its principal place of business at 1875 S. Grant Street, Suite 250, San Mateo, California 94402.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "Respondent" means National Payment Network, Inc., also known as NPN, Inc., and its successors and assigns.

B. "Add on product or service" means any product or service relating to the sale, lease, or financing of a motor vehicle that is offered, provided, or arranged by the dealer that is not provided or installed by the motor vehicle manufacturer, including but not limited to extended warranties, payment programs, guaranteed automobile protection ("GAP") or "GAP insurance," etching, service contracts, theft protection or security devices, global positioning systems or starter interrupt devices, undercoating, rustproofing, fabric protection, road service or club memberships, appearance products, credit life insurance, credit accident or disability insurance, credit loss of income insurance, and debt cancellation and debt suspension coverage. The term excludes any such product or service that the dealer provides to the consumer at no charge.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

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

E. "Current customers" means all customers who are enrolled in Respondent's biweekly payment program as of October 1, 2014.

F. "Fee waiver period" means the period beginning 30 days after the date of service of the order and concluding when no current customer is enrolled in Respondent's biweekly payment program.

G. "Payment program" means any product, service, plan, or program represented, expressly or by implication, to provide payment or meet other terms of a financing contract between a consumer and (1) a creditor, including an auto dealer, or (2) another financing entity, including a finance company, a bank, or another assignee.

I.

IT IS ORDERED that Respondent, its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any payment program and add-on product or service, shall not in any manner, expressly or by implication:

A. Represent that the payment program or add-on product or service will save any consumer money, including interest, unless:

1. The amount of savings a consumer will achieve is greater than the total amount of fees and costs charged in connection with the payment program or add-on product or service and the representation is otherwise true, or

2. Any qualifying information relating to the savings a consumer might achieve from the payment program or add-on product or service is clearly and conspicuously disclosed, including, but not limited to, information about the total amount of fees and costs charged in connection with such payment program or add-on product or service.

B. Represent that the payment program or add-on product or service will save any consumer a specific amount of money, including interest, unless:

1. The specified amount is the amount of savings after deducting any fees or costs charged in connection with the payment program or add-on product or service and the representation is otherwise true, or

2. Any qualifying information relating to the savings a consumer might achieve from the payment program or add-on product or service is clearly and conspicuously disclosed, including, but not limited to, information about the total amount of fees and costs charged in connection with such payment program or add-on product or service.

II.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any payment program shall not misrepresent, in any manner, expressly or by implication:

A. The existence, amount, timing, or manner of any fee or cost charged by Respondent or a third party in connection with such payment program;

B. That such payment program has the ability to improve, repair or otherwise affect a consumer's credit record, credit history, credit rating, or ability to obtain credit; and

C. The benefits, performance, or efficacy of the payment program.

III.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any add-on product or service shall not misrepresent, in any manner, expressly or by implication:

A. The total costs to purchase, receive, or use, or the quantity of, the add-on product or service;

B. Any restriction, limitation, or condition on purchasing, receiving, or using the add-on product or service;

C. Any aspect of the benefits, performance, or efficacy of the add-on product or service;

D. Any aspect of the nature or terms of any refund, cancellation, exchange, or repurchase policy, including, but not limited to, the likelihood of a consumer obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted to the consumer; and

E. That any add-on product or service has the ability to improve, repair or otherwise affect a consumer's credit record, credit history, credit rating, or ability to obtain credit.

IV.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any payment program or add-on product or service shall not make any representation or assist others in making any representation, expressly or by implication, about the benefits, performance, or efficacy of any add-on product or service or payment program, unless at the time such representation is made, the Respondent possesses and relies upon competent and reliable evidence that substantiates that the representation is true.

V.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, shall not assess, collect, or attempt to collect any cancellation fees from current customers who complete Respondent's biweekly payment program or finish paying off their financing contract.

VI.

IT IS FURTHER ORDERED that Respondent shall pay two million four hundred and seventy five thousand dollars ($2,475,000.00) as follows:

A. Respondent shall refund customers one million five hundred and twenty-six thousand dollars ($1,526,000.00) within thirty (30) days of the date of service of this order, or remit the balance to the FTC within forty (45) days of the date of service of this order. Such refunds shall include refunds of all cancellation fees paid by customers who remained in Respondent's biweekly payment program for 48 months or more, and for the remaining amount of the $1,526,000.00, pro rata refunds of fees assessed to current customers. Within forty five (45) days of the date of service of this order, Respondent shall provide records to the Commission sufficient to show all payments made pursuant to this Section VI.A.

B. Respondent shall waive an additional nine hundred and forty-nine thousand dollars ($949,000.00) in fees for current customers during the fee waiver period, or remit the balance to the FTC within fifteen (15) days of the conclusion of the fee waiver period. Such waived fees shall include all remaining enrollment fees and cancellation fees, and at least 50% of each ACH fee, and may include other fees. Respondent shall provide the Commission with quarterly reports within thirty (30) days after the end of each quarter sufficient to show all fee waivers made during that quarter, until the entire amount of $949,000.00 is waived or the balance is remitted to the FTC.

C. In the event of default on the obligation pursuant to Sections VI.A and VI.B of this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable.

D. In the event that Respondent remits any balance to the FTC pursuant to Sections VI.A and VI.B, Respondent shall also provide to the Commission a searchable electronic file containing the name and contact

information of all consumers who enrolled in Respondent's biweekly payment program, to the extent it has such information in its possession or control, including information available upon request from auto dealers and others. Such file: (1) shall include each consumer's name and address, the date of enrollment, the total amount of payments made under the biweekly payment program, the total amount of all fees paid in connection with the biweekly payment program less any amounts credited for refunds or waived by Respondent, and, if available, the consumer's telephone number and email address; (2) shall be updated through the National Change of Address database; and (3) shall be accompanied by a sworn affidavit attesting to its accuracy.

E. All funds paid to the Commission pursuant to Sections VI.A and VI.B of this order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Respondent has no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

F. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.

G. Respondent agrees that the facts as alleged in the complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further agrees that the facts alleged in the complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and that this order shall have collateral estoppel effect for such purposes.

H. Respondent acknowledges that its Taxpayer Identification Number (or Employer Identification Number), which Respondent must submit to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this order, in accordance with 31 U.S.C. § 7701.

I. Proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

VII.

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

A. All advertisements and promotional materials containing the representations;

B. All materials that were relied upon in disseminating the representations;

C. All evidence in its possession or control that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the

representations, 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.

VIII.

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, including auto dealerships who sell Respondent's payment programs or Respondent's add-on products and services, having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the entity that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor 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 entity's 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 Section 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: FTC v. NPN, Inc.

X.

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.

XI.

This order will terminate on May 4, 2035, 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 Section 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;

C. This order if such complaint is filed after the order has terminated pursuant to this Section.

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 Section 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") has accepted, subject to final approval, an agreement containing a consent order from National Payment Network, Inc., also known as NPN, 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 company that offers an auto payment program to consumers financing a motor vehicle. The matter involves its advertising of the auto payment program to consumers. According to the FTC complaint, respondent has represented that consumers who enroll in its biweekly payment program in order to pay off their auto-financing contract will save money, often including a specific amount of savings in interest. Respondent failed to disclose, however, that it charged fees that in many cases offset any savings under the program, and also failed to disclose the total amount of these fees. These facts would be material to consumers in their decision to enroll in respondent's biweekly payment program. The complaint alleges therefore that respondent's failure to disclose the above-mentioned facts is a deceptive practice in violation of Section 5 of the FTC Act.

Analysis to Aid Public Comment

The proposed order is designed to prevent respondent from engaging in similar deceptive practices in the future. Section I prohibits respondent from representing that a payment program or add-on product or service will save consumers money, including interest, unless the amount of savings is greater than the total amount of fees associated with the product or service or any qualifying information is clearly and conspicuously disclosed. Section I also prohibits respondent from representing that a payment program or add-on product or service will save any consumer a specific amount of money, including interest, unless the specified amount is the amount of savings after deducting any fees or any qualifying information relating to savings is clearly and conspicuously disclosed.

Section II of the proposed order prohibits respondent from making misrepresentations related to any payment programs, including regarding the existence, amount, timing, or manner of any fees, the program's benefits, performance, or efficacy, or the ability of any payment program to affect consumer credit.

Section III of the proposed order prohibits respondent from making misrepresentations related to any add-on products or services, including regarding the total costs of the add-on and the benefits, performance, or efficacy of the add-on, any restrictions or conditions associated with the add-on, the nature or terms of any refund, cancellation, or exchange of an add-on and that any add-on product can improve, repair or otherwise affect a consumer's credit.

Section IV requires respondent to substantiate any representations about the benefits, performance or efficacy of any add-on product or service or any payment program.

Section V prohibits respondent from collecting cancellation fees from consumers who have finished paying off their financing contract through NPN's Plan.

Section VI of the proposed order requires respondent to pay consumers two million four hundred and seventy-five thousand dollars ($2,475,000.00) in monetary relief. The proposed order permits respondent to pay the monetary relief amount by: (1)

refunding customers a total of $1,526,000.00 within thirty days of service of the order; (2) waiving an additional $949,000.00 in fees for current customers. If respondent is unable to provide refunds or fee waivers in the stated amount, it must remit the balance to the Commission.

Section VII of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Section VIII requires that respondent provide copies of the order to certain of its personnel. Section IX requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Section X requires the respondent to file compliance reports with the Commission. Finally, Section XI is a provision "sunsetting" 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

CITY NISSAN INC. D/B/A ROSS NISSAN OF EL MONTE

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, SEC. 184 OF THE CONSUMER LEASING ACT, SEC. 213.7 OF REGULATION M, SEC. 144 OF THE TRUTH IN LENDING ACT, AND SEC. 226.24(D) OF REGULATION Z

Docket No. C-4524; File No. 132 3114
Complaint, May 4, 2015 – Decision, May 4, 2015

This consent order resolves concerns that City Nissan Inc. ("Ross Nissan") misled consumers with deceptive promotions of its vehicle financing and leasing terms. According to the complaint, Ross Nissan advertised that consumers could finance its vehicles at an annual percentage rate of 0%. In fact, the annual percentage rate charged is substantially greater than 0%. The complaint further alleges that Ross Nissan falsely advertised that consumers could pay $0 at lease signing to lease its vehicles, when in fact, consumers were required to pay substantially more to drive off with these vehicles. Ross Nissan's failure to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit violated the Consumer Leasing Act, Regulation M, the Truth in Lending Act ("TILA"), and Regulations Z. The consent order requires Ross Nissan to make all disclosures required by TILA and Regulation Z when any of its advertisements state relevant triggering terms.

Participants

For the *Commission: Sana Chriss* and *John Jacobs.*

For the *Respondent: Timothy Robinett, Manning Leaver Bruder & Berberich.*

COMPLAINT

The Federal Trade Commission, having reason to believe that City Nissan Inc. ("City Nissan"), a corporation also doing business as Ross Nissan of El Monte ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and the Truth in Lending Act ("TILA"), and its implementing

Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent City Nissan Inc. is a Delaware corporation, also doing business as Ross Nissan of El Monte, with its principal office or place of business at 3428 N. Peck Road, El Monte, CA 91731. Respondent offers automobiles for sale or lease to consumers.

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 August 2012, Respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. §213.2, as amended.

5. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

6. Respondent has placed numerous such advertisements promoting consumer leases for automobiles, or promoting credit sales and other extensions of closed-end credit in consumer credit transactions, in various newspapers, including but not limited to the Los Angeles Times, the San Gabriel Valley Tribune, the Pasadena Star, and La Opinion, and also in the Pennysaver.

7. Respondent's advertisements deceptively promote lease offers.

8. A copy of one such advertisement, which Respondent ran in the Los Angeles Times, is attached as Exhibit A. This full-page advertisement contains the statements and depictions

described in parts a through e of this Paragraph, below. Respondent has run other advertisements in other editions of the Los Angeles Times, in the San Gabriel Valley Tribune, and in the Pasadena Star, that contain substantially similar statements and depictions.

a. The following statement is prominently featured at the top of the advertisement attached as Exhibit A:

b. Immediately below these "$0" representations, the advertisement offers three Nissan vehicles for lease ("on approved credit").

   i. The first vehicle offered for lease is a new 2013 Nissan Sentra SV for $99 per month plus tax for a 24-month lease.

   ii. The second vehicle offered for lease is a new 2013 Nissan Rogue S for $149 per month plus tax for a 39-month lease.

   iii. The third vehicle offered for lease is a new 2013 Nissan Pathfinder for $249 per month plus tax for a 39-month lease.

c. Although other vehicles are listed for sale in the advertisement, these three vehicles are the only vehicles that are offered for lease in the advertisement.

d. Near the bottom of the advertisement, below multiple pictures of other vehicles, the following statements appear in minuscule white type against a black background:

$99 a month- 24-month lease with $0 security deposit. $4100 due at lease

signing plus registration and taxes. Lessee responsible for mileage in excess of 24,000 miles at 15¢ per mile. On approved credit.

$149 a month 39-month lease with $0 security deposit. $5400 due at lease

signing plus registration and taxes. Lessee responsible for mileage in excess of 39,000 miles at 15¢ per mile. On approved credit.

$249 a month 39 month lease with $0 security deposit. $3113 due at lease signing plus registration and taxes. Lessee responsible for mileage in excess of 39,000 miles at 15¢ per mile. On approved credit.

e. Thus, the amount that consumers who wanted to lease these vehicles were required to pay to "drive off" with these vehicles was substantially more than the "$0" that is prominently stated at the top of the advertisements.

9. Respondent has run similar advertisements, written in Spanish, in La Opinion. A copy of one such Spanish-language advertisement is attached as Exhibit B. This full-page advertisement contains the statements and depictions described in parts a through f of this Paragraph, below. One or more other advertisements that Respondent ran in other editions of La Opinion contain substantially similar statements and depictions.

a. The following statement is prominently featured at the top of the advertisement attached as Exhibit B: "EVENTO DE FIRME Y MANEJE" $0 DE PAGO INICIAL," "$0 DE ENGANCHE," "$0 AL FIRMAR EL ARRENDAMIENTO." (This translates to mean "SIGN AND DRIVE EVENT," "$0 INITIAL PAYMENT," "$0 DOWN," AND "$0 ON LEASE

SIGNING.") This statement as it appears in the advertisement is depicted below:

b. Immediately below these $0 representations, the advertisement offers three vehicles for lease ("CON CREDITO APROBADO," which translates to mean "on approved credit").

i. The first vehicle offered for lease is a "NUEVO 2013 NISSAN SENTRA SV ARRIENDE POR $99 AL MES + IMPUESTOS 1 A ESTOS TERMINOS* 24-MESES DE ARRENDAMIENTO." (This translates to mean "NEW 2013 NISSAN SENTRA SV LEASE FOR $99 PER MONTH + TAXES 1 AT THESE TERMS* 24-MONTH LEASE.")

ii. The second vehicle offered for lease is a "NUEVO 2013 NISSAN ROGUE S ARRIENDE POR $149 AL MES + IMPUESTOS 1 A ESTOS TERMINOS* 39-MESES DE ARRENDAMIENTO." (This translates to mean "NEW 2013 NISSAN ROGUE S FOR $149 PER MONTH + TAXES 1 AT THESE TERMS* 39-MONTH LEASE.")

iii. The third vehicle offered for lease is a "NUEVO 2013 NISSAN PATHFINDER ARRIENDE POR $149 AL MES + IMPUESTOS 1 A ESTOS TERMINOS* 39-MESES DE ARRENDAMIENTO" (This translates to mean "NEW 2013 NISSAN PATHFINDER FOR $249 PER MONTH + TAXES 1 AT THESE TERMS* 39-MONTH LEASE.")

c. Although other vehicles are listed for sale in the advertisement, these three vehicles are the only vehicles that are offered for lease in the advertisement.

d. Near the bottom of the advertisement, below multiple pictures of other vehicles, the following statements appear in minuscule white type against a black background:

*$99/Month - 24-meses de arrendamiento con $0 depósito de seguidad. $4100 al momento de firmar el arrendamiento mas registro e impuestos
registration. Cliente es responsible mas de 32,500 milas al ano a 20¢ por cada milla adicional. Con Crédito aprobado. (This translates to mean: "$99/Month - 24-month lease with $0 security deposit. $4100 on lease signing plus registration and taxes registration. Client responsible for miles over 32,500 at 20¢ per additional mile. With credit approval.")

*$149/Month- 39 meses de arrendamiento con $0 depósito de seguidad. $5,400 al momento de firmar el arrendamiento mas registro e impuestos registration. Cliente es responsible mas de 32,500 milas al ano a 20¢ por cada milla adicional. Con Crédito aprobado. (This translates to mean: "$149/Month- 39 month lease with $0 security deposit. $5,400 on lease signing plus registration and taxes registration.

Client responsible for miles over 32,500 at 20¢ per additional mile. With credit approval.")

*$249/Month 39 meses de arrendamiento con $0 depósito de seguidad. $5,400 al momento de firmar el arrendamiento mas registro e impuestos registration. Cliente es responsible mas de 32,500 milas al ano a 20¢ por cada milla adicional. Con Crédito aprobado. (This translates to mean: "$249/Month 39 month lease with $0 security deposit. $5,400 on lease signing plus registration and taxes registration. Client responsible

for miles over 32,500 at 20¢ per additional mile. With credit approval.")

f. Thus, the amount that consumers who wanted to lease these vehicles were required to pay to "drive off" with these vehicles was substantially more than the "$0" that is prominently stated at the top of the advertisements.

10. A copy of another of Respondent's advertisements that promotes lease offers, which appeared in the Pennysaver, is attached as Exhibit C. This advertisement contains the statements and depictions described in parts a through d of this Paragraph, below. Other advertisements of Respondent that appeared in one or more other editions of the Pennysaver contain substantially similar statements and depictions.

a. The ad promotes "0 DOWN PAYMENT" in the top right corner, in large bold print, followed in very fine print with the statement "on select Nissan models." These statements are surrounded by three boxes that promote lease deals on three different vehicles, including a 2013 Nissan Sentra offered at $99 per month, a 2013 Nissan Rogue S for $149 per month, and a 2013 Nissan Pathfinder for $249 per month. These three are the only vehicles in the ad for which specific lease or finance deals are offered. The statements described herein as they appear in the advertisement are depicted below:

b. Various other vehicles are then depicted in the ad, each adjacent to a sales price. Further down the page,

below these depictions of vehicles offered for sale, the following statements appear in minuscule white type against a black background:

$99/Month – 24 month lease with $0 security deposit. $4100 due at lease signing plus registration and taxes. Lessee responsible for mileage in excess of 24,000 miles at 15¢ per mile. On approved credit.

$149/Month – 39 month lease with $0 security deposit. $5400 due at lease signing plus registration and taxes. Lessee responsible for mileage in excess of 39,000 miles at 15¢ per mile. On approved credit.

$249/Month – 39 month lease with $0 security deposit. $3113 due at lease signing plus registration and taxes. Lessee responsible for mileage in excess of 39,000 miles at 15¢ per mile. On approved credit.

c. Thus, the amount that consumers who wanted to lease any of the three vehicles shown above were required to pay upon leasing the vehicle was substantially more than the "0 DOWN PAYMENT" that is prominently stated at the top of the advertisements.

11. Respondent's advertisements also deceptively promote offers of closed-end credit on vehicles it offers for sale.

12. A copy of one such advertisement, which appeared in the Pennysaver, is attached as Exhibit D. This advertisement contains the statements and depictions described in parts a through d of this Paragraph, below. Other advertisements of Respondent that appeared in one or more other editions of the Pennysaver contain substantially similar statements and depictions.

a. The ad prominently promotes "$0 DOWN" and "0% APR FINANCING" in the top left corner, in large bright print, followed in very fine print with the statement "on select Nissan models." These statements as they appear in the advertisement attached as Exhibit D are depicted below:

b. A row of three photographs of three different vehicles immediately follows these statements, with a monthly payment amount prominently featured next to each vehicle, including a 2005 Nissan Sentra S offered at $99 per month, a 2003 Honda CR-V EX offered at $139 per month, and a 2006 Honda CR-V EX offered at $159 per month. A small asterisk follows each of the three dollar amounts. These three are the only vehicles in the ad for which specific finance deals are offered.

c. Below the row of photographs depicting these three finance offers, various other vehicles are depicted, each adjacent to a sales price. Further down the page, below the depictions of the vehicles offered for sale, the following statements appear in minuscule white type against a black background:

*$7,995 purchase price plus tax and license. 60-monthly terms with $3500 down payment. 4.0% APR rate with 720+ FICO. On approved credit.

$10,995 purchase price plus tax and license. 60-monthly terms with $5000 down payment. 4.0% APR rate with 720+ FICO. On approved credit.

$12,995 purchase price plus tax and license. 60-monthly terms with $6000 down payment. 4.0% APR rate with 720+ FICO. On approved credit.

d. Thus, the amount of the down payment that a consumer who wanted to purchase any of these three cars was required to make was substantially more than the "$0" that is prominently stated at the top of the advertisements, and the annual percentage rate for

financing any of these three cars was significantly greater than "0%."

13. A copy of another advertisement that promotes offers of closed-end credit, which Respondent ran in the Los Angeles Times, is attached as Exhibit E. This full-page advertisement contains the statements and depictions described in parts a through c of this Paragraph, below. Respondent ran other advertisements in other editions of the Los Angeles Times, as well as in the San Gabriel Valley Tribune, that contain substantially similar statements and depictions.

a. The ad prominently promotes 1.99% APR financing for a term of up to 48 months. These statements as they appear in the advertisement attached as Exhibit E are depicted below:

The advertisement does not disclose the amount or percentage of the down payment, or the full terms of repayment, that are associated with this offer.

b. The bottom half of the advertisement attached as Exhibit E, which begins immediately below the statements that are described in part a of this Paragraph, includes multiple rows and columns of photographs of vehicles offered for sale. Immediately below each photograph is a boldly printed dollar figure. The far-left column consists of three photographs of three different vehicles, next to each of which is printed a monthly payment amount: $125 for the first, $165 for the second, and $175 for the third. No asterisks or other symbols prompt consumers to look for disclosures elsewhere in the ad. For example, the following is a copy of the photo and information that is printed at the top of the far-left column:

c. Toward the bottom of the advertisement, below the multiple rows of photographs, the following statements appear in minuscule white type against a medium blue background:

*$125/month - $10,995 plus tax and license. 60 months at 3.9% APR. $5000 down payment. 720+ FICO score. On approved credit. $165/month: $11,995 plus tax and license. 60 months at 4.9% APR. $4500 down payment. 720+ FICO score. On approved credit. $175/month - $10,995 plus tax and license. 60 months at 3.9% APR. $2800 down payment. 720+ FICO score. On approved credit.

14. Respondent has also run advertisements, written in Spanish, in La Opinion, that promote offers of closed-end credit. A copy of one such Spanish-language advertisement is attached as Exhibit F. This full-page advertisement contains the statements and depictions described in parts a through d of this Paragraph, below. One or more other advertisements that Respondent ran in other editions of La Opinion contain substantially similar statements and depictions.

a. The bottom third of the advertisement attached as Exhibit F includes separate photographs of fifteen used vehicles offered for sale, arranged in columns and rows; immediately adjacent to each photograph is a boldly printed dollar figure.

b. The following is a copy of the photo and information that appears in the upper left of this portion of the advertisement:

(The text in this box translates to mean "2007 Nissan Sentra S. Buy for . . . $99 per month.*")

c. The dollar figures for the remaining fourteen vehicles in this portion of the advertisement are purchase prices.

d. Toward the bottom of the advertisement, below the three rows of photographs of used vehicles offered for sale, the following statements appear in minuscule black type against a white background:

$7995 Precio más impuestos y licencia. 60 pagos mensuales con $3500 de enganche. 3.9% de APR con calificación de crédito FICO de 720+. Con crédito aprobado. (This translates to mean: "$7995 Price, plus taxes and license. 60 monthly payments with $3500 down payment. 3.9% APR for qualified FICO credit [score] of 720+. With credit approved.")

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I
MISREPRESENTATION OF AMOUNT DUE AT LEASE INCEPTION

15. Through the means described in Paragraphs 8 through 10, Respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the vehicles shown in the advertisements for the advertised monthly payment amount.

16. In truth and in fact, consumers cannot pay $0 at lease inception to lease the vehicles shown in the advertisements for the advertised monthly payment amount. Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
MISREPRESENTATION OF AMOUNT OF DOWN PAYMENT

18. Through the means described in Paragraph 12, Respondent has represented, expressly or by implication, that consumers are not required to make any down payment to finance the vehicles shown in the advertisements for the advertised monthly payment amount.

19. In truth and in fact, consumers are required to make a down payment to finance the vehicles shown in the advertisements for the advertised monthly payment amount. Therefore, the representation set forth in Paragraph 18 was, and is, false or misleading.

20. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III
MISREPRESENTATION OF AMOUNT OF THE ANNUAL PERCENTAGE RATE

21. Through the means described in Paragraph 12, Respondent has represented, expressly or by implication, that Respondent is offering consumers an annual percentage rate of 0% to finance the vehicles shown in the advertisements for the advertised monthly payment amount.

22. In truth and in fact, the annual percentage rate that Respondent is offering to finance the vehicles shown in the advertisements for the advertised monthly payment amount is substantially greater than 0%. Therefore, the representation set forth in Paragraph 21 was, and is, false or misleading.

23. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

24. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("CLA additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

25. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 8 through 10, are subject to the requirements of the CLA and Regulation M.

COUNT IV
FAILURE TO DISCLOSE OR TO DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED LEASE INFORMATION

26. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 8 through 10, have included CLA

triggering terms, but have failed to disclose or to disclose clearly and conspicuously CLA additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

27. Therefore, the practices set forth in Paragraph 26 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

28. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

29. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 12 through 14, are subject to the requirements of the TILA and Regulation Z.

COUNT V
FAILURE TO DISCLOSE OR DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED CREDIT INFORMATION

30. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 12 through 14, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously TILA additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the downpayment.

b. The terms of repayment, including any balloon payment.

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

31. Therefore, the practices set forth in Paragraph 30 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this fourth day of May, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A

Complaint

EXHIBIT B

Complaint

EXHIBIT C

Complaint

EXHIBIT D

Complaint

EXHIBIT E

Complaint

EXHIBIT F

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Consumer Leasing Act ("CLA"); and

Respondent, Respondent's counsel, and counsel for the Commission having thereafter executed an agreement containing consent order ("consent agreement"), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the consent agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent City Nissan Inc. is a Delaware corporation, with its principal office or place of business at 3428 N. Peck Road, El Monte, CA 91731.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondent" shall mean City Nissan Inc., a corporation, also doing business as Ross Nissan of El Monte, and its successors and assigns.

2. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

3. "Clearly and conspicuously" shall mean as follows:

   a. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

   b. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

   c. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

d. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

e. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

4. Consumer credit" shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

5. "Consumer lease" shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C. F. R. § 213.2, as amended.

6. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

7. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

8. "Motor vehicle" or "vehicle" shall mean:

a. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

b. Recreational boats and marine equipment;

c. Motorcycles;

d. Motor homes, recreational vehicle trailers, and slide-in campers; and

e. 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 any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, the annual percentage rate or any other finance rate, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or

indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed;

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

IV.

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

A. All advertisements and promotional materials containing the representation;

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.

V.

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

VI.

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: FTC v. City Nissan Inc.

VII.

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.

VIII.

This order will terminate on May 4, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from City Nissan, Inc., also doing business as Ross Nissan. 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 motor vehicle dealer. According to the FTC complaint, the respondent has advertised promotions for the leasing and financing of automobiles. In advertising lease offers, the complaint alleges, the respondent has misrepresented that consumers can pay $0 at lease inception to lease the vehicles shown in the advertisements for the advertised monthly payment amount. The complaint alleges that, in fact, consumers must pay substantially more to drive off with these vehicles. The complaint alleges therefore that the representations are false and misleading in violation of Section 5 of the FTC Act.

The complaint further alleges that the respondent has advertised an annual percentage rate of 0% to finance the vehicles shown in the advertisements for the advertised monthly payment. The complaint alleges that in fact, the annual percentage rate is substantially greater than 0%. The complaint alleges therefore that the representations are false and misleading in violation of Section 5 of the FTC Act.

Additionally, the complaint alleges violations of the Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit. Finally, the complaint alleges violations of the Truth in Lending Act ("TILA") and Regulation Z for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit.

Analysis to Aid Public Comment

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A of the proposed order prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, the annual percentage rate or any other finance rate, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the CLA allegations. Part II.A prohibits the respondent from stating the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously: (1) that the transaction advertised is a lease; (2) the total amount due at lease signing or delivery; (3) whether or not a security deposit is required; (4) the number, amounts, and timing of scheduled payments; and (5) that an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term. Part II.B prohibits the respondent from violating any provision of the CLA or Regulation M.

Part III of the proposed order addresses the TILA allegation. Part III.A requires the respondent to make all of the disclosures required by TILA and Regulation Z when any of its advertisements state relevant triggering terms. It also requires that if any finance charge is advertised, the rate be stated as an "annual percentage rate" using that term or the abbreviation "APR." In addition, Part III.C prohibits the respondent from failing to comply in any respect with TILA and Regulation Z.

Part IV of the proposed order requires the respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part V requires the

respondent to provide copies of the order to certain of its personnel. Part VI requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VII requires the respondent to file compliance reports with the Commission. Finally, Part VIII is a provision "sunsetting" 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

JIM BURKE AUTOMOTIVE, INC. D/B/A JIM BURKE NISSAN

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

Docket No. C-4523; File No. 152 3036
Complaint, May 4, 2015 – Decision, May 4, 2015

This consent order addresses allegations that Jim Burke Nissan, a motor vehicle dealer, deceived consumers by advertising that its vehicles were available for purchase at the prices advertised, when in fact, consumers were required to pay an additional $3,000 to purchase an advertised vehicle. The complaint further alleges that Jim Burke Nissan advertised that specific discounts, rebates, bonuses, or incentives were generally available to consumers, when, in fact, they were not. The consent order bars Jim Burke Nissan from representing that a discount, rebate, bonus, incentive or price is available unless it is available to all consumers or the qualification terms are clearly and conspicuously disclosed.

Participants

For the *Commission: Sana Chriss* and *John Jacobs.*

For the *Respondent: Robert C. Byerts, Bass Sox Mercer.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jim Burke Automotive, Inc., also doing business as Jim Burke Nissan ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Alabama corporation with its principal place of business at 1300 3rd Avenue North, Birmingham, AL 35203. Respondent offers automobiles for sale or lease to consumers.

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 caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

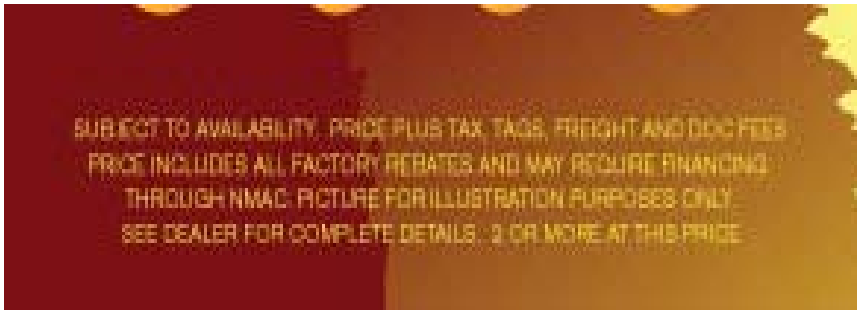
5. Respondent's advertisements include, but are not necessarily limited to advertisements posted on the website, www.jimburkenissancars.com, pages of which are attached as Exhibit A. These advertisements are prominently displayed on the dealer's home page and throughout the website.

6. Respondent has advertised various vehicles for sale and financing and discounted prices. For example, Respondent has advertised a Nissan Murano for "$9,000 off" or "ZERO % for 72 months," as depicted below and in Exhibit A.

7. In this advertisement, Respondent offers closed-end credit for a 72-month term; however, Respondent does not include required information triggered by the advertisement, such as the

down payment amount, the monthly payment amount, and the annual percentage rate.

8. Respondent's advertisements typically include disclaimers such as the following that appear in fine print and muted colors that are difficult to read. These disclaimers routinely state, in part, that the advertised prices and financing deals include all factory rebates.



9. In fact, in numerous instances, the advertised discount and price are not generally available to consumers. In numerous instances, the advertised discount and price are subject to various qualifications or restrictions. Such qualifications or restrictions have included, for example, being a recent college graduate.

10. Additionally, in numerous instances, the advertised prices and financing offers require substantial down payment amounts, often $3,000. Thus, the actual price of each of Respondent's advertised vehicles is $3,000 more than the dollar amount that is prominently advertised.

11. In other web pages linked to the advertisements on its home page, Respondent advertises vehicles for specific "Dealer Rebate[s]" and "Internet Price[s]" for particular automobiles. For example, as illustrated below and in Exhibit B, Respondent advertises a 2014 Nissan Murano LE as having an Internet price of $33,549 and dealer rebate of $8,241:

12. Further down on the web page, the following information typically appears in part:

> *The selling price shown appears after calculating dealer offers, it is for informational purposes only. Price can include all available rebates, not all customers may qualify for the offers, incentives, discounts or financing.

Exhibit B.

13. In fact, in numerous instances, the advertised discount and price are not generally available to consumers. In numerous instances, the advertised discount and price are subject to various qualifications or restrictions. Such qualifications or restrictions have included, for example, being a recent college graduate.

14. Additionally, in numerous instances, the advertised prices and financing offers require substantial down payment amounts, often $3,000. Thus, the actual price of each of Respondent's advertised vehicles is $3,000 more than the dollar amount that is prominently displayed in the advertisement for the vehicle.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I
MISREPRESENTATION OF VEHICLE PURCHASE PRICE

15. Through the means described in Paragraphs 6 through 14, Respondent has represented, expressly or by implication, that

vehicles are available for purchase at the prices prominently advertised.

16. In truth and in fact, vehicles are not available for purchase at the prices prominently advertised. Consumers must pay an additional $3,000 to purchase the advertised vehicles. Therefore, Respondent's representations as alleged in Paragraphs 6 through 14, were, and are, false and misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
MISREPRESENTATION OF REBATES AND INCENTIVES

18. Through the means described in Paragraphs 6 through 13, Respondent has represented, expressly or by implication, that specific discounts, rebates, bonuses, or incentives are generally available to consumers.

19. In truth and in fact, the specific dealer discounts, rebates, bonuses, or incentives are not generally available to consumers. Therefore, the representations set forth in Paragraphs 6 through 13 of this Complaint were, and are, false and misleading.

20. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

21. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

22. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in

Paragraphs 6 through 7, are subject to the requirements of the TILA and Regulation Z.

COUNT III
FAILURE TO DISCLOSE OR DISCLOSE CLEARLY AND CONSPICUOUSLY REQUIRED CREDIT INFORMATION

23. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 6 through 7, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment;

b. The terms of repayment, including any balloon payment;

c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

24. Therefore, the practices set forth in Paragraphs 6 through 7 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this fourth day of May, 2015, has issued this complaint against Respondent.

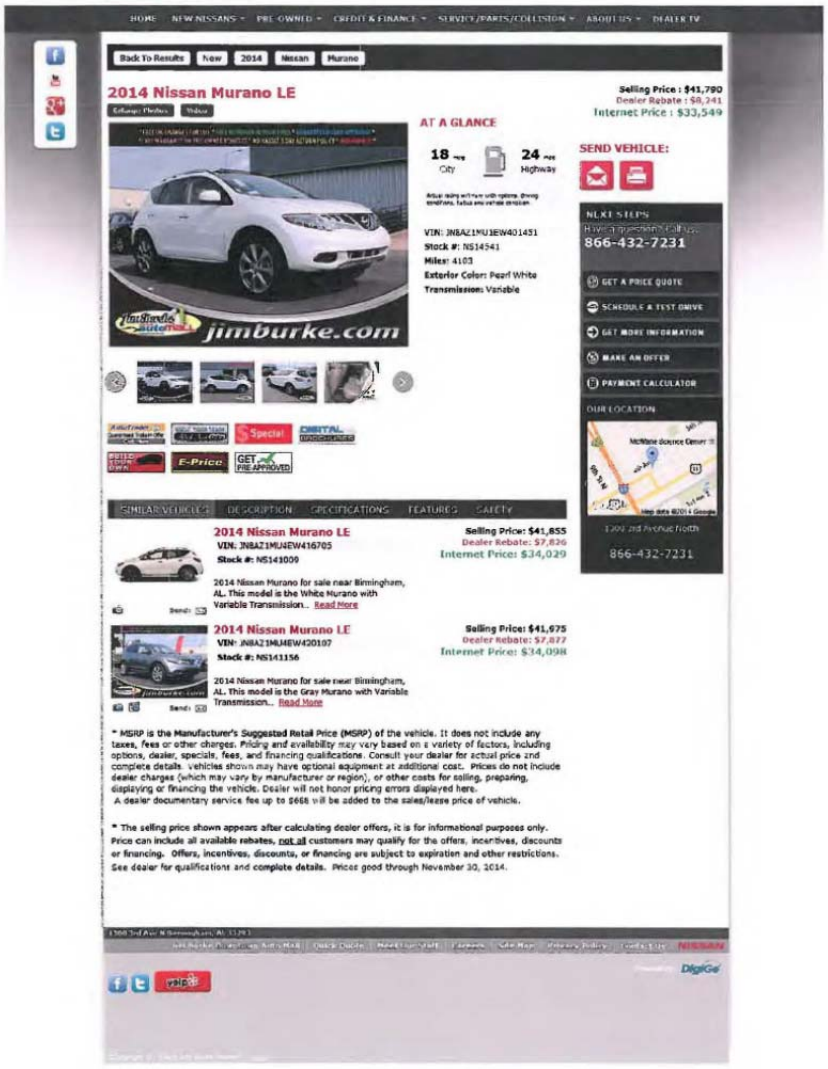
By the Commission.

Complaint

EXHIBIT A

Complaint

EXHIBIT B



DECISION AND ORDER

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

Respondent, Respondent's counsel, and counsel for the Commission having thereafter executed an agreement containing consent order ("consent agreement"), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the consent agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent, Jim Burke Automotive, Inc., also doing business as Jim Burke Nissan, is an Alabama corporation with its principal place of business at 1300 3rd Avenue North, Birmingham, AL 35203. Respondent offers automobiles for sale or lease to consumers.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondent" shall mean Jim Burke Automotive, Inc. also doing business as Jim Burke Nissan, and its successors and assigns.

2. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

3. "Clearly and conspicuously" shall mean as follows:

   a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or a mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

   b. In communications disseminated orally or through audible means (e.g.,radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the

predominant language that is used in the communication;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and

e. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

4. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

5. "Motor vehicle" or "vehicle" shall mean:

a. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

b. Recreational boats and marine equipment;

c. Motorcycles;

d. Motor homes, recreational vehicle trailers, and slide-in campers; and

e. 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 any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Represent that a discount, rebate, bonus, incentive or price is available unless:

1. It is available to all consumers, and for all vehicles advertised; or

2. The representation clearly and conspicuously discloses all qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive, or price and (b) the vehicles available at the discount, rebate, bonus incentive, or price.

B. Misrepresent any of the following:

1. The existence or amount of any discount, rebate, bonus, incentive, or price;

2. The existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase;

3. The number of vehicles available at particular prices; or

4. Any other material fact about the price, sale, financing, or leasing of motor vehicles.

III.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed;

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

IV.

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

A. All advertisements and promotional materials containing the representation;

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.

V.

IT IS FURTHER ORDERED that Respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to

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

VI.

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: JIM BURKE AUTOMOTIVE, INC. D/B/A JIM BURKE NISSAN.

VII.

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.

VIII.

This order will terminate on May 4, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Jim Burke Automotive, Inc., also doing business as Jim Burke Nissan. 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 motor vehicle dealer. This matter involves the respondent's advertising of the purchase and financing of its motor vehicles. According to the FTC's complaint, the respondent has advertised that vehicles are available for purchase at the prices prominently advertised when in fact, the complaint alleges, consumers must pay an additional $3,000 to purchase the advertised vehicles. The complaint alleges therefore that the representations are false or misleading in violation of Section 5 of the FTC Act.

The complaint further alleges that the respondent has advertised that specific discounts, rebates, bonuses, or incentives are generally available to consumers, when in fact, according to the complaint, they are not generally available to consumers. The complaint alleges therefore that the representations are false or misleading in violation of Section 5 of the FTC Act.

In addition, the complaint alleges that the respondent violated the Truth in Lending Act ("TILA") and Regulation Z by failing to disclose or disclose clearly and conspicuously certain costs and terms when advertising credit.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A of the proposed order prohibits the respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the down

payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or (2) leasing a vehicle, including but not limited to the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II.A of the proposed order prohibits respondent from representing that a discount, rebate, bonus, incentive or price is available to consumers unless, it is available to all consumers and for all vehicles advertised; or the representation clearly and conspicuously discloses all material qualifications or restrictions, if any, including but not limited to qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive or price and (b) the vehicles available at the discount, rebate, bonus, incentive or price. Part II.B prohibits respondent from misrepresenting: (1) the existence or amount of any discount, rebate, bonus, incentive or price; (2) the existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase; (3) the number of vehicles available at particular prices; or 4) any other material fact about the price, sale, financing, or leasing of motor vehicles.

Part III of the proposed order addresses the TILA allegation. Part III.A requires the respondent to make all of the disclosures required by TILA and Regulation Z when any of its advertisements state relevant triggering terms. It also requires that if any finance charge is advertised, the rate be stated as an "annual percentage rate" using that term or the abbreviation "APR." In addition, Part III.C prohibits the respondent from failing to comply in any respect with TILA and Regulation Z.

Part IV of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part V requires that respondent provide copies of the order to certain of its personnel. Part VI requires notification to the Commission regarding changes

Analysis to Aid Public Comment

in corporate structure that might affect compliance obligations under the order. Part VII requires the respondent to file compliance reports with the Commission. Finally, Part VIII is a provision "sunsetting" 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

PAR PETROLEUM CORPORATION

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

Docket No. C-4522; File No. 141 0171
Complaint, May 8, 2015 – Decision, May 8, 2015

This consent order resolves concerns relating to the $107 million acquisition by Par Petroleum Corporation ("Par") of Koko'oha Investments, Inc.'s subsidiary, Mid Pac Petroleum, LLC ("Mid Pac"). Only four firms – Par, Chevron Corporation, Mid Pac and Aloha Petroleum, Ltd. – provide Hawaii with bulk supply of Hawaii-grade gasoline blendstock, *i.e.*, gasoline that has not yet been blended with ethanol to make finished gasoline. Par and Chevron own refineries in Hawaii that produce the gasoline blendstock. Mid Pac and Aloha either buy their bulk supply from Par and Chevron or import product. These four firms also own or control access to all of the Hawaii terminals that store bulk volumes of Hawaii-grade gasoline blendstock. The complaint alleges that the merger would reduce competition and lead to higher prices for bulk supply of Hawaii-grade gasoline blendstock, ultimately increasing the price of gasoline for Hawaii consumers. The consent order requires Par to terminate the storage and throughput rights it acquires from Mid Pac for the Barbers Point terminal within five days after the merger is completed. Par will retain rights to load a limited number of tanker trucks at the Barbers Point terminal, but it must obtain prior FTC approval to modify these rights or enter into any new agreement at the Barbers Point terminal.

Participants

For the *Commission: Nathan Chubb, Anna Kertesz, Marc Schneider,* and *Brian Telpner.*

For the *Respondent: Marc Schildkraut, Cooley LLP*; and *Mark Bennett, Starn O'Toole Marcus Fisher.*

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 Par Petroleum Corporation ("Respondent" or "Par") has agreed to acquire 100% of the outstanding voting securities of Koko'oha Investments, Inc. ("Koko'oha"), which owns all of the

membership interests of Mid Pac Petroleum, LLC ("Mid Pac"), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and 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. THE RESPONDENT

1. Respondent Par is a publicly-traded 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 800 Gessner Road, Suite 875, Houston, Texas 77024.

2. Respondent, a diversified energy company, is engaged in, among other things, the refining, bulk supply, transportation, and marketing of refined petroleum products in Hawaii through its wholly-owned subsidiary, Hawaii Independent Energy, LLC.

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

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger ("Agreement") dated June 2, 2014, Respondent Par proposes to acquire Koko'oha for $107 million (the "Acquisition").

III. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the competitive effects of the Acquisition is the bulk supply of Hawaii-grade gasoline blendstock ("HIBOB").

6. Refineries produce HIBOB from crude oil. HIBOB is the only gasoline blendstock that, when combined with ethanol,

yields gasoline that meets the standards and specifications of Hawaii law. No substitute exists for HIBOB for motor vehicles that must use Hawaii-grade gasoline.

7. Bulk supply means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels. Bulk suppliers of HIBOB deliver HIBOB into gasoline terminals for storage and local distribution or further pipeline or marine shipment. No alternative exists to the bulk supply of HIBOB.

8. The relevant geographic market in which to assess the competitive effects of the Acquisition is the state of Hawaii. Bulk suppliers refine HIBOB in, or import it into, Hawaii.

IV. THE STRUCTURE OF THE MARKET

9. Two refineries located in Hawaii produce bulk supply of HIBOB. Out-of-state imports to Hawaii via ocean-going vessels are also sources of bulk supply of HIBOB. Firms that can receive imports of HIBOB by virtue of their access to local terminals are bulk suppliers.

10. Respondent Par owns one of two refineries in Hawaii that provide bulk supply of HIBOB; Chevron Corporation ("Chevron") owns the other refinery. Aloha Petroleum, Ltd. ("Aloha") owns and operates Barbers Point Terminal ("Barbers Point Terminal") in Hawaii. Barbers Point Terminal is the only terminal in Hawaii not owned by one of the local refiners that can economically import bulk supply of HIBOB. Mid Pac can import bulk supply of HIBOB at Barbers Point Terminal by virtue of a long-term terminaling agreement with Aloha.

11. The Acquisition would weaken the threat of imports as a constraint on local refiners' HIBOB bulk supply prices. By acquiring Mid Pac's storage rights at Barbers Point Terminal, Par could limit Aloha's use of the terminal to import bulk supply of HIBOB. The Acquisition likely would increase prices for bulk supply of HIBOB, and, ultimately, gasoline prices for Hawaii consumers.

V. BARRIERS TO ENTRY

12. Entry into the relevant line of commerce in the relevant section of the country would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Current bulk suppliers have no incentive to create a new competitor by offering terminal access.

VI. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be to substantially 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, in the following ways, among others:

a. by increasing the likelihood that Respondent Par would unilaterally exercise market power; and

b. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining competitors in the relevant market.

VII. VIOLATIONS CHARGED

14. The Agreement described in Paragraph 4 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

15. 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of May, 2015, issues its Complaint against Respondent.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Par Petroleum Corporation of 100% of the outstanding voting securities of Koko'oha Investments, Inc., which owns all of the membership interests of Mid Pac Petroleum, LLC, 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 ("Consent Agreement") containing 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 Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Par Petroleum Corporation 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 800 Gessner Road, Suite 875, Houston, Texas 77010.

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" means Par Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Par Petroleum Corporation including Hawaii Independent Energy, LLC (and after the Acquisition, Koko'oha Investments, Inc., and Mid Pac Petroleum, LLC) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger by and among Par Petroleum Corporation, Bogey, Inc., Koko'oha Investments, Inc., and Bill D. Mills, dated as of June 2, 2014.

D. "Aloha" means Aloha Petroleum, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Hawaii, with its offices and principal place of business located at 1132 Bishop Street, Suite 1700, Honolulu, Hawaii 96813.

E. "Amended Honolulu Terminal Agreement" means the Terminalling Agreement between Aloha Petroleum, Ltd. and Tesoro Hawaii Corporation (now known as

Hawaii Independent Energy, LLC), executed on September 23, 2010, relating to the storage and throughput of petroleum products at Aloha's terminal located at 789 N. Nimitz Highway, Honolulu, Hawaii 96817, including the First Amendment To Terminalling Agreement between Aloha Petroleum, Ltd. and Hawaii Independent Energy, LLC, dated January 28, 2015, attached to this Order as Confidential Appendix B.

F. "Barbers Point Terminal" means Aloha's petroleum products storage facility located at 91-119 Hanua Street, Kapolei, Hawaii 96707.

G. "Barbers Point Terminal Agreement" means the Terminalling Agreement between Aloha Petroleum, Ltd. and Mid Pac Petroleum, LLC, dated September 30, 2005, (including any amendments), relating to the Barbers Point Terminal, attached to this Order as Confidential Appendix A.

H. "Bulk Supply" means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels.

I. "Mid Pac" means Mid Pac Petroleum, LLC, a wholly-owned subsidiary of Koko'oha Investments, Inc., and a limited liability company 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 1100 Alakea Street, 8th Floor, Honolulu, Hawaii 96813.

J. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

II.

IT IS FURTHER ORDERED that:

A. No later than five (5) days after the closing date of the Acquisition, Respondent shall terminate the Barbers Point Terminal Agreement; *provided, however,* that Respondent may retain rights necessary to load petroleum products at the Barbers Point Terminal truck rack pursuant to the Amended Honolulu Harbor Terminal Agreement.

B. Respondent shall not, without the prior approval of the Commission, (i) modify the Amended Honolulu Terminal Agreement relating to storage or throughput at Barbers Point Terminal or (ii) enter into any new agreement relating to storage or throughput at Barbers Point Terminal; *provided, however,* that Respondent may agree to renew or extend the term of the Amended Honolulu Terminal Agreement without prior approval.

C. The purpose of this Order is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint, by preserving flexibility for Hawaii-grade gasoline blendstock imports at Barbers Point Terminal.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Person, corporate or non-corporate, or in any assets engaged in Bulk Supply of Hawaii-grade gasoline blendstock in the state of Hawaii; *provided, however,* that this Paragraph III.A. shall not apply to acquisitions of (i) pipeline throughput rights; (ii) barges or other vessels that transport Hawaii-grade gasoline blendstock only

between or among islands in Hawaii; or (iii) petroleum product terminals or other storage facilities not capable of receiving imports of at least 150,000 barrels of petroleum products in a single delivery from out of state on ocean-going vessels.

B. The prior notification required by this Paragraph III. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent 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 III. 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 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 no later than (i) thirty (30) days

from the date this Order is issued; and (ii) 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.

V.

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.

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 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, or employees of the Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 8, 2025.

By the Commission, Commissioner Wright dissenting.

CONFIDENTIAL APPENDIX A

[Redacted From The Public Record, But Incorporated By Reference]

CONFIDENTIAL APPENDIX B

[Redacted From The Public Record, But Incorporated By Reference]

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted from Par Petroleum Corporation ("Par"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from Par's proposed acquisition of 100% of the outstanding voting securities of Koko'oha Investments, Inc. ("Koko'oha"), which owns all of the membership interests of Mid Pac Petroleum, LLC ("Mid Pac"). Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Par must terminate its acquired storage and throughput rights at Aloha Petroleum, Ltd.'s ("Aloha") Barbers Point Terminal ("Barbers Point Terminal").

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 the Order final.

The Parties

Par, a publicly-traded diversified energy company based in Houston, Texas, engages in the refining, bulk supply, transportation, and marketing of petroleum products in Hawaii through its wholly-owned subsidiary, Hawaii Independent Energy, LLC ("HIE"). HIE owns and operates the 94,000 barrel-per-day Kapolei refinery on Oahu and refined product terminals in Hawaii. HIE markets gasoline through its Tesoro-branded retail locations and wholesale and retail sales to third parties.

Koko'oha, through its wholly-owned subsidiary Mid Pac, engages in the bulk supply, marketing, and distribution of petroleum products in Hawaii. Mid Pac owns and operates refined products terminals and is the exclusive licensee of the "76" gasoline brand in Hawaii. Mid Pac markets gasoline through

its branded retail locations and wholesale and retail sales to third parties.

The Proposed Acquisition

Pursuant to an Agreement and Plan of Merger dated June 2, 2014, Par proposes to acquire Koko'oha for $107 million (the "Acquisition"). 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, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for bulk supply of Hawaii-grade gasoline blendstock ("HIBOB") in the state of Hawaii.

The Relevant Market

The relevant product market in which to analyze the competitive effects of the Acquisition is the bulk supply of HIBOB. Refineries produce HIBOB from crude oil. HIBOB is the only gasoline blendstock that, when combined with ethanol, yields gasoline that meets the standards and specifications of Hawaii law. No substitute exists for HIBOB for motor vehicles that must use Hawaii-grade gasoline.

Bulk supply means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels. Bulk suppliers need bulk volumes of gasoline blendstock (either through their own refinery operations or through imports) and terminal capacity. Bulk suppliers deliver bulk supply of HIBOB into gasoline terminals for storage and local distribution, or for further pipeline or marine shipment. No alternative exists to the bulk supply of HIBOB.

The relevant geographic market in which to assess the competitive effects of the Acquisition is Hawaii. Bulk suppliers refine HIBOB in, or import it into, Hawaii.

The Structure Of The Market

Bulk supply of HIBOB comes from either the two local refineries or imports from out of state via ocean-going vessels.

Par and Chevron Corporation ("Chevron") are the only local refiners. Non-refiners Aloha and Mid Pac can supply bulk volumes to Hawaii, for distribution throughout the state, by receiving imported HIBOB cargoes through Barbers Point Terminal. This is the only terminal in Hawaii not owned by a local refiner that can receive full waterborne cargoes of HIBOB from out of state. By virtue of a long-term storage and throughput agreement, Mid Pac holds substantial storage and throughput rights at Barbers Point Terminal, which provides Mid Pac with sufficient terminal access to handle and distribute imported HIBOB cargoes. The four bulk suppliers – Par, Mid Pac, Chevron, and Aloha – own or control access to all of the Hawaii gasoline terminals that handle bulk volumes of HIBOB.

Effects Of The Acquisition

The Acquisition is likely to substantially lessen competition and lead to higher prices for bulk supply of HIBOB in Hawaii. The potential for competitive harm from the Acquisition stems from the importance of imports in establishing HIBOB prices. Although Aloha and Mid Pac typically buy bulk supply of HIBOB from Par and Chevron, Aloha and Mid Pac use their import capabilities to obtain favorable HIBOB bulk supply prices from the local refiners. Aloha and Mid Pac's import capabilities serve to constrain local refiners' bulk supply prices of HIBOB.

The Acquisition would weaken the threat of imports and relax a competitive constraint on HIBOB bulk supply prices. Although the Acquisition reduces from four to three the number of bulk suppliers of HIBOB, the increase in concentration from the loss of Mid Pac does not give rise to competitive concerns. Mid Pac's ability to command import parity pricing makes it a bulk supply market participant, but the evidence did not show that Mid Pac's participation in bulk supply or downstream markets is competitively significant. However, Par's acquisition of Mid Pac's storage rights at Barbers Point Terminal would result in Par and Aloha sharing access to the terminal. Through these acquired rights, Par could limit Aloha's use of the terminal and hamper Aloha's ability to import bulk supply of HIBOB, thus weakening Aloha's ability to use its import capabilities to obtain better bulk supply prices. With Aloha as a weakened competitor, Par could unilaterally exercise market power post-merger or increase the

likelihood and degree of coordination between Par and Chevron. As a result, the Acquisition likely would increase the price of bulk supply of HIBOB, which would ultimately lead to higher gasoline prices for Hawaii consumers.

Entry Conditions

Entry into the relevant line of commerce in the relevant section of the country would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. The prospect of new entry through construction of a refinery or import-capable terminal is extremely remote, given the financial, regulatory, and logistical challenges such entry would need to surmount. It is also unlikely that a new entrant would import HIBOB to counteract the competitive harm described above, as current bulk suppliers have no incentive to offer terminal access to create or support entry by a new bulk supply competitor.

The Decision And Order

The Order resolves the competitive concerns raised by the Acquisition by preserving flexibility for HIBOB imports at Barbers Point Terminal. The Order requires Par to terminate its rights at Barbers Point Terminal within 5 days after the closing date of the Acquisition. The Order allows Par to retain only those rights necessary to load a limited number of tanker trucks at Barbers Point Terminal truck rack. These rights would not interfere with the storage and handling of full cargoes of imported HIBOB at Barbers Point Terminal. The Commission must approve any modification to Par's rights to load products at Barbers Point Terminal or any new agreement relating to storage or throughput rights at Barbers Point Terminal. Par may renew or extend the agreement that permits the loading of tanker trucks at Barbers Point Terminal truck rack, without prior Commission approval.

In addition, the Order obligates Par to provide the Commission prior written notice of an acquisition of any leasehold, ownership, or any other interest in any assets engaged in the bulk supply of HIBOB in Hawaii. In light of the post-acquisition structure of the HIBOB bulk supply market, Par's

future acquisition of any interest enumerated above could raise competitive concerns that may warrant careful investigation by the Commission. However, Par may acquire, without prior written notice, rights or assets not used for bulk supply, which would not result in an increase in concentration in the relevant market. Specifically, the Order excludes from prior written notice the acquisitions of: (i) pipeline throughput rights, (ii) barges or other vessels engaged only in inter-island movement of HIBOB, or (iii) petroleum product terminals or other storage facilities that are unable to receive at least 150,000 barrels of petroleum products in a single delivery from out of state on ocean-going vessels. The acquisition of these rights or assets would not raise competitive concerns in the bulk supply of HIBOB in Hawaii.

To ensure Par's compliance with the Order, Par must submit periodic compliance reports and give the Commission prior notice of certain events that might affect its compliance obligations arising from the Order. Lastly, the Order terminates after 10 years.

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 Order or to modify its terms in any way.

STATEMENT OF THE COMMISSION

The Commission has reason to believe the proposed acquisition of Koko'oha Investment Inc.'s wholly-owned subsidiary Mid Pac Petroleum, LLC by Par Petroleum Corporation is likely to substantially lessen competition in the bulk supply of Hawaii-grade gasoline blendstock, in violation of Section 7 of the Clayton Act. The transaction is likely to impede the ability of Aloha Petroleum, Ltd., the only remaining bulk supplier without a local refinery, to use imports to constrain the local refiners' bulk supply prices. Par has agreed to settle the Commission's charges. Our remedy counteracts the alleged potential anticompetitive effects of the proposed acquisition without eliminating any of the efficiencies from the combination of Par and Mid Pac.

As set forth in the complaint, the competitive concerns from this acquisition stem from the unique characteristics of the Hawaiian market for bulk supply of Hawaii-grade gasoline blendstock ("HIBOB"), which is blended with ethanol to make finished gasoline. Other than Par and Chevron, Aloha is the only owner of a commercial gasoline terminal in Hawaii that is capable of receiving economical shipments of imported HIBOB – the Barbers Point terminal. Pursuant to a long-term storage and throughput agreement, Mid Pac currently shares access to Barbers Point.[1] Par and Chevron can produce more gasoline (HIBOB and other gasoline blending components) than is consumed in Hawaii, rendering imports unnecessary. However, Aloha's ability to threaten credibly to import HIBOB constrains the prices charged by the local refiners and, ultimately, the price paid by Hawaii gasoline consumers. Aloha's ability to threaten to import at Barbers Point thus is key to negotiations with Par and Chevron.

The Commission's investigation uncovered evidence that Par's acquisition of Mid Pac's throughput and storage rights at Barbers Point would give Par the incentive and ability to reduce Aloha's capability to constrain prices through importing, thereby increasing the price Aloha pays for bulk supply. As an incumbent

[1] Mid Pac acquired its rights to the Barbers Point terminal in 2005 after the Commission's challenge of Aloha's acquisition of Trustreet Properties LLP, which was Aloha's 50 percent partner in the terminal at the time.

local refiner that seeks to supply Aloha, Par would have an incentive to use the Barbers Point rights strategically and differently than Mid Pac. By storing substantial amounts of gasoline for an extended period, Par could reduce the size of an import cargo that Aloha could receive at the terminal. This would force Aloha to spread substantial fixed freight costs over a smaller number of barrels of gasoline, which would significantly increase its cost-per-barrel of importing. Contrary to Commissioner Wright's assertion, the evidence shows that market participants, including Aloha itself, believe Par might profitably seek to adopt this strategy.

Our reason to believe that Par would take steps leading to this competitive harm also flows from evidence and analysis suggesting that the benefits to Par of such a strategy outweigh its likely costs. The costs to Par associated with storing the amount of product necessary to tie up Aloha's import capability at Barbers Point appear modest at best. At the same time, Par stands to benefit significantly, in its bulk supply and downstream businesses, from even a slight increase in bulk supply prices.

Moreover, even if the benefit to Par depends on Chevron following Par's strategy, evidence from the investigation suggests a substantial risk that Chevron would respond in that fashion. As the only other incumbent local refiner and potential local supplier to Aloha, Chevron also stands to benefit if Aloha's import costs are increased. Regardless of where in the supply chain it occurs, any increase in prices would harm Hawaii gasoline consumers.

The proposed consent order is narrowly tailored to address these specific competitive concerns by requiring the termination of Par's acquired storage and throughput rights at Aloha's Barbers Point terminal.[2] There is no evidence that this particular remedy would eliminate any of the efficiencies arising from the acquisition. The prior approval and notice provisions in the proposed consent order provide additional safeguards to alert the

[2] Aloha and Par had entered into negotiations regarding the termination of Par's storage and throughput rights at the Barbers Point terminal before the Commission identified this as a competitive concern.

Commission of any future agreements or acquisitions that might similarly harm competition, while imposing minimal reporting requirements on Par. Under these circumstances, we believe that the remedy furthers the public interest.

DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and a Decision & Order against Par Petroleum Corporation ("Par") to remedy the allegedly anticompetitive effects of Par's proposed acquisition of Mid Pac Petroleum, LLC ("Mid Pac"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Par's acquisition will substantially lessen competition in bulk supply of Hawaii-grade gasoline blendstock ("HIBOB") in the state of Hawaii, in violation of Section 7 of the Clayton Act.[1] I commend Staff for their hard work in this matter. Staff has worked diligently to collect and analyze evidence related to numerous product markets within the Hawaiian gasoline industry. Indeed, Staff's thorough investigation has narrowed the scope of potential competitive concerns arising from the proposed transaction to the single theory of harm alleged in the Complaint. Based upon the evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in any relevant market. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

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[1] The Complaint alleges Mid Pac and Aloha participate in the bulk supply of HIBOB by virtue of the fact that they could command import parity pricing. While I am not persuaded by that assertion, my analysis of the transaction's likely competitive effects does not turn upon whether Mid Pac and Aloha are classified as bulk suppliers. Nor does the theory of harm articulated in the Complaint depend upon a reduction in the number of competitors in the bulk-supplied HIBOB market. I assume, *arguendo*, that the market definition articulated in the Complaint is correct and use it throughout this statement without loss of generality.

The Complaint articulates a theory of competitive harm arising from the proposed transaction based upon the possibility that Par, a bulk supplier of HIBOB, will foreclose a potential downstream customer, Aloha Petroleum, Ltd. ("Aloha"), from its ability to import to discipline the prices of bulk-supplied HIBOB. Par's acquisition of Mid Pac includes the latter's storage rights at Barbers Point Terminal. Mid Pac and Aloha each currently have storage rights at Barbers Point Terminal sufficient to allow them to import HIBOB. After the merger, Par and Aloha would share access to the terminal. The theory of harm articulated in the Complaint is that Par would have the incentive and ability to use its newly acquired Mid Pac storage rights to "park" petroleum products at Barbers Point Terminal, and that this strategy would reduce or eliminate Aloha's ability to discipline bulk supply prices by threatening to import HIBOB, thus resulting in higher HIBOB prices which would ultimately be passed on to Hawaii consumers.

The theory that Par might exclude Aloha in this way is certainly a plausible basis for further investigation. Indeed, competitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, though empirical evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign.[2] The question, however, is whether the record evidence supports the theory. In short, the answer is no. For Par to have the incentive and ability to engage in this strategy, it must be profitable for it to do so. Neither economic analysis nor record evidence gives me reason to believe this is so. The evidence strongly suggests such an exclusionary strategy would not be profitable without Chevron Corporation's ("Chevron's") cooperation. Chevron is the only other Hawaiian refiner aside from Par capable of selling bulk supplies of HIBOB to Aloha. Such tacit or explicit coordination to exclude Aloha is highly unlikely in the HIBOB market. Furthermore, the record evidence

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[2] *See generally* James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi, ed., 2008).

also indicates Aloha, the potential victim of the strategy, does not have any reason to believe Par would adopt this potentially anticompetitive strategy. Thus, I have no reason to believe that post-acquisition, Par will have the incentive and ability to raise prices of the bulk supply of HIBOB.

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. The fact that the Commission believes the proposed consent order is costless is not relevant to this determination. A plausible theory may be sufficient to establish the mere possibility of competitive harm, but that theory must be supported by record evidence to establish reason to believe its likelihood. Modern economic analysis supplies a variety of tools to assess rigorously the likelihood of competitive harm. These tools are particularly important where, as here, the conduct underlying the theory of harm – that is, vertical integration – is empirically established to be procompetitive more often than not. Here, to the extent those tools were used, they uncovered evidence that, consistent with the record as a whole, is insufficient to support a reason to believe the proposed transaction is likely to harm competition. Thus, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

Complaint

IN THE MATTER OF

AMERICAN INTERNATIONAL MAILING, INC.

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

Docket No. C-4526; File No. 152 3051
Complaint, May 20, 2015 – Decision, May 20, 2015

This consent order concerns American International Mailing, Inc.'s ("AIM") deception of consumers regarding its participation in international privacy frameworks. AIM transports mail, parcels, and freight worldwide. The complaint alleges that AIM falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from May 2010 until January 2015, AIM was not. Though AIM submitted its self-certification to the U.S.-EU Safe Harbor Framework in 2006, the complaint alleges that AIM failed to renew its self-certification in May 2010. The consent order prohibits AIM from misrepresenting the extent to which it participates in any privacy or data security program sponsored by the government or any other self-regulatory or standard-setting organization.

Participants

For the *Commission: Monique F. Einhorn.*

For the *Respondent: Brian McGovern, McCarthy, Leonard & Kaemmerer.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American International Mailing, 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 American International Mailing, Inc., is a Delaware corporation with its principal office or place of business at 3922 Vero Road, Suite 1, Baltimore Maryland 21227.

2. Respondent provides a service for transporting mail, parcels and freight worldwide.

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, www.aimmailing.com/privacy.html, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

THE FRAMEWORK

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

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

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement

action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In May 2006, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In May 2010, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website. As of January 2015, respondent has not renewed its self-certification to the U.S.-EU Safe Harbor Framework and remains in "not current" status on Commerce's website.

11. Respondent has disseminated or caused to be disseminated privacy policies and statements on the www.aimmailing.com/privacy.html website, including, but not limited to, the following:

> AIM abides by the Safe Harbor Principles developed by the US Department of Commerce and the European Commission in services rendered to clients that use personal data.

12. Through the means described in Paragraph 11, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, since May 2010, respondent has not been a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is, and was, false and misleading.

14. 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 twentieth day of May 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

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

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

1. Respondent American International Mailing, Inc., is a Delaware corporation with its principal office or place of business at 3922 Vero Road, Suite 1, Baltimore, Maryland 21227.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean American International Mailing, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a

member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

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

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

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

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director 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 American International Mailing, Inc., FTC File No. 152 3051.

V.

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

VI.

This order will terminate on May 20, 2035, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS 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 American International Mailing, Inc. ("American International Mailing" or "AIM").

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 or misleading representations that AIM made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

American International Mailing provides a service for transporting mail, parcels, and freight worldwide. According to the Commission's complaint, AIM has set forth on its website, www.aimmailing.com/privacy.html, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that American International Mailing falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from May 2010 until January 2015, AIM was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in May 2006, American International Mailing submitted its self-certification to the U.S.-EU Safe Harbor Framework. AIM did not renew its self-certification in May 2010 and Commerce subsequently updated American International Mailing's status to "not current" on its public website. In January 2015, American International Mailing

removed its Safe Harbor representation from its website privacy policy.

Part I of the proposed order prohibits American International Mailing from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

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

The purpose of 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

TES FRANCHISING, LLC

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

Docket No. C-4525; File No. 152 3015
Complaint, May 20, 2015 – Decision, May 20, 2015

This consent order resolves concerns that TES Franchising ("TES") deceived consumers about its participation in the U.S.-EU Safe Harbor Privacy Framework and about the nature of its dispute resolution policies. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to the U.S. Department of Commerce that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. The complaint alleges that, from March 2013 until February 2015, TES falsely represented that it was currently certified under the U.S.-EU Safe Harbor Framework. In fact, the company's self-certifications had lapsed. The complaint also alleges that, during this same period, TES represented that all Safe Harbor-related disputes would be settled by an "arbitration administered agency" such as the American Arbitration Association, that the hearings would take place in Connecticut, and that the parties would share the costs of arbitration equally. In fact, under the U.S.-EU Safe Harbor Framework, TES was required to settle Safe Harbor-related disputes before European data protection authorities, at no cost to consumers and without requiring in-person hearings. The complaint alleges that TES's false representations were likely to deter EU and Swiss citizens from attempting to take advantage of the dispute resolution services offered by the company. The order prohibits TES from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization. The order further prohibits TES from misrepresenting its participation in or the terms of any alternative dispute resolution process or service.

Participants

For the *Commission: Jessica Lyon.*

For the *Respondent: Not Represented by Counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that TES Franchising, LLC, a limited liability company, 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 TES Franchising, LLC ("TES") is a Connecticut limited liability company with its principal office or place of business at 900 Main Street South, Building 2, Southbury, CT 06484.

2. Respondent provides business coaching services to franchisees.

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, www.entrepreneursource.com, privacy policies and statements about its practices, including (1) statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland (collectively, "the Safe Harbor Frameworks"), and (2) statements indicating that it is a licensee of the TRUSTe Privacy Program.

THE SAFE HARBOR FRAMEWORKS

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor

Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. The seven principles are: notice, choice, onward transfer, security, data integrity, access, and enforcement. Among other things, the enforcement principle requires companies to provide a readily available and affordable independent recourse mechanism to investigate and resolve an individual's complaints and disputes.

8. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

9. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

10. The U.S.-Swiss Safe Harbor Framework is identical to the U.S.-EU Safe Harbor Framework and is consistent with the requirements of the Swiss Federal Act on Data Protection.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

MISREPRESENTATIONS REGARDING SAFE HARBOR PARTICIPATION

11. In March 2011, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks,

which is publicly available at the www.export.gov/safeharbor website.

12. In its self-certification, respondent identified the European data protection authorities as its chosen independent recourse mechanism.

13. In March 2013, respondent did not renew its self-certification to the Safe Harbor Frameworks, and Commerce subsequently updated respondent's status to "not current" on its public website.

14. From at least March 2011 until February 2015, respondent disseminated or caused to be disseminated privacy policies and statements on the www.entrepreneursource.com website, including but not limited to, the following statements:

> TES Franchising, LLC 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 transferred from the European Union and Switzerland to the United States. We have certified that we adhere 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, please visit http://www.export.gov/safeharbor/...
>
> If you are a resident of the European Union or Switzerland and have any concerns or complaints, please first address these issues to our Privacy Officer… If the Privacy Officer does not satisfactorily address a complaint within thirty (30) days, any dispute, controversy or claim shall be settled by an arbitration administered agency, such as the American Arbitration Association ("AAA"). All arbitration will be conducted in English. Judgment rendered by the arbitrator may be entered into any court having jurisdiction. The costs of arbitration will be borne equally by the parties. Connecticut, USA will be the site of all hearings, and such hearings will be before a single arbitrator…

COUNT 1

15. Through the means described in Paragraph 14, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Frameworks.

16. In truth and in fact, beginning in March 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework. Therefore, the representation set forth in Paragraph 15 is false and misleading.

COUNT 2

17. Through the means described in Paragraph 14, respondent represented, expressly or by implication, that all Safe Harbor-related disputes would be settled by an "arbitration administered agency" such as the American Arbitration Association, that hearings would take place in Connecticut, and that the costs of arbitration would be shared equally by the parties.

18. In truth and in fact, the independent recourse mechanism authorized under respondent's Safe Harbor certification was the European data protection authorities, which resolve Safe Harbor-related disputes at no cost to consumers and do not require in-person hearings. Therefore, the representation set forth in Paragraph 17 is false and misleading.

19. Further, the representation set forth in Paragraph 17 is likely to deter EU and Swiss citizens from attempting to take advantage of the dispute resolution services offered by the company.

MISREPRESENTATIONS REGARDING TRUSTE STATUS

20. True Ultimate Standards Everywhere, Inc. ("TRUSTe") provides privacy and data security certification seals to online 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 websites.

Program requirements include specifications related to transparency of company practices, verification of privacy practices, and consumer choice regarding the collection and use of consumer personal information.

21. Respondent has disseminated or caused to be disseminated privacy policies and statements on the www.entrepreneursource.com website, including but not limited to, the following statement:

> www.entrepreneursource.com is a Licensee of the TRUSTe Privacy Program . . . Because this Website wants to demonstrate its commitment to your privacy, it has agreed to disclose its information practices and have its privacy practices reviewed for compliance by TRUSTe.

COUNT 3

22. Through the means described in Paragraph 21, respondent represented, expressly or by implication, that respondent was a current Licensee of the TRUSTe Privacy Program.

23. In truth and in fact, respondent was not a current Licensee of the TRUSTe Privacy Program. Therefore, the representation set forth in Paragraph 22 was and is false and misleading.

24. 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 twentieth day of May, 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

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

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

1. Respondent TES Franchising, LLC, is a Connecticut limited liability company with its principal office or place of business at 900 Main Street South, Building 2, Southbury, Connecticut 06484.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean TES Franchising, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework, the U.S.-Swiss Safe Harbor Framework, and the TRUSTe privacy programs.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the respondent's participation in, or the rules, processes, policies, or costs of, any alternative dispute resolution process or service, including, but not limited to, arbitration, mediation, or other independent recourse mechanism.

III.

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

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

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with 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 relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part V, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

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(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director 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 TES Franchising, LLC., FTC File No. 152 3015.

VI.

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

VII.

This order will terminate on May 20, 2035, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS 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 TES Franchising, LLC ("TES").

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

This matter concerns alleged false or misleading representations that TES made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union and the U.S. and Switzerland (collectively, "Safe Harbor Frameworks") and concerning the

handling of consumer disputes relating to the Safe Harbor Frameworks. The proposed complaint also alleges that TES made false or misleading representations to the effect that it was a current licensee of the TRUSTe self-regulatory program.

The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with European law. To join the Safe Harbor Frameworks, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission and Switzerland as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Among other things, the enforcement principle requires companies to provide a readily available and affordable independent recourse mechanism to investigate and resolve an individual's complaints and disputes. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor Frameworks. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Frameworks.

TES provides business coaching services to franchisees. According to the Commission's complaint, TES has set forth on its website, www.entrepreneursource.com, privacy policies and statements about its practices, including (1) statements related to its participation in the Safe Harbor Frameworks and (2) statements indicating that it is a licensee of the TRUSTe Privacy Program.

The Commission's complaint alleges that from March 2013 until February 2015 TES falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, the company's self-certifications had lapsed. The

Commission's complaint also alleges that during this same time period TES represented that all Safe Harbor-related disputes would be settled by an "arbitration administered agency" such as the American Arbitration Association, that hearings would take

place in Connecticut, and that the costs of arbitration would be shared equally by the parties. In fact, the independent recourse mechanism authorized under TES's Safe Harbor certification was the European data protection authorities, which resolve Safe Harbor-related disputes at no cost to consumers and do not require in-person hearings. The Commission's complaint alleges that these false representations are likely to deter EU and Swiss citizens from attempting to take advantage of the dispute resolution services offered by the company.

The Commission's complaint further alleges that until February 2015, TES represented through statements in its online privacy policy that it was a current licensee of the TRUSTe Privacy Program, when, in fact, it was not a current licensee.

Part I of the proposed order prohibits TES from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework, the U.S.-Swiss Safe Harbor Framework, and the TRUSTe privacy programs. Part II of the proposed order also prohibits TES from misrepresenting in any manner, its participation in, or the rules, processes, policies, or costs of, any alternative dispute resolution process or service, including but not limited to, arbitration, mediation, or other independent recourse mechanism.

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

NETWORK SOLUTIONS, LLC

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

Docket No. C-4527; File No. 132 3084
Complaint, May 28, 2015 – Decision, May 28, 2015

This consent order resolves concerns that Network Solutions, LLC misled purchasers of its web hosting services by falsely promising a full refund if canceled within 30 days. Network Solutions is a domain name registrar and web-hosting provider offering web-hosting packages. The complaint alleges that the company advertised a "30-Day Money Back Guarantee" on its website but did not adequately disclose that it would withhold up to 30 percent of the purchase price. The complaint further alleges that Network Solutions' offer of a 30-day money back guarantee combined with its failure to disclose the cancellation fee amounted to a deceptive act or practice under Section 5 of the FTC Act. The consent order requires Networks Solutions to clearly disclose the terms of any money back guarantee applicable to web services. Additionally, the order requires the company to refund the full purchase price of any web hosting service sold with a money back guarantee, in response to a request that complies with the terms of that guarantee, unless any applicable fees are disclosed clearly.

Participants

For the *Commission: James Evans* and *Shameka Walker.*

For the *Respondent: Dee Bansal, M. Howard Morse,* and *Sarah K. Swain, Cooley LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Network Solutions, 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 is a Delaware limited liability company with its principal office or place of business at 12808 Gran Bay Parkway West, Jacksonville, Florida 32258.

2. Respondent has advertised, offered for sale, and sold web hosting services.

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.

Respondent's Business Practices

4. Respondent's web hosting services allow Respondent's customers to make webpages available on the World Wide Web by storing customers' webpage information, including programming code, images, and videos, on web servers owned or leased by Respondent, and providing the technology and Internet connectivity required to serve webpages on the Internet.

5. Respondent sells web hosting services in monthly, annual, or multi-year terms. Respondent offers new annual and multi-year web hosting terms with a free domain name registration for the term of the web hosting agreement.

6. Respondent sells web hosting services in packages that offer different services for different prices. For example, Respondent charges $120 for one year of "Essential Web Hosting;" $160 for one year of "Professional Web Hosting," which includes more services than Essential Web Hosting; and $350 for one year of "Premium Web Hosting," which includes more services than Professional Web Hosting.

7. Since approximately 2008, Respondent has offered a thirty-day money back guarantee (the "Guarantee") with its web hosting services.

8. Respondent has disseminated or has caused to be disseminated advertisements for the Guarantee, including but not necessarily limited to the icon pictured in Figure 1, which states: "30 Day Money Back Guarantee."

Figure 1—Guarantee icon.

9. If Respondent's customers purchase a new annual or multi-year web hosting package,

register the included domain name of the same term, and subsequently cancel their web hosting services within thirty days of purchase under the Guarantee, Respondent withholds a cancellation fee from their refund based on the number of years of web hosting purchased, and customers retain the included domain name. Respondent's cancellation fees are listed in Table 1.

Package	Cancellation Fee	
	since Apr. 29, 2011	before Apr. 29, 2011
1 year	$34.99	$29.95
2 years	$69.98	$49.90
3 years	$104.97	$59.85
5 years	$114.95	$47.75
10 years	$179.90	$99.50

Table 1—Network Solutions cancellation fees.

10. The cancellation fee may be a substantial portion of a customer's purchase price. For example, a customer that purchases one year of "Essential Web Hosting" pays Respondent $120 for web hosting services. If that customer registers the included domain name and then cancels his or her web hosting services within thirty days, Respondent will withhold $34.99 from his or her refund—almost 30% of the purchase price.

11. Respondent did not disclose the cancellation fee in its advertisements for the Guarantee or on webpages that advertised the Guarantee.

12. At the bottom of webpages advertising the Guarantee, Respondent noted, sometimes in a font considerably smaller than other text on the webpage: "* See Terms and Conditions for," followed by several hyperlinks, including one that reads: "30-Day Money Back Guarantee." Respondent did not disclose the existence of the cancellation fee in these notes. Respondent sometimes placed the hyperlink in blue text against a black background. The placement, wording, size, and color of these hyperlinks made it unlikely that customers would notice them, as in Figure 2.

Figure 2—example of Network Solutions webpage with the Guarantee icon and hyperlinks to the disclosures at the bottom.

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13. If customers clicked on the small "30-Day Money Back Guarantee" hyperlink, they were taken to a new pop-up webpage (the "Disclosure Webpage"). On the Disclosure Webpage, Respondent has called the Guarantee a "30-Day Limited Money Back Guarantee." The word "limited" did not appear in some advertisements for the Guarantee. The Disclosure Webpage noted the existence of the cancellation fee, referring to it as a "processing fee."

14. As described in Paragraphs 11–13, disclosure of the cancellation fee is not clear and conspicuous.

COUNT I
DECEPTIVE FAILURE TO DISCLOSE CANCELLATION FEE

15. In connection with the advertising, promotion, offering for sale or sale of web hosting services, Respondent has represented, directly or indirectly, expressly or by implication, that if Respondent's customers cancel web hosting services within thirty days of purchase, they will receive a full refund of their money.

16. In instances in which Respondent has made the representation set forth in Paragraph 15, Respondent has failed to disclose adequately that it withholds part of the refund from customers who: (1) purchase an annual or multi-year web hosting package, (2) register the included domain name, and (3) cancel within thirty days. This fact would be material to consumers in deciding whether to purchase web hosting services from Respondent.

17. Respondent's failure to disclose adequately the material information described in Paragraph 16, in light of the representation described in Paragraph 15, is a deceptive act or practice.

VIOLATIONS OF SECTION 5

18. 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 twenty-eighth day of May, 2015, has issued this Complaint against Respondent.

By the Commission.

DECISION AND ORDER

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

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

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

1. Respondent Network Solutions, LLC ("Network Solutions") is a Delaware limited liability company with its principal office or place of business at 12808 Gran Bay Parkway West, Jacksonville, Florida 32258.

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

ORDER

DEFINITIONS

1. "Clearly and Conspicuously" means:

   a. In textual communications, the disclosure must be in a noticeable type, size, and location, using language and syntax comprehensible to an ordinary consumer;

   b. In communications disseminated orally or through audible means, the disclosure must be delivered in a volume, cadence, language, and syntax sufficient for an ordinary consumer to hear and comprehend them;

   c. In communications disseminated through video means: (i) written disclosures must be in a form consistent with definition 1(a), above, and appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and be in the same language as the predominant language that is used in the communication; and (ii) audio disclosures must be consistent with definition 1(b), above; and

   d. The disclosure cannot be combined with other text or information that is unrelated or immaterial to the subject matter of the disclosure; no other representation(s) may be contrary to, inconsistent with, or in mitigation of, the disclosure.

2. "Commerce" has the meaning defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. Unless otherwise specified, "respondent" means Network Solutions, LLC, a limited liability company, and its successors and assigns.

4. "Web hosting" means a service offered for sale or sold by respondent primarily designed to allow respondent's customers to make webpages available

on the World Wide Web by storing customers' webpage information, including programming code, images, and videos, on web servers owned or leased by respondent, and providing the technology and Internet connectivity required to serve webpages on the Internet. "Web hosting" does not refer to products for which storage of customers' webpage information is incidental to the product being marketed, such as email delivery services or online directory listings.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of web hosting, in or affecting commerce, shall not, in any manner:

A. Fail to disclose, clearly and conspicuously, before obtaining a customer's billing information, the material terms of any applicable money back guarantee, including but not limited to the existence and amount of any service charges or other fees applicable to any such money back guarantee; or

B. Fail to refund the full purchase price paid for web hosting in conjunction with a money back guarantee, in response to a request that complies with the terms of such a money back guarantee; *provided, however,* that service charges or other fees may be excluded from refunds made pursuant to a money-back guarantee if the fact of the exclusion of such fees is disclosed clearly and conspicuously and in close proximity to the money-back guarantee.

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or

sale of web hosting, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. Material terms of any refund or cancellation policy or applicable money back guarantee; or

B. Any other material fact concerning web hosting, such as any material restrictions, limitations, or conditions, or any other material aspect of the performance, efficacy, nature, or central characteristics of respondent's web hosting.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission business records demonstrating its compliance with the terms and provisions of this order, including but not limited to:

A. Accounting records showing the revenues from and refunds paid for web hosting sold in conjunction with a money back guarantee;

B. Records of all written customer complaints concerning money back guarantees for web hosting, whether received directly or indirectly, such as through a third party, and any response;

C. 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 concerning money back guarantees for web hosting.

IV.

IT IS FURTHER ORDERED that, for three (3) years after service of this order, respondent shall deliver a written or electronic copy of this order to all officers, directors, LLC managers and members, and to all employees, agents, and representatives having responsibilities with respect to money back

guarantees for web hosting, 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. For any business entity resulting from a change in structure set forth in Section V of this order, delivery shall be within at least thirty (30) days after the change in structure.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be emailed to debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Network Solutions, LLC, File No. 1323084.

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) business days of receipt of written notice from an

authorized representative of the Commission, respondent shall submit additional true and accurate written reports.

VII.

This order will terminate on May 28, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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 ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Network Solutions, LLC ("Network Solutions"). The Commission has placed the proposed Order on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the 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.

Network Solutions advertises and sells web hosting services. The company's web hosting services allow customers to make webpages available on the internet by storing their webpage information, including programming code, images, and videos, on web servers owned or leased by Network Solutions, and by providing the technology and internet connectivity required to serve the webpages on the internet. Network Solutions has sold its web hosting services subject to a thirty-day money back guarantee. It has advertised that guarantee on its website.

The Commission's proposed Complaint alleges that Network Solutions failed to disclose adequately that its web hosting thirty-day money back guarantee could be subject to a cancellation fee. This cancellation fee was sometimes a substantial portion of the purchase price. Network Solutions did not disclose the cancellation fee on its webpages advertising the guarantee. Instead, at the bottom of those webpages, Network Solutions included a hyperlink to "Terms and Conditions" for the guarantee. This link often appeared in smaller print than the rest of the webpage and sometimes also appeared in blue text against a black background. The link opened a pop-up window that disclosed the existence of the cancellation fee. The Commission's proposed Complaint alleges that, coupled with the triggering representation that it offers a thirty-day money back guarantee, Network Solutions' failure to disclose adequately the cancellation fee is a deceptive act or practice under Section 5 of the FTC Act.

Analysis to Aid Public Comment

The proposed Order contains provisions designed to prevent Network Solutions from engaging in the same or similar acts or practices in the future. Section I of the proposed Order requires Network Solutions to clearly and conspicuously disclose the material terms of any money back guarantees applicable to web hosting services, including the existence and amount of any fee applicable to money-back guarantees. It also requires Network Solutions to refund the full purchase price of web hosting sold under a money back guarantee, in response to a request that complies with the terms of that guarantee, unless any applicable fees are disclosed clearly and conspicuously. Section II of the proposed Order broadly prohibits misrepresentations with regard to refund or cancellation policies or any other material fact concerning the web hosting services that Network Solutions offers or sells. Sections III through VI of the proposed Order are standard reporting and compliance provisions that allow the Commission to better monitor Network Solutions' ongoing compliance with the Order. Under Section VII, the Order will expire in 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

FINANCE SELECT, INC. D/B/A FAST CASH TITLE PAWN

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

Docket No. C-4528; File No. 132 3262
Complaint, June 2, 2015 – Decision, June 2, 2015

This consent order addresses allegations that Finance Select, Inc. ("Fast Cash") failed to disclose important conditions and financing information about its title loans. The complaint alleges that Fast Cash advertised, both online and in print, zero percent interest rates for a 30-day car title loans without disclosing important loan conditions or the increased finance charge imposed after the 30-day introductory period ended. Specifically, Fast Cash failed to disclose that, unless a loan was paid in full in 30 days, the zero percent offer did not apply, and a borrower would have to pay a finance charge for the initial 30 days of the loan in addition to any finance charges incurred going forward. These high finance charges would add up quickly, with a consumer paying hundreds or thousands of dollars in fees or forfeiting the vehicle. Under the consent order, Fast Cash is barred from failing to disclose all the qualifying terms associated with obtaining a loan at its advertised rate and what the finance charge will be after an introductory period ends; and from misrepresenting any material terms of its loan agreements.

Participants

For the *Commission: Peter Lamberton* and *Helen Wong.*

For the *Respondent: James Kaminski, Hughes & Bentzen.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Finance Select, Inc., a Georgia corporation ("Respondent"), has violated the 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 Finance Select, Inc., is a Georgia corporation with its principal place of business at 432 Newnan Rd, Carrollton, GA, 30117. Respondent operates from five different locations in the state of Georgia and two locations in the state of Alabama.

2. Respondent offers loans secured by consumers' free-and-clear car titles ("title loans").

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.

BACKGROUND ON CAR TITLE LOANS

4. Car title loans can be short term loans and are often advertised as 30 day loans. Title loans have high interest rates and short repayment periods, with payments due every month. In many instances, however, the loans are structured as longer-term, high cost installment loans with payments due over several months. The typical APR of a car title loan can be over 300%.

5. Each additional payment after the first month is termed a "renewal." The average consumer does not repay the loan in 30 days, instead "renewing" the loan an average of eight times. Loan amounts differ but typically are $1,000 and up to $10,000. The lender takes possession of the consumer's car title and charges a monthly fee, sometimes as much as 25% of the amount borrowed per month. For example, the amount of fees would be $250 per month and after eight renewals, a consumer taking out the average loan amount of $1,000 would pay approximately $2,000 in fees.

RESPONDENT'S BUSINESS PRACTICES

6. Respondent offers consumers car title loans, which are secured by the borrower's free-and-clear car title. Respondent offers a 0% introductory interest rate, but the loans are "renewed" to a much higher interest rate after the first 30 days if the borrower does not repay the loan completely within those 30 days.

7. Since at least January 2012, Respondent has disseminated or caused to be disseminated advertisements promoting its title loans, including on the website www.fastcashtitlepawn.com, on its' mobile website of the same address, and on web ads, with the following representations, copies of which are attached as Exhibits 1, 2, and 3:

a. The website advertisements, copies of which are attached as Exhibit 1, provide the following disclosures:

TITLE LOANS

1st 30 Days 0% NEW CUSTOMERS

No Credit Check

b. On Respondent's mobile website, copies of which are attached as Exhibit 2, the advertisement contains the following representation:

TITLE LOANS

0% 1st 30 Days

c. The web ads appearing as a Google advertisement on the side webpages, copies of which are attached as Exhibit 3, provide the following disclosures:

0% Title Loans – Best Rate
1st 30 days 0%, No Credit Ck,
We Loan More, call now
fastcashtitlepawn.net

0% Max Cash Title Loan
1st 30 days 0%
Lowest Rates, Call Now!
fastcashtitlepawn.net

8. The advertisements, as shown in Paragraph 7, do not disclose: (1) that the advertised 0% offer does not apply unless the loan is completely repaid in 30 days, (2) that there will be a substantial finance charge if the loan is not completely repaid in 30 days and (3) the amount of this finance charge.

9. The advertisements, as shown in Paragraph 7, do not disclose that if the loan is not repaid in full in 30 days, the consumer would be required to pay the finance charge for the first

30 days in addition to any additional finance charges that incur on day 31 (for the second 30-day period).

10. Many of Respondent's borrowers do not repay their loans within the first 30 days, and thus many of its borrowers end up paying finance charges.

COUNT I
FAILURE TO DISCLOSE TERMS OF THE LOAN

11. In numerous instances, including but not limited to, through the means described in Paragraphs 6 to 10, Respondent has represented, directly or indirectly, expressly or by implication, that it offers title loans to consumers with a 0% finance charge for a 30-day introductory period.

12. In instances in which Respondent has made the representation set forth in Paragraph 11, Respondent has failed to disclose, or failed to disclose adequately: (1) the existence and amount of the finance charge that consumers have to pay for the 30 day introductory period if certain terms and conditions are not met and (2) the existence and amount of the finance charge that consumers have to pay after the conclusion of the 30-day introductory period. These facts would be material to consumers in their decisions regarding Respondent's title loans.

13. Respondent's failure to disclose, or failure to disclose adequately, the material information described in Paragraph 12, in light of the representation set for forth in Paragraph 11, is a deceptive act or practice.

14. The acts and practices of Respondent alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

THEREFORE, the Federal Trade Commission this second day of June, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT 1

Complaint

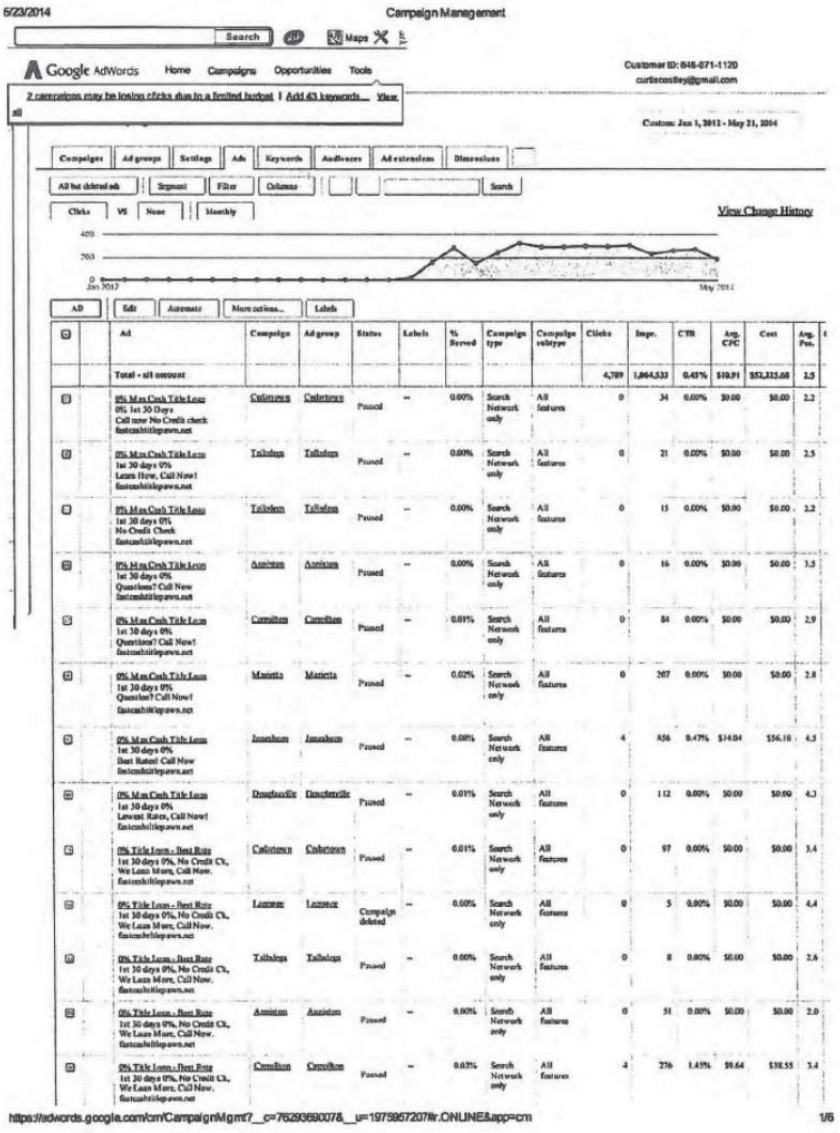
EXHIBIT 1

Complaint

EXHIBIT 2

Complaint

EXHIBIT 3



DECISION AND ORDER

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

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

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

1. Respondent Finance Select, Inc., d/b/a Fast Cash Title Pawn ("Fast Cash") is a Georgia corporation with its principal place of business at 432 Newnan Rd, Carrollton, GA, 30117.

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

ORDER

DEFINITIONS

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

A. "Consumer Credit" means credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 1026.2(a)(12) of Regulation Z, 12 C.F.R. §1026.2(a)(12) as amended.

B. "Clear and Conspicuous" or "Clearly and Conspicuously" means:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

C. "Respondent" means Finance Select, Inc. and its successors and assigns.

I.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, in or affecting commerce, shall not, in any manner, expressly or by implication:

A. State an introductory or temporary finance charge without disclosing, clearly and conspicuously, the finance charge after the introductory or temporary period ends;

B. State an introductory or temporary finance charge without disclosing, clearly and conspicuously, the full effect of failing to make a timely complete repayment of the loan within the introductory or temporary time period;

C. Fail to disclose, clearly and conspicuously, all qualifying terms associated with obtaining the loan at its advertised rate, including but not limited to, minimum loan requirements, new customer requirements, and any other material term;

D. Fail to disclose, clearly and conspicuously, all costs associated with obtaining the loan, including but not limited to transaction costs, registration costs or fees, recording costs or fees, and title fees; or

E. Misrepresent any other material fact about the terms of the loan.

II.

IT IS FURTHER ORDERED that Respondent shall deliver as soon as practicable, but in no event later than thirty (30) days after entry of this order, an exact copy (written or electronic) of this order, showing the date of delivery, to all of Respondent's current and future principals, officers, directors, and managers and to all current employees, agents, and representatives having responsibilities with respect to the advertisement of consumer credit, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to future personnel within thirty (30) days after the person assumes such position or responsibilities.

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 Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

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

D. Other records that will demonstrate compliance with the requirements of this order.

IV.

IT IS FURTHER ORDERED that Respondent, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Finance Select, Inc., Docket No.C-4528.

V.

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.

VI.

This order will terminate on June 2, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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 Finance Select, 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 title loan company. According to the FTC complaint, respondent has advertised its loans with

advertisements that broadly state that the title loans are available for "1st 30 Days 0%." In much smaller print, these advertisements state "New Customers Only." However, respondent's advertisements fail to disclose that unless the loan is completely repaid in 30 days, the 0% offer does not apply and there is a significant finance charge. If a consumer does not repay the loan in full in 30 days, he or she would then be required to pay the finance charge for the first 30 days in addition to any additional finance charges incurred on day 31 (to start the second 30-day period). The advertisements also fail to disclose the amount of the finance charge after expiration of the 30-day introductory period. The proposed complaint alleges that these material omissions constitute 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 stating an introductory or temporary finance charge without disclosing, clearly and conspicuously, the finance charge after the introductory or temporary period ends; or the full effect of failing to make a timely complete repayment of the loan within the introductory or temporary time period. Respondent must further disclose all qualifying terms associated with obtaining the loan at its advertised rate, including but not limited to, minimum loan requirements, new customer requirements, and any other material term; all costs associated with obtaining the loan, including but not limited to transaction costs. Respondent also cannot misrepresent registration costs or fees, recording costs or fees, and title fees; and respondent cannot misrepresent any other material fact about the terms of the loan.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II is an order distribution provision that requires respondent to provide the order to current and future principals, officers, directors, and managers and to all current employees, agents, and representatives having responsibilities with respect to the advertisement of consumer credit. Part III of the proposed order requires respondent to maintain and upon request make available to the Commission certain compliance-related records, including all advertisements and also consumer complaints and records that demonstrate compliance with the proposed order for a period of five years. Part IV requires

respondent to notify the Commission of corporate changes that may affect compliance obligations within 30 days of such a change. Part V requires 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 VI "sunsets" the order after 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

FIRST AMERICAN TITLE LENDING OF GEORGIA, LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT, SEC. 144 OF THE TRUTH-IN-LENDING ACT, AND SEC. 1026.24 OF REGULATION Z

Docket No. C-4529; File No. 132 3264
Complaint, June 2, 2015 – Decision, June 2, 2015

This consent order addresses allegations that First American Title Lending of Georgia, LLC ("First American") failed to disclose important conditions and financing information about their title loans. First American is a car title loan company. The complaint alleges that First American advertised that title loans were available to consumers for "0% Interest," but failed to disclose that the 0 % offer did not apply unless the loan was completely repaid in 30 days. If the consumer did not repay the loan in full in 30 days, he would then be required to pay the finance charge for the first 30 days in addition to any finance charges incurred on day 31. The advertisement also omitted the finance charge amount that would be charged. The complaint alleges that these material omissions constitute a deceptive act or practice under Section 5 of the FTC Act. Under the consent order, First American is prohibited from failing to disclose all the qualifying terms and finance charges associated with obtaining a loan at its advertised rate and from misrepresenting any material terms of its loan agreements.

Participants

For the *Commission: Peter Lamberton* and *Helen Wong.*

For the *Respondent: Traci Fant, Corporate Counsel.*

COMPLAINT

The Federal Trade Commission, having reason to believe that First American Title Lending of Georgia, LLC, a limited liability company, ("Respondent"), has violated the provisions of the Federal Trade Commission Act ("FTC Act") and provisions of the Truth in Lending Act ("TILA") and its implementing Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent First American Title Lending of Georgia, LLC, is a Tennessee limited liability company with its principal place of business at 6045 Century Oaks Drive, Chattanooga, Tennessee, 37416. First American Title Lending of Georgia, LLC, operates from 33 different locations in the state of Georgia.

2. Respondent offers loans secured by consumers' free-and-clear car titles ("title loans").

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.

BACKGROUND ON CAR TITLE LOANS

4. Car title loans can be short term loans and are often advertised as 30 day loans. Title loans have high interest rates and short repayment periods, with payments due every month. In many instances, however, the loans can be longer-term, high cost installment loans with payments due over several months. The typical APR of a car title loan can be over 300%.

5. Each additional payment after the first month is termed a "renewal." The average consumer does not repay the loan in 30 days, instead "renewing" the loan an average of eight times. Loan amounts differ but typically are $1,000 and up to $10,000. The lender takes possession of the consumer's car title and charges a monthly fee, sometimes as much as 25% of the amount borrowed per month. For example, the amount of fees would be $250 per month and after eight renewals, a consumer taking out the average loan amount of $1,000 would pay approximately $2,000 in fees.

RESPONDENT'S BUSINESS PRACTICES

6. Respondent offers consumers car title loans in Georgia, purportedly in accord with Part 5 of Article 3 of Chapter 12 of Title 44 of the Georgia statutes relating to pawnbrokers, O.C.G.A. Sections 44-12-130 *et seq*., which are secured by the borrower's free-and-clear car title. Respondent's advertisements state that the title loans are offered at "0% interest rate" or "0% interest rate for 30 days."

7. Respondent has disseminated or caused to be disseminated advertisements to the public promoting extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "closed-end credit," and "consumer credit" are defined in Section 1026.2 of Regulation Z, 12 C.F.R. § 1026.2, as amended.

8. Since at least January 2012, Respondent has disseminated or caused to be disseminated advertisements promoting its title loans, including on the website www.firstamericantitlelending.com, on web ads, on billboards, flyers and brochures, newspapers, and yard signs, with the following representations, copies of which are attached as Exhibits 1 - 12:

a. The website advertisements, copies of which are attached as Exhibit 1, provide the following disclosures:

0% Interest
FOR 30 DAYS*

**Some restrictions apply*

b. The web search ads, appearing as a Google advertisement on the side of the webpage, copies of which are attached as Exhibit 2, provide the following disclosures:

Lowest Rate Title Pawns
Ask about 0% Interest. No Credit Check.

Title Lending – Low Rates
0% for 30 days. Get the Most Money.

c. A sampling of the billboard advertisements, copies of which are attached as Exhibits 3 – 5 (Exhibit 5 is in Spanish), provides the following disclosures:

i. Exhibit 3:

0% Interest for 30 days

Certain terms and conditions may apply

ii. Exhibit 4:

0% Interest

iii. Exhibit 5:

0% Interest
Compramos Prestamos Sobre Su Titulo
(Buy on your title loans)

d. The flyer and brochure advertisements, copies of which are attached as Exhibits 6 – 8, provide the following disclosures:

i. Exhibit 6:

0% Interest

9.5% or lower!

Lowest Rates in Town

ii. Exhibit 7:

- Get up to $5,000 in less than 30 minutes
- No credit check – your car is your credit
- Lowest rates in town – as low as 9.5%
- Title pawned? We can buy it out!
- 0% Interest for 30 days

(This ad is also in Spanish)

iii. Exhibit 8:

0% Interest for 30 days!
Rates as low as 9.5%

e. The newspaper advertisements, copies of which are attached as Exhibits 9 – 10, provides the following disclosures:

i. Exhibit 9:

Lowest Rates!
0% Interest!

ii. Exhibit 10:

0% Interest!
(for 30 days)
Lowest Rates!

f. The yard sign advertisements, copies of which are attached as Exhibits 11 – 12 provides the following disclosures:

i. Exhibit 11:

0% Title Pawn

ii. Exhibit 12:

0% Interest

9. The advertisements, as shown in Paragraph 8, do not disclose that the 0% offer does not apply unless: (1) the borrower is a new customer of Respondent, (2) the borrower is starting a new title loan and not refinancing a different loan through another title lender, and (3) the loan is repaid in certified funds or money order and not by cash or personal check.

10. The advertisements, as shown in Paragraph 8, do not disclose: (1) that the advertised 0% does not apply unless the loan is completely repaid in 30 days, (2) that there will be a substantial finance charge if the loan is not completely repaid in 30 days and (3) the amount of this finance charge.

11. The advertisements, as shown in Paragraph 8, do not disclose that if the loan is not repaid in full in 30 days, the

consumer would be required to pay the finance charge for the first 30 days in addition to any additional finance charges that incur on day 31 (for the second 30-day period).

12. The advertisements, as shown in Paragraph 8.d., display an additional rate of finance but do not disclose the rate of finance charge as an annual percentage rate ("APR").

13. Many of Respondent's borrowers do not repay their loans within the first 30 days or do not meet the requirements for the 0% introductory rate, and thus many of its borrowers end up paying finance charges.

VIOLATIONS OF THE FEDERAL TRADE COMMISION ACT

COUNT I
FAILURE TO DISCLOSE TERMS OF THE LOAN

14. In numerous instances, including but not limited to, through the means described in Paragraphs 6 to 13, Respondent has represented, directly or indirectly, expressly or by implication, that it offers title loans to consumers with: (1) a 0% "interest rate" or (2) a 0% rate of finance charge for a 30-day period.

15. In instances in which Respondent has made the representation set forth in Paragraph 14 Respondent has failed to disclose, or failed to disclose adequately: (1) the existence and amount of the finance charge that consumers have to pay for the 30 day introductory period if certain terms and conditions are not met; (2) the existence and amount of the finance charge that consumers have to pay after the conclusion of the 30-day introductory period; and (3) the conditions to get the 0% rate. These facts would be material to consumers in their decisions regarding Respondent's title loans.

16. Respondent's failure to disclose, or failure to disclose adequately, the material information described in paragraph 15, in light of the representation set forth in Paragraph 14, is a deceptive act or practice.

17. The acts and practices of Respondent alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

VIOLATION OF THE TRUTH IN LENDING ACT AND REGULATION Z

18. Respondent's advertisements promoting title loans, including but not limited to those described in Paragraph 8.d., are subject to the requirements of TILA and Regulation Z.

19. Section 144 of TILA and Section 1026.24(c) of Regulation Z require that the rate of finance charge must be stated as an "annual percentage rate" using that term or the abbreviation "APR."

COUNT II

20. Respondent's advertisements promoting the extension of closed-end credit in consumer credit transactions, including but not limited to those described in Paragraph 8.d., provide a rate of finance charge but fail to state that rate as an "annual percentage rate" or "APR."

21. Therefore, Respondent's practices violate Section 144 of TILA, 15 U.S.C. §1664, and Section 1026.24(c) of Regulation Z, 12 C.F.R. §1026.24(c).

THEREFORE, the Federal Trade Commission this second day of June, 2015, has issued this complaint against Respondent.

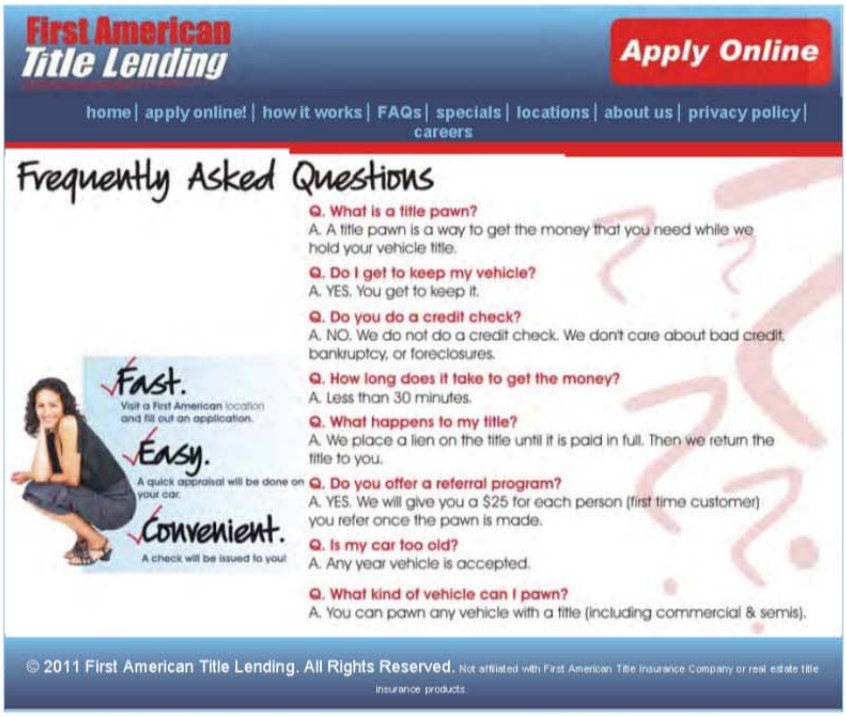
By the Commission.

Complaint

EXHIBIT 1

Complaint

EXHIBIT 1



Complaint

EXHIBIT 2

Google Adword Ads

Lowest Rate Title Pawns
Ask about 0% Interest. No Credit Check. We Buy Out Title Loans!
www.firstamericantitlelending.com

Title Lending – Low Rate.
0% for 30 days. Get The Most Money.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% for 30 days. Most Money.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest 30 days. Most Money.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% for 30. Get The Most Money.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% 30 days . Get The Most Money.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest for 30 days!
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% for 30 days. All Makes & Models.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest for 30 Days.
Title Pawned? We Can Help!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest 30 days.
Title Pawned? We Can Buy it Out!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest for 30 days. We Buy Out Title Pawns. Nor Credit Check.
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% Interest for 30 Days. No Credit Check. We Buy Out Title Loans!
www.firstamericantitlelending.com

Title Lending – Low Rates.
0% for 30 days! No Credit Check.
Title Pawned? We Can Buy it Out!

Complaint

EXHIBIT 3

Complaint

EXHIBIT 4

Complaint

EXHIBIT 5

Complaint

EXHIBIT 5

Complaint

EXHIBIT 6

Complaint

EXHIBIT 7

First American Title Lending

Get the cash you need today!

- Get up to $5,000 in less than 30 minutes
- No credit check - your car is your credit
- Lowest rates in town - as low as 9.5%
- Title pawned? We can buy it out!
- 0% Interest for 30 days

- NO NECESITA CREDITO!...Y USTED PUEDE SEGUIR MANEJANDO SU CARRO.
- GARANTIZAMOS LOS MAS BAJOS INTERESES EN LA CUIDAD.
- NECESITA AYUDA CON LOS GASTOS DE SU MUDANZA?
- RESIBA HASTA $ 5,000 EN SOLO 30 MINUTOS.
- 0% INTERESES EN LOS PRIMEROS 30 DIAS.

Gainesville 770-532-6741
199 John Morrow Parkway
(across from Ci-Ci's Pizza)
Some restrictions apply. See branch for details.

Complaint

EXHIBIT 8

Complaint

EXHIBIT 9

Complaint

EXHIBIT 10

Complaint

EXHIBIT 11

Complaint

EXHIBIT 12

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with a violation of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq*.; and a violation of the Truth In Lending Act ("TILA"), 15 U.S.C. § 1664; and Section 1026.24(c) of Regulation Z; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the FTC Act and TILA and its implementing Regulation Z, 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, and having 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 Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent First American Title Lending of Georgia, LLC, is a limited liability company with its principal place of business at 6045 Century Oaks Drive, Chattanooga, Tennessee 37416.

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

ORDER

DEFINITIONS

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

A. "Consumer Credit" means credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 1026.2(a)(12) of Regulation Z, 12 C.F.R. §1026.2(a)(12) as amended.

B. "Clear and Conspicuous" or "Clearly and Conspicuously" means:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

C. "Respondent" means First American Title Lending of Georgia, LLC, and its successors and assigns.

I.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, in or affecting commerce, shall not, in any manner, expressly or by implication:

A. State an introductory or temporary finance charge without disclosing, clearly and conspicuously, the finance charge after the introductory or temporary period ends;

B. State an introductory or temporary finance charge without disclosing, clearly and conspicuously, the full effect of failing to make a timely complete repayment of the loan within the introductory or temporary time period;

C. Fail to disclose, clearly and conspicuously, all qualifying terms associated with obtaining the loan at its advertised rate, including but not limited to, minimum loan requirements, new customer requirements, and any other material term;

D. Fail to disclose, clearly and conspicuously, all costs associated with obtaining the loan, including but not limited to transaction costs, registration costs or fees, recording costs or fees, and title fees; or

E. Misrepresent any other material fact about the terms of the loan.

II.

IT IS FURTHER ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

A. State the amount or percentage of down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. §1664, and Section 1026.24(d) of Regulation Z, including but not limited to:

1. The amount of percentage or the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Section 144 of the TILA, 15 U.S.C. §1664, and Section 1026.24(c) of Regulation Z; or

C. Fail to comply in any other respect with the TILA, 15 US.C. §§ 1601- 1667, as amended, and its implementing Regulation Z, 12 C.F.R. Part 1026 as amended.

III.

IT IS FURTHER ORDERED that Respondent shall deliver as soon as practicable, but in no event later than thirty (30) days after entry of this order, an exact copy (written or electronic) of this order, showing the date of delivery, to all of Respondent's current and future principals, officers, directors, and managers and to all current employees, agents, and representatives having responsibilities with respect to the advertisement of consumer credit, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

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

D. Other records that will demonstrate compliance with the requirements of this order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: First American Title Lending, Docket No. C-4529.

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 June 2, 2035, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

B. This order's application to any Respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though 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 First American Title Lending of Georgia, LLC, or 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 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.

Analysis to Aid Public Comment

The respondent is a car title loan company. According to the FTC complaint, respondent has advertised its loans with advertisements that broadly state that the title loans are available for "0% Interest!" Sometimes, but not always, these advertisements state in much smaller print, "Certain terms and conditions may apply" or "Some restrictions apply." However, respondent's advertisements fail to disclose that unless the loan is completely repaid in 30 days, the 0% offer does not apply and there is a significant finance charge. If a consumer does not repay the loan in full in 30 days, he or she would then be required to pay the finance charge for the first 30 days in addition to any additional finance charges incurred on day 31 (to start the second 30-day period). The advertisements also fail to disclose the amount of the finance charge after expiration of the 30-day introductory period. The proposed complaint alleges that these material omissions constitute a deceptive act or practice under Section 5 of the FTC Act.

The Commission is also alleging a Truth in Lending Act ("TILA") violation against respondent. Some advertisements displayed "9.5%" next to the claim of "0% interest." First American allegedly violated TILA by advertising a finance rate (9.5%), but failing to state the rate as an APR.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices, or violating TILA, in the future. Part I prohibits the respondent from stating an introductory or temporary finance charge without disclosing, clearly and conspicuously, the finance charge after the introductory or temporary period ends; or the full effect of failing to make a timely complete repayment of the loan within the introductory or temporary time period. Respondent must further disclose all qualifying terms associated with obtaining the loan at its advertised rate, including but not limited to, minimum loan requirements, new customer requirements, and any other material term; all costs associated with obtaining the loan, including but not limited to transaction costs, registration costs or fees, recording costs or fees, and title fees. The respondent also cannot misrepresent any other material fact about the terms of the loan.

Part II of the proposed order prohibits the respondent, in connection with any advertisement to promote, directly or

indirectly, any extension of consumer credit in or affecting commerce, from expressly or by implication stating the amount or percentage of down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of TILA, 15 U.S.C. §1664, and Section 1026.24(d) of Regulation Z, including but not limited to the amount of percentage or the down payment; the terms of repayment; and the annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate or APR may be increased after the consummation of the credit transaction, that fact must also be disclosed. Moreover, the respondent cannot state a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Section 144 of the TILA, 15 U.S.C. §1664, and Section 1026.24(c) of Regulation Z; or fail to comply in any other respect with the TILA, 15 US.C. §§ 1601- 1667, as amended, and its implementing Regulation Z, 12 C.F.R. Part 1026 as amended.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III is an order distribution provision that requires respondent to provide the order to current and future principals, officers, directors, and managers and to all current employees, agents, and representatives having responsibilities with respect to the advertisement of consumer credit. Part IV of the proposed order requires respondent to maintain and upon request make available to the Commission certain compliance-related records, including all advertisements and also consumer complaints and records that demonstrate compliance with the proposed order for a period of five years. Part V requires respondent to notify the Commission of corporate changes that may affect compliance obligations within 30 days of such a change. Part VI requires 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 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

HOLCIM LTD. AND LAFARGE S.A.

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

Docket No. C-4519; File No. 141 0129
Complaint, May 4, 2015 – Decision, June 11, 2015

This consent order addresses the $24.95 Billion acquisition by Holcim Ltd. ("Holcim") of Lafarge S.A ("Lafarge"). Holcim is a Swiss-based, vertically integrated global building materials company. and Lafarge is a vertically integrated global building materials company incorporated in France. In the United States, Holcim currently operates nine portland cement and three slag-grinding plants, as well as a large network of distribution assets. Lafarge currently operates six portland cement and three slag cement-grinding plants as well as numerous distribution terminals. The complaint alleges that merger of Holcim and Lafarge would create the world's largest cement manufacturer and likely harm competition for portland cement—an essential ingredient in making concrete—in 12 geographic markets in the United States. The consent order eliminates the competitive concerns raised by the acquisition, by requiring the parties to divest assets in each relevant market. Under the order, the two companies are required to divest cement plants, quarries, terminals and other assets in 12 states. The order further requires Holcim to find a Commission-approved buyer for the cement plants and cement terminals located in the U.S., at no minimum price, no later than 120 days from the date the parties consummate the acquisition.

Participants

For the *Commission: Jennifer Milici* and *James E. Southworth.*

For the *Respondents: George Cary* and *Mark W. Nelson, Cleary Gottlieb Steen & Hamilton*; and *Andrew M. Lacy* and *Matthew J. Reilly, Simpson Thacher & Bartlett 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 Holcim Ltd. ("Holcim"), a company subject to the jurisdiction of the Commission, has agreed to

acquire Lafarge S.A. ("Lafarge"), 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 Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim's principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.

2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge's principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.

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 Business Combination Agreement dated July 7, 2014 ("Agreement"), Holcim proposes to make a public exchange offer in accordance with the provisions of French laws

to acquire all of the issued and outstanding shares of Lafarge in exchange for Holcim shares valued, at the time of entering into the agreement, 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 manufacture, import, and sale of:

a. portland cement, including but not limited to, blended cement, masonry cement, mortar, and clinker; and

b. ground granulated blast furnace slag ("slag cement").

6. Portland cement is the essential binding ingredient in concrete. A fine, usually gray powder, portland cement is a chemical combination of calcium, silicon, aluminum, iron, and small amounts of other ingredients. Users mix portland cement with water and aggregates (crushed stone, sand, or gravel) to form concrete, a fundamental building material that is widely used in residential, non-residential, and public infrastructure construction projects.

7. Slag cement is manufactured by grinding granulated blast furnace slag to a suitable fineness. Slag cement is usually used to replace a portion of portland cement in a concrete mixture. Blending or inter-grinding slag cement with portland cement within specified limits can improve the characteristics of the concrete for use in certain environments or construction applications.

8. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the portland cement market are:

a. Minneapolis-St. Paul, MN and surrounding areas;

b. Duluth, MN and surrounding areas;

c. Western Wisconsin;

d. Eastern Iowa;

e. Memphis, TN and surrounding areas;

f. Baton Rouge, LA and surrounding areas;

g. New Orleans, LA and surrounding areas;

h. Detroit, MI and surrounding areas;

i. Grand Rapids, MI and surrounding areas;

j. Northern Michigan;

k. Western Montana; and

l. Boston, MA/Providence, RI and surrounding areas.

9. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the slag cement market are:

a. the Mid-Atlantic Region, which consists of the states of Maryland, Delaware, New Jersey, Massachusetts, Connecticut, and Rhode Island, as well as the District of Columbia, Eastern New York, Eastern and Central Pennsylvania, and Northern Virginia; and

b. the Western Great Lakes Region, which consists of the states of Michigan, Indiana, Illinois, Iowa, Wisconsin, and Minnesota.

IV. THE STRUCTURE OF THE MARKETS

10. Respondents Holcim and Lafarge are significant participants in each of the relevant markets, and each relevant market is already highly concentrated. The Acquisition would further increase concentration levels, resulting in the merged company becoming the largest supplier of portland cement and slag cement in each relevant market. Holcim and Lafarge are

either the only two significant suppliers or two of, at most, four significant suppliers in each of the relevant markets.

V. ENTRY CONDITIONS

11. New entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Building a new plant or distribution terminal of sufficient scale requires significant sunk costs and is challenging because of the extensive permitting that is required. Because of the various obstacles that must be overcome, it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition or 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 eliminating actual, direct, and substantial competition between Respondents Holcim and Lafarge and reducing the number of significant competitors in each relevant market; thereby increasing the likelihood that:

a. the merged company would unilaterally exercise market power in the relevant markets;

b. the remaining firms in the relevant markets would engage in collusion or coordinated interaction between or among each other; and

c. consumers would be forced to pay higher prices or accept reduced service.

VII. VIOLATIONS CHARGED

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

14. 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 fourth day of May, 2015, issues its Complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Holcim Ltd. ("Holcim") of Respondent Lafarge S.A. ("Lafarge") (collectively, "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("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 alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and Order to Hold Separate and Maintain Assets ("Hold Separate Order"), 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 Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim's principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.

2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge's principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, 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. "Holcim" means Holcim Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Holcim Ltd., including Holcim (US) Inc. and Holcim (Canada) Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Lafarge" means Lafarge S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lafarge S.A., including Lafarge North America, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondent" or "Respondents" means Lafarge and Holcim, individually and collectively.

D. "Acquirer" means a person or entity approved by the Commission to acquire any of the Assets To Be Divested pursuant to this Order.

E. "Acquisition" means the proposed merger of Holcim and Lafarge, as described and contemplated by the Business Combination Agreement dated July 7, 2014 between Holcim and Lafarge, as amended on March 20, 2015.

F. "Acquisition Date" means the date the Acquisition is consummated.

G. "Assets To Be Divested" means the businesses and facilities, or portions thereof, listed below, but excluding in each case the Excluded Assets:

1. The Camden Slag Plant;

2. The Canada/Great Lakes Assets;

3. The Elmira Terminal;

4. The Everett Terminal;

5. The Grandville Terminal;

6. The Mississippi River Assets;

7. The Rock Island Terminal;

8. The Skyway Slag Plant; and

9. The Trident Assets;

Provided, however, that the Assets To Be Divested need not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names, except with respect to any purchased inventory or as may be provided in any Remedial Agreement(s).

Provided, further, that in cases in which books and records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to divest only copies or relevant excerpts of the materials containing such information. In instances where such copies are divested to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under

circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

H. "Bettendorf Terminal" means the Terminal Assets relating to Summit's Bettendorf Terminal located at 2871 Depot Street, Bettendorf, Iowa, that stores, distributes and sells Cement and related products.

I. "Buzzi" means River Cement Sales Company d/b/a Buzzi Unicem USA, 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 100 Brodhead Road, Bethlehem, PA 18017-8989.

J. "Buzzi Divestiture Agreement" means the two Divestiture Agreements dated as of April 15, 2015 by and between Respondent Holcim and Buzzi, attached as non-public Appendix I, for the divestiture of the Elmira Terminal, the Grandville Terminal, and the Rock Island Terminal.

K. "Camden Slag Plant" means the Plant Assets relating to Holcim's Slag plant located at 2500 Broadway, Camden, New Jersey, that produces, stores, distributes and sells Slag and related products.

L. "Canada/Great Lakes Assets" means:

1. The Plant Assets relating to Holcim's Mississauga Cement plant located at 2391 Lakeshore Road, Mississauga, Ontario, Canada, that produces, stores, distributes and sells Cement and related products;

2. The Terminal Assets relating to Holcim's Buffalo terminal located at 1751 Fuhrmann Boulevard, Buffalo, New York, that stores, distributes and sells Cement and related products;

3. The Terminal Assets relating to Holcim's Cleveland terminal located at 6925 Granger,

Independence, Ohio that stores, distributes and sells Cement and related products;

4. The Terminal Assets relating to Holcim's Detroit terminal located at 101 N. Forman, Detroit, Michigan that stores, distributes and sells Cement and related products;

5. The Terminal Assets relating to Holcim's Duluth terminal located at 1100 Port Terminal Drive, Duluth, Minnesota that stores, distributes and sells Cement and related products; and

6. The Terminal Assets relating to Holcim's Dundee terminal located at 15125 Day Road, Dundee, Michigan that stores, distributes and sells Cement and related products;

M. "Canada Competition Bureau" or "CCB" means the Competition Bureau of Canada, the Commissioner of Competition under Canada's Competition Act, the Competition Tribunal established by Canada's Competition Tribunal Act, or any other Canadian governmental, judicial or regulatory entity with responsibility for granting clearances or approvals relating to competition or antitrust matters.

N. "Cement" means the product that is the result of the combination of calcium (normally from limestone), silicon, aluminum, iron and other raw materials, and that is produced by quarrying, crushing and grinding the raw materials, burning them in kilns at high temperatures, and then finely grinding the resulting pellets ("clinker") with gypsum into an extremely fine powder. The term "Cement" includes, but is not limited to, Portland cement, masonry and mortar cement, and the clinker that is ground to produce Cement.

O. "Commission" means the Federal Trade Commission.

P. "Direct Costs" means cost not to exceed the cost of labor, material, travel, and other expenditures to the

extent the costs are directly incurred to provide services under this Order or the Hold Separate Order. "Direct Cost" to an Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

Q. "Divestiture Agreement" means any agreement between Respondents and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph V. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that has been approved by the Commission to accomplish the requirements of this Order. The term "Divestiture Agreement" includes, as appropriate, the Buzzi Divestiture Agreement, the Eagle Divestiture Agreement, the Essroc Divestiture Agreement, and the Summit Divestiture Agreement.

R. "Divestiture Date" means the date any of the respective divestitures required by this Order are consummated.

S. "Divestiture Trustee" means any person or entity appointed by the Commission pursuant to Paragraph V. of this Order to act as a trustee in this matter.

T. "Eagle" means Eagle Materials 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 3811 Turtle Creek, Suite 1100, Dallas, Texas 75219-4487.

U. "Eagle Divestiture Agreement" means the Divestiture Agreement dated as of March 3, 2015 by and between Respondent Holcim and Eagle, attached as non-public Appendix II, for the divestiture of the Skyway Slag Plant.

V. "Elmira Terminal" means the Terminal Assets relating to Holcim's Elmira terminal located at 8649 Parmater

Road and 8715 Parmater Road, Elmira, Michigan that stores, distributes and sells Cement and related products.

W. "Essroc" means Essroc Cement Corp., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Pennsylvania, with its offices and principal place of business located at 3251 Bath Pike, Nazareth, Pennsylvania 18064.

X. "Essroc Divestiture Agreement" means the two Divestiture Agreements dated as of April 14, 2015 by and between Respondent Holcim and Essroc, attached as non-public Appendix III, for the divestiture of the Camden Slag Plant and the Everett Terminal.

Y. "Everett Terminal" means the Terminal Assets relating to Holcim's Everett terminal located at 202 Rover Street, Everett, Massachusetts that stores, distributes and sells Cement and related products.

Z. "Excluded Assets" means the "Excluded Assets" as defined in each Divestiture Agreement approved by the Commission.

AA. "Grandville Terminal Assets" means the Terminal Assets relating to Holcim's Grandville terminal located at 3443 Viaduct Street SW, Grandville, Michigan that stores, distributes and sells Cement and related products.

BB. "Hold Separate Monitor" means the Person approved by the Commission to serve as a Hold Separate Monitor pursuant to the Hold Separate Order issued by the Commission.

CC. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.

DD. "Know-How" means know-how, trade secrets, techniques, data, inventions, practices, methods, and

other confidential or proprietary technical, business, research, development and other similar information.

EE. "Material Confidential Information" means any material non-public information relating to the Assets To Be Divested either prior to or after the applicable Divestiture Date, including, but not limited to, business and strategic plans, customer or supplier lists, customer or supplier contract terms, information about sales to customers or purchases from suppliers, manufacturing volumes or costs, price lists, marketing methods, or Know-How, and:

1. Obtained by Respondents prior to the Divestiture Date; or,

2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents' obligations under any Remedial Agreement(s) or the Hold Separate Order;

Provided, however, that Material Confidential Information shall not include:

x. Information that is in the public domain when received by Respondents;

y. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;

z. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and,

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

FF. "Mississippi River Assets" means:

1. The Plant Assets relating to Lafarge's Davenport Cement plant located at 301 East Front Street, Buffalo, Iowa that produces, stores, distributes and sells Cement and related products;

2. The Terminal Assets relating to Lafarge's Red Rock terminal located at 1363 Red Rock Road, St. Paul, Minnesota that stores, distributes and sells Cement and related products;

3. The Terminal Assets relating to Lafarge's Minneapolis terminal located at 33 26th Ave North Minneapolis, Minnesota that stores, distributes and sells Cement and related products;

4. The Terminal Assets relating to Lafarge's Des Moines terminal located at 275 South 11th Street, West Des Moines, Iowa that stores, distributes and sells Cement and related products;

5. The Terminal Assets relating to Lafarge's La Crosse terminal located at 816 Bain Bridge St., La Crosse, Wisconsin that stores, distributes and sells Cement and related products;

6. The Terminal Assets relating to Lafarge's Memphis terminal located at 48 Henry Avenue, Memphis, Tennessee that stores, distributes and sells Cement and related products;

7. The Terminal Assets relating to Lafarge's Union terminal located at 10650 Hwy 44, Convent, Louisiana that stores, distributes and sells Cement and related products; and

8. The Terminal Assets relating to Lafarge's France Road terminal located at 2315 France Street, New Orleans, Louisiana that stores, distributes and sells Cement and related products.

GG. "Monitor" means any person or entity appointed by the Commission pursuant to Paragraph IV. of this Order to act as a monitor in this matter.

HH. "Plant Assets" means all of Respondents' rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, or reserved for use in, its Cement and Slag plant operations, including but not limited to, all: real property, whether owned or leased, and including any quarries, pits, or other natural resource rights (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances); personal property; equipment, machinery and tools; furniture and fixtures; vehicles, railcars, barges or other transportation vessels; storage facilities; inventory and supplies; raw materials; books and records; contracts; customer and vendor lists; licenses, government approvals, registrations, permits, and applications (to the extent transferable); telephone and fax numbers; and goodwill;

Provided, that, Plant Assets need not include terminals that receive, store, distribute, or sell Cement, Slag or related products produced or distributed by the plant, unless otherwise required by this Order.

II. "Proposed Acquirer" means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes, as appropriate, Buzzi, Eagle, Essroc, and Summit.

JJ. "Remedial Agreement(s)" means:

1. Any Divestiture Agreement; and

2. Any other agreement between a Respondent and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), including but not limited to any Transition Services Agreement and any Cement or Slag supply, throughput, storage or transportation

agreement, 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.

KK. "Rock Island Terminal" means the Terminal Assets relating to Holcim's Rock Island terminal located at 625 First Avenue, Rock Island, Illinois, that stores, distributes and sells Cement and related products.

LL. "Slag" means ground granulated blast furnace slag (or "GGBFS"), which is a cementitious material produced by grinding granulated blast furnace slag to a suitable fineness for use as a hydraulic binder in the production of concrete and mortar.

MM. "Skyway Slag Plant" means the Plant Assets relating to Holcim's Slag plant located at 3020 East 103rd Street, Chicago, Illinois that produces, stores, distributes and sells Slag and related products.

NN. "Summit" means Summit Materials, 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 1550 Wynkoop Street, 3rd Floor, Denver, Colorado. "Summit" includes its wholly-owned subsidiary Continental Cement Company, LLC.

OO. "Summit Divestiture Agreement" means the Divestiture Agreement dated as of April 16, 2015 by and between Respondent Lafarge and Summit, attached as non-public Appendix IV, for (a) the divestiture of the Mississippi River Assets to Summit and (b) the purchase by Respondents of the Bettendorf Terminal from Summit.

PP. "Terminal Assets" means all of Respondents' rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, its Cement terminal operations, including but not

limited to, all: real property, whether owned or leased (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances); personal property; equipment, machinery and tools; furniture and fixtures; vehicles, railcars, barges or other transportation vessels; storage facilities; inventory and supplies; raw materials; books and records; contracts; customer and vendor lists; licenses, government approvals, registrations, permits, and applications (to the extent transferable); telephone and fax numbers; and goodwill;

Provided, that, Terminal Assets need not include any of the Cement or Slag production plants that supply Cement, Slag or related products to the terminal, unless otherwise required by this Order.

QQ. "Trident Assets" means:

1. The Plant Assets relating to Holcim's Trident Cement plant located at 4070 Trident Road, Three Forks, Montana that produces, stores, distributes and sells Cement and related products;

2. The Terminal Assets relating to Holcim's Edmonton terminal located at 10122 17th Street NW, Edmonton, Alberta, Canada, that stores, distributes and sells Cement and related products; and

3. The Terminal Assets relating to Holcim's Lethbridge terminal located at 5114 1st Street, Coalhurst, Alberta, Canada, that stores, distributes and sells Cement and related products.

RR. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between one or both Respondents and an Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, any services (or training for the Acquirer to provide services for itself)

reasonably necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order, and may include, but are not limited to, payroll, employee benefits, accounting, IT systems, supply, distribution, warehousing, terminal or throughput services, access to Know-How, use of trademarks or trade names, or other logistical and administrative support.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as follows:

1. Within 10 days of the Acquisition Date, the Camden Slag Plant and the Everett Terminal shall be divested to Essroc pursuant to and in accordance with the Essroc Divestiture Agreement;

2. Within 10 days of the Acquisition Date, the Mississippi River Assets shall be divested to Summit pursuant to and in accordance with Summit Divestiture Agreement;

3. Within 10 days of the Acquisition Date, the Elmira Terminal, the Grandville Terminal, and the Rock Island Terminal shall be divested to Buzzi pursuant to and in accordance with the Buzzi Divestiture Agreement;

4. Within 10 days of the Acquisition Date, the Skyway Slag Plant shall be divested to Eagle pursuant to and in accordance with the Eagle Divestiture Agreement; and

5. Within 120 days of the Acquisition Date, the Canada/Great Lakes Assets and the Trident Assets shall be divested, at no minimum price, to one or more Acquirers that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

Provided, however, that such Acquirer(s) shall have received all necessary approvals from the Canada Competition Bureau to acquire the Canada/Great Lakes Assets and the Trident Assets prior to the applicable Divestiture Date(s);

B. *Provided, that*, if prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested pursuant to Paragraph II.A.1.-4. and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Any Proposed Acquirer identified in Paragraph II.A.1.-4. is not an acceptable Acquirer, then Respondents shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Respondents that such Proposed Acquirer is not an acceptable Acquirer; or

2. The manner in which any divestiture identified in Paragraph II.A.1.-4. was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph V. of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

C. All Remedial Agreement(s) approved by the Commission:

1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply

with the terms of any such Remedial Agreement(s) shall constitute a violation of this Order; and

2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any Remedial Agreement(s) 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.

D. At the option of each Acquirer, and subject to the prior approval of the Commission, Respondents shall enter into a Transition Services Agreement for a term extending up to two years following the relevant Divestiture Date, which agreement may be terminated at any time by the Acquirer without penalty upon commercially reasonable notice to Respondents.

E. Prior to each applicable Divestiture Date:

1. Respondents shall secure, at their sole expense, consents from any third parties that are necessary to effect the complete transfer of the Assets To Be Divested to each Acquirer, and for each Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order;

Provided, however, that for consents not required to be secured by the Divestiture Date pursuant to the applicable Divestiture Agreement, Respondents shall use commercially reasonable efforts to secure such consents promptly following the Divestiture Date;

Provided, further, that Respondents shall not be required to secure the consent of any governmental agency relating to any permit, license, or right that

Respondents have no legal right to divest or transfer to the Acquirer; and

2. Respondents shall use best efforts to assist each Acquirer to obtain from any governmental agency the transfer from Respondents or issuance to the Acquirer of any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer.

F. Pending divestiture of any of the Assets To Be Divested, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and

2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.

G. With respect to each Divestiture Agreement:

1. Respondents shall provide reasonable opportunity in advance of the Divestiture Date for the Proposed Acquirer to:

a. Meet personally, and outside of the presence or hearing of any employee or agent of Respondents, with any or all of the employees of the Assets To Be Divested pursuant to the applicable Divestiture Agreement; and

b. Make offers of employment to any or all of the employees of the Assets To Be Divested

pursuant to the applicable Divestiture Agreement;

2. Respondents shall: (i) not directly or indirectly interfere with the hiring by the Acquirer of employees of the Assets To Be Divested; (ii) not directly or indirectly attempt to persuade any one or more of the employees of any Assets To Be Divested to decline any offer of employment from any Acquirer, or offer any incentive to any employee to decline employment with any Acquirer; (iii) remove any impediments within the control of Respondents that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer); (iv) not make any counteroffer to any employee who has an outstanding offer of employment, or who has accepted an offer of employment, from an Acquirer; and (v) continue to extend to any employee of the Assets To Be Divested, prior to the applicable Divestiture Date, all employee benefits offered in the ordinary course of business, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;

3. Respondents shall not, directly or indirectly, for a period of two (2) years from the applicable Divestiture Date, solicit, negotiate, hire, or enter into any arrangement for the services of any employee of the Assets To Be Divested who has accepted an offer of employment with, or who is employed by, an Acquirer.

Provided, however, a violation of this provision will not occur if:

a. The employee's employment has been terminated by the Acquirer;

b. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer(s); or,

c. Respondents hire an employee who has applied for employment with Respondents, provided that such application was not, directly or indirectly, solicited or induced by Respondents in violation of this Order.

H. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable facilities engaged in the Cement and/or Slag businesses 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 not:

1. Provide, disclose, or otherwise make available any Material Confidential Information to any person except as required or permitted by this Order, the Hold Separate Order, or any Remedial Agreement(s); or

2. Use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order, the Hold Separate Order, or any of the Remedial Agreement(s), and shall limit access to Material Confidential Information to only those employees necessary for Respondents to fulfill their obligations under the Order, the Hold Separate Order, or the Remedial Agreement(s).

B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order, the Hold Separate Order, or the Remedial Agreement(s). These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

C. Notwithstanding anything else in paragraph III of this Order and subject to the Hold Separate Order, Respondents may use and disclose Material Confidential Information:

1. In the ordinary course of business in the operation of Respondents' retained businesses and assets if:

   a. The Material Confidential Information relates both to the Assets To Be Divested and to Respondents' retained businesses or assets;

   b. The Divestiture Agreement permits Respondents to retain Material Confidential Information that also relates to Respondents' retained businesses or assets; and

   c. Respondents protect against the disclosure or use of such Material Confidential Information in the same way Respondents protect against the disclosure or use of Respondents' other confidential information;

2. For the purpose of performing Respondents' obligations under this Order, the Hold Separate Order, or the Remedial Agreement(s);

3. To ensure compliance with legal and regulatory requirements including, but not limited to:

   a. Retaining a copy of Material Confidential Information for the sole purpose of complying with any applicable law, regulations, and other legal obligations; and,

b. Requirements of the rules and regulations of the Securities and Exchange Commission and of any stock, the performance of necessary audits and the maintenance of effective internal controls and procedures for required disclosures of financial information;

4. To provide accounting, information technology, and credit-underwriting services;

5. To provide legal services associated with actual or potential litigation and transactions;

6. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or

7. As otherwise provided by this Order and the Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. The Commission appoints ING Financial Markets LLC as Monitor, and approves the agreement between the Monitor and Respondents, attached as Appendix V ("Monitor Agreement") and Non-Public Appendix V-1 ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement(s).

B. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:

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

2. The Monitor shall serve until such time as Respondents have complied fully with all of their obligations under the Remedial Agreement(s);

3. The Monitor shall have the power and authority to Monitor Respondents' compliance with this Order and the Remedial Agreement(s);

4. The Monitor shall have power and authority to review and audit, at the Respondents' sole cost and expense, the books and records of Respondents to determine whether Respondents have complied fully with their obligations under the Order and the Remedial Agreement(s);

5. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of this Order and in consultation with the Commission and its staff;

6. The Monitor shall review all reports submitted to the Commission by Respondents under this Order and, within thirty (30) days from the date the Monitor receives a report, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order and the Remedial Agreement(s); and,

7. The Monitor shall provide written reports to the Commission every 60 days, or upon a schedule determined by Commission staff, that provides the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order and the Remedial Agreement(s). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order and the Remedial Agreement(s).

The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.

C. Respondents 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. 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 Agreement(s);

2. Subject to any demonstrated legally recognized privilege, Respondents shall provide the Monitor 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 and the Remedial Agreement(s);

3. Within one (1) calendar day of submitting a report required by this Order, Respondents shall deliver a copy of such report to the Monitor;

4. Except as otherwise set forth in this Order, the Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;

5. 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 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 Respondents the substance of communications to or from the Commission, its staff, or an Acquirer.

D. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

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. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed 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 the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Remedial Agreement(s) in a manner consistent with the purpose of this Order. If a substitute Monitor is appointed, Respondents shall consent to the terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor as set forth in this Paragraph.

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

H. A Monitor appointed pursuant to this Order may be, but need not be, the same person appointed as the Divestiture Trustee pursuant to Paragraph V. of this Order and as Hold Separate Monitor appointed pursuant to the Hold Separate Order.

V.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested all of the Assets To Be Divested in the time and manner required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested, and to enter into Transition Services Agreements and other Remedial Agreement(s), and 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 required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including 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 Respondents to comply with this Order.

B. The Commission may select a 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, and stated in writing their 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.

1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures 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 Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

2. 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:

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

    b. 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 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 divestiture obligations 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.

c. Subject to any demonstrated legally recognized privilege, any 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. Respondents shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. Any 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 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 any Divestiture Trustee receives bona fide offers for any 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 Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

e. Any 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. Any 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. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of 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.

f. Respondents shall indemnify any 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.

g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

i. 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.

C. 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.

D. 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 divestitures required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph may be, but need not be, the same person as the Monitor appointed under this Order and as Hold Separate Monitor appointed pursuant to the Hold Separate Order.

VI.

I**T IS FURTHER ORDERED** that:

A. Within thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the completion of the last divestiture required by this Order, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order, and the Hold Separate Monitor appointed under the Hold Separate Order) 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. 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 divestitures and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda reviewing or evaluating possible acquirers or divestiture proposals, and all reports and recommendations concerning completing the obligations.

B. On the first anniversary of the date this Order is issued, and thereafter on each subsequent anniversary until Respondents have satisfied in full all of their obligations under Paragraph II. of this Order and all of the Remedial Agreement(s), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. For the period covered by each such report, Respondents shall state the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced)

that one or more Respondents have failed to comply fully with the Order (including any Remedial Agreement(s) made a part thereof), briefly describe the Person's claim, and provide copies of any written communications between Respondents and the Person concerning the claim.

VII.

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

VIII.

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents made to either Respondent's principal United States offices, registered office of its United States subsidiary, or its headquarters address, 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 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. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on June 11, 2025.

By the Commission, Commissioner Wright dissenting.

APPENDIX I

Buzzi Divestiture Agreement

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

APPENDIX II

Eagle Divestiture Agreement

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

APPENDIX III

Essroc Divestiture Agreement

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

APPENDIX IV

Summit Divestiture Agreement

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

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APPENDIX V

Monitor Agreement

Appendix V REDACTED PUBLIC VERSION

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement") entered into this 16th day of April, 2015 by and among ING Financial Markets LLC ("ING" or the "Monitor"), Lafarge S.A. ("Lafarge"), and Holcim Ltd. ("Holcim," collectively with Lafarge, "Respondents") (ING, Lafarge and Holcim together, the "Parties") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for public comment an Agreement Containing Consent Order, including a proposed Decision and Order and a proposed Order to Hold Separate and Maintain Assets ("Hold Separate Order" and collectively, the "Orders"), which, among other things, requires the divestiture of certain plant and terminal assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondents' compliance with their obligations under the Orders;

WHEREAS, the Commission has appointed ING as Monitor pursuant to the Orders, and ING has consented to such appointment;

WHEREAS, the Orders further provide that Respondents shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders; and

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:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with their obligations as set forth in the Orders and the Divestiture Agreements, as defined in the Orders ("Monitor's Responsibilities").

1.2 Access to Relevant Information and Facilities. The Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondents related to Respondents' obligations under the Orders and the Divestiture Agreements, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Orders.

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1.3 Compliance Reports. Respondents shall provide the Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event no later than five (5) business days after the date on which Respondents file such a report with the Commission;

1.4 Monitor's Obligations. The Monitor shall:

a. carry out the Monitor's Responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondents' compliance with the Orders;

b. maintain the confidentiality of all confidential information, including Confidential Business Information, and any other non-public confidential information provided to the Monitor by Respondents, the Acquirers of the Divested Businesses, any supplier or customer of Respondents, or the Commission, and shall use such confidential information only for the purpose of discharging the his obligations pursuant to this Agreement and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential information only to:

i. persons employed by ING Groep N.V. or an affiliate of ING Groep N.V. or who are working with the Monitor under this Agreement;

ii. persons working with the Monitor under this Agreement (and only to the extent such persons have executed a confidentiality agreement consistent with the provisions of this Agreement); and

iii. persons employed at the Commission or Canadian Competition Bureau working on this matter.

iv. The Monitor shall maintain a record and inform the Commission of all persons (other than the persons referenced in 1.4 (b)(i) and 1.4 (b)(iii) above) to whom confidential information related to this Monitor Agreement has been disclosed.

c. require any consultants, accountants, attorneys, and any other representatives or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties to treat confidential information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

d. maintain the confidentiality, for a period of ten (10) years after the termination of this Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose any confidential information, including Confidential Business Information, relating thereto; and

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APPENDIX V

e. upon termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or the Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

In the event that confidential information must be disclosed by the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein under applicable law or pursuant to legal process, such party shall, to the extent not otherwise prohibited, give written notice to the Respondents that such disclosure is required so that the Respondents may, at their sole expense, seek an appropriate protective order or waive compliance with the terms hereof or both. If, absent the entry of a protective order or the receipt of a waiver of this Monitor Agreement, the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein is compelled by law or legal process to disclose any confidential information, such party (x) may disclose such information solely to the extent required by law; (y) shall not disclose such information until such time as it is required by law; and (z) shall exercise commercially reasonable efforts to obtain reliable assurances that confidential treatment will be accorded to any confidential information so disclosed. Notwithstanding the foregoing, the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein may disclose confidential information to any regulatory or self-regulatory agency having jurisdiction over such party in the course of routine

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reviews or audits when such disclosure is required by law, which confidential information may be disclosed without notice or restriction.

1.5 Monitor Payment. Respondents will pay the Monitor the hourly fee specified in the attached confidential fee schedule ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. In addition, Respondents will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder; however, all such out-of-pocket expenses and fees and disbursements shall be pre-approved by Respondents, which shall not withhold approval unreasonably. The Monitor shall invoice Respondents on a monthly basis, within seven (7) days of the conclusion of the month, including details and an explanation of all matters for which the Monitor submits an invoice to Respondents. Respondents shall pay such invoices within thirty (30) days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to Respondents for payment. At their own expense, Respondents may retain an independent auditor to verify such invoices. The Monitor and Respondents shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

1.6 Monitor's Indemnification. Respondents indemnify the Monitor, ING Groep N.V. and all affiliates of ING Groep N.V. and their directors and employees (the "Indemnified Parties") and Respondents shall hold the Indemnified Parties harmless (regardless of any action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties and obligations hereunder, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Indemnified Parties. The Monitor's maximum liability to the Respondents relating to services rendered pursuant to this Monitor Agreement (regardless ofthe form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Respondents, except to the extent resulting from the gross negligence, willful misconduct or bad faith by the Indemnified Parties, in which case the liability is not so limited.

1.7 Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents' obligations under one or both of the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, any Party may seek the assistance of the individual in charge of the Commission's Compliance Division.

1.9 Conflicts of Interest. If the 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 the Monitor's Responsibilities, the Monitor shall immediately inform Respondents and the Commission of any such conflict.

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ARTICLE II

2.1 Termination. This Agreement shall terminate upon the earlier of: (a) the expiration or termination of the Orders; (b) the expiration or termination of the last to expire of the Divestiture Agreements; (c) Respondents' receipt of written notice from the Commission that the Commission has determined that ING has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; and (d) with at least thirty (30) days advance notice to be provided by the Monitor to Respondents and to the Commission, upon resignation of the Monitor. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.3 above will remain in force.

2.2 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the state of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with them may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

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

2.4 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of Respondents and the Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

2.5 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

2.6 Approval by the Commission. This Agreement shall have no force or effect with respect to the Orders until approved by the Commission.

2.7 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the Monitor and Respondents, written or oral, with respect to the subject matter hereof.

2.8 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.9 Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

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Appendix V

ARTICLE III

3.1 In the performance of his functions and 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 its own business affairs.

3.2 It is understood that the Monitor will be serving under this Agreement as an independent contractor and that the relationship of employer and employee shall not exist between the Monitor and Respondents.

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

3.4 In the event that ING wishes to terminate this Agreement, ING shall provide written notice to the Respondents and the Commission. Respondents and ING shall work in good faith with the Commission to identify and propose to the Commission a successor Monitor. ING shall continue to serve as Monitor under the terms of this Agreement until such time as the Commission approves a successor Monitor, and ING's termination of this Agreement shall be effective only upon the approval by the Commission of a successor Monitor.

ARTICLE IV

4.1 The Monitor should have all of the powers and responsibilities and protections conferred upon the Monitor by the Hold Separate Order, including but not limited to:

a. monitoring the organization and operations of the Hold Separate Business;

b. supervising the management of the Hold Separate Business through the Managers;

c. maintaining the independence of the Hold Separate Business;

d. monitoring Respondents' compliance with their obligations as required by the Orders; and

e. reviewing Replacement Contracts and Allocated Shared Contracts and determining, in consultation with Commission staff, whether these contracts comply with the Hold Separate Order.

4.2 By the date of the Hold Separate Order, Respondents shall transfer to and confer upon the Monitor all rights, powers and authority necessary to permit the Monitor to perform its duties and responsibilities pursuant to and consistent with the purposes of the Hold Separate Order.

4.3 Subject to applicable laws and regulations, the Monitor shall have full and complete access to the personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Monitor may reasonably request,

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including but not limited to all documents kept by the Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial and other information as the Monitor may reasonably request and shall cooperate with the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or information. The Monitor shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations.

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APPENDIX V

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

MONITOR

ING Financial Markets LLC

_____
Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.

_____
By: Bi Yong Chungunco
Title: Senior Vice President – Group General Counsel & Corporate Secretary

Holcim Ltd.

_____
By:
Title:

APPENDIX V

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

MONITOR

ING Financial Markets LLC

Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.

By:
Title:

Holcim Ltd.

By:
Title:

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APPENDIX V

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

MONITOR

ING Financial Markets LLC

Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.

By:
Title:

Holcim Ltd.

16/04/2015

By: Bernard Fontana
Title: CEO, Holcim Ltd

16/04/2015

By: Xavier Dedullen
Title: Chief Legal & Compliance Officer,
Holcim Ltd

APPENDIX V-1

Monitor Compensation

[Redacted From the Public Record, But Incorporated by Reference]

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Holcim Ltd. ("Holcim") of Respondent Lafarge S.A. ("Lafarge") (collectively, "Respondents"), and Respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters this Order to Hold Separate and Maintain Assets ("Hold Separate Order"):

1. Respondent Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim's principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business

under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.

2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge's principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.

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

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Allocated Shared Contracts" means contracts between Respondents and Summit that allocate the contract rights and obligations of the Shared Contracts to promote the competitive and viable operation of the Bettendorf Terminal and the Davenport Plant after the Divestiture Date in a manner that achieves the purposes of the Decision & Order.

B. CCB Consent Agreement" means the agreement between Respondents and the Canada Competition Bureau dated as of __, which requires that: (a) Respondents divest Holcim's "Alberta Business" and

"Canada Business," as those terms are defined in the agreement, including among other assets the Canada/Great Lakes Assets and the Trident Assets; and (b) Respondents keep the "Alberta Business" and the "Canada Business" separate from the rest of Respondents' operations following the Acquisition Date.

C. "Decision and Order" means:

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

2. the Final Decision and Order issued and served by the Commission.

D. "Hold Separate Business" means the Canada/Great Lakes Assets and the Trident Assets.

E. "Hold Separate Business Employee" means any employee or agent of the Hold Separate Businesses (other than a Support Services Employee).

F. "Hold Separate Business Manager" means the Chief Executive Officer of Holcim (Canada) Inc., or such alternative manager as selected by the Hold Separate Monitor, in consultation with Commission staff.

G. "Hold Separate Period" means the period from the Acquisition Date until the Divestiture Date of the Hold Separate Business.

H. "Orders" means the Decision and Order and this Hold Separate Order.

I. "Replacement Contracts" means contracts relating to the same subject matter of the Shared Contracts that provide the Respondents and Summit each with contract rights and obligations that are substantially equivalent in the aggregate to those contract rights and

obligations in the Shared Contracts, and that promote the competitive and viable operation of the Bettendorf Terminal and the Davenport Plant after the Divestiture Date in a manner that achieves the purposes of the Decision & Order.

J. "Required Inputs" means raw materials, Cement, Slag or any other input products used by the Hold Separate Business in the ordinary course of business and in accordance with past practice.

K. "Shared Contracts" means the contracts relating both to divested businesses and retained businesses that are defined as "Shared Contracts" in the Summit Divestiture Agreement.

L. "Support Services" means assistance with respect to the operation of the Hold Separate Business, including, but not limited to: (i) human resources and administrative services such as payroll processing and employee benefits; (ii) preparation of tax returns, environmental health and safety services; (iii) financial accounting and reporting services; (iv) legal, licensing, and audit services; (v) licensing and regulatory compliance in any jurisdiction in which it does business; (vi) maintenance and oversight of information technology systems and other computerized or electronic systems and databases; (vii) processing of accounts payable and accounts receivable; (viii) supply, procurement, and related services, including supply of Required Inputs; (ix) public relations and public affairs services; (x) construction and development services; (xi) safety and security services; and (xii) procurement and renewal of insurance and related services. Support Services includes any assistance provided to the Hold Separate Business at any time within twenty four (24) months prior to the commencement of the Hold Separate Period, and in addition, any other assistance or support reasonably required during the Hold Separate Period to achieve the purposes of this Hold Separate Order and the Decision and Order.

M. "Support Services Employee" means any of Respondents employees or agents tasked with providing Support Services under this Hold Separate Order.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall operate, or cause to be operated, the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall take such actions as are necessary to maintain the full viability, marketability, and competitiveness of the Assets To Be Divested, minimize any risk of loss of competitive potential for the Assets To Be Divested, and prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear. Included in these obligations, Respondents shall, without limitation:

1. Maintain and operate the Assets To Be Divested in the ordinary course of business and consistent with past practice (including regular repair and maintenance efforts);

2. 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 (or fail to take any action) that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested, or that would cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws or regulations;

3. Use best efforts to preserve the existing relationships and good will with suppliers, customers, employees, and others having business relationships with the Assets To Be Divested;

Order to Maintain Assets

4. Maintain staffing levels and a work force of equivalent size, training and expertise associated with each of the Assets To Be Divested in the ordinary course of business;

5. Maintain the books and records of the Assets To Be Maintained;

6. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with the Assets To Be Divested in the ordinary course of business and in accordance with past practice;

7. Provide the Assets To Be Divested with sufficient financial and other resources to:

    a. Operate and staff the Assets To Be Divested in the ordinary course of business and in accordance with past practices;

    b. Perform all maintenance to, and repair of, the Assets To Be Divested in the ordinary course of business and in accordance with past practice;

    c. Carry on capital projects, physical plant improvements, and business plans as are already underway or planned, including but not limited to any existing or planned renovation, remodeling, or expansion projects;

    d. Maintain the viability, competitiveness, and marketability of Assets To Be Divested; and

    e. Perform any other obligations as required by the Decision and Order and this Hold Separate Order.

Order to Maintain Assets

8. Prior to the Divestiture Date, for each of the Shared Contracts, and in each case subject to the approval of the Hold Separate Monitor (in consultation with Commission staff), negotiate Replacement Contracts or Allocated Shared Contracts in place of each of the Shared Contracts

B. During the Hold Separate Period, Respondents shall:

1. Keep the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order, and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business; and

2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, the CCB Consent Agreement, and applicable laws.

C. The purpose of this Hold Separate Order is to: (i) maintain and preserve the Assets To Be Divested as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (ii) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents during the Hold Separate Period; (iii) assure that no Material Confidential Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; (iv) prevent interim harm to competition pending the relevant divestitures; and (v) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:the Commission appoints ING Financial Markets LLC as Hold Separate Monitor to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.

A. Respondents shall enter into the agreement with the Hold Separate Monitor, attached to the Decision and Order as Appendix V, that shall become effective no later than one (1) day after the date this Hold Separate Order is issued, and that transfers to and confers upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his or her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission:

1. The Hold Separate Monitor shall have the responsibility for:

   a. monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Hold Separate Business Manager; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order; and,

   b. Reviewing Replacement Contracts and Allocated Shared Contracts and determining, in consultation with Commission staff, whether these contracts comply with this Hold Separate Order;

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Monitor may reasonably request;

3. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities;

4. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties;

5. Respondents may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission;

6. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities;

7. Respondents shall indemnify the Hold Separate Monitor and hold it harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate 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 the Hold Separate Monitor's malfeasance, gross negligence, willful or wanton acts, or bad faith.

8. Thirty (30) days after the date the Acquisition is completed, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order.

B. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:

1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the

identity of the proposed substitute Hold Separate Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform, its, his, or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order;

Provided, that, if the CCB removes, or fails to appoint, ING Financial Markets LLC as the monitor under the CCB Consent Agreement, the Commission may remove the Hold Separate Monitor and appoint, in consultation with the CCB, a substitute Hold Separate Monitor under this Paragraph.

C. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

D. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

E. A Monitor appointed pursuant to this Hold Separate Order may be, but need not be, the same Person appointed as the Monitor and/or Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

Order to Maintain Assets

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor, (ii) any Hold Separate Business Employee, or (iii) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order;

B. Respondents shall continue to provide, or offer to provide, Support Services and Required Inputs to the Hold Separate Business as were being provided to the Hold Separate Business by Respondents prior to the Acquisition Date;

1. For Support Services and Required Inputs that Respondents provided to the Hold Separate Business prior to the Acquisition Date, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and Required Inputs in the ordinary course of business and in accordance with past practice;

2. For any other Support Services and Required Inputs that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services or Required Inputs; and

3. Notwithstanding the above, the Hold Separate Business shall have, in consultation with the Hold Separate Monitor, the ability to acquire Support Services or Required Inputs from persons other than Respondents.

C. Respondents shall not permit:

1. Any of its employees, officers, agents, or directors, other than (i) any Hold Separate Employees, and (ii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.

2. Any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.

D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as may be required to fulfill Respondents' obligations and responsibilities under the Orders, and as may reasonably be requested by the Hold Separate Monitor, to:

1. Operate the Hold Separate Business as it was prior to the Acquisition Date (including efforts to generate new business) consistent with the ordinary course practices of the Hold Separate Business in place prior to the Acquisition Date;

2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;

3. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned for which all necessary regulatory and legal approvals have been obtained, including, but not limited to, existing or planned renovation, remodeling, and expansion projects; and

4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order, the Hold Separate Monitor may, in consultation with Commission staff, direct the Hold Separate Business Employees to reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

E. Respondents shall provide each Hold Separate Business Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Hold Separate Business pending divestiture. Such incentives shall include a continuation of all employee benefits (or employee benefits of substantially equivalent value), including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business until the Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

F. No later than ten (10) days after the date the Acquisition Date, Respondents shall establish and implement procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.

G. No later than ten (10) days after the date the Acquisition Date, Respondents shall circulate to Hold

Separate Business Employees, Support Services Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business, a notice of the requirements of this Hold Separate Order, the Decision and Order, and the Consent Agreement, in a form approved by the Hold Separate Monitor in consultation with Commission staff, including copies of the Hold Separate Order and the Decision and Order.

V.

IT IS FURTHER ORDERED that:

A. After the Acquisition Date, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Hold Separate Business except in the course of:

1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;

2. Performing their obligations under the Divestiture Agreements;

3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and

4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and

regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Hold Separate Order.

For purposes of this Paragraph V.A., Respondents' employees that provide Support Services or that staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

B. If access to or disclosure of Material Confidential Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph V.A. of this Hold Separate Order, Respondents shall:

1. Implement and maintain a process and procedures, as approved by the Hold Separate Monitor, such approval not to be unreasonably withheld, pursuant to which Material Confidential Information of the Hold Separate Business may be disclosed or used only:

   a. to or by those employees who require such information;

   b. to the extent such Material Confidential Information is required; and

   c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.

2. Enforce the terms of this Paragraph V. as to any of Respondents' employees and take such action as is

necessary to cause each such employee to comply with the terms of this Paragraph V., including training Respondents' employees and taking all other actions that Respondents would take to protect their own trade secrets and proprietary information.

C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

D. No Hold Separate Business Employee shall receive or have access to, or use or continue to use, any non-public, confidential information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

VI.

IT IS FURTHER ORDERED that within thirty (30) days after this Hold Separate Order is issued, and every thirty (30) days thereafter until this Hold Separate Order terminates, 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 all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

VII.

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

A. Dissolution of such Respondent;

B. Acquisition, merger or consolidation of such Respondent; or

C. Any other change in such 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 Hold Separate Order.

VIII.

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

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents related to compliance with this Hold Separate Order, which copying services shall be provided by Respondents at its expense; and

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

IX.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each of the Assets To Be Divested, the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture as described in and required by the Decision and Order.

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

By the Commission, Commissioner Wright dissenting.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") designed to remedy the anticompetitive effects resulting from the proposed acquisition of Lafarge S.A ("Lafarge") by Holcim Ltd. ("Holcim"). Under the terms of the proposed Consent Agreement, Lafarge is required to divest to Continental Cement Company ("Continental") its Davenport cement plant and quarry located in Buffalo, Iowa along with cement terminals and associated distribution assets in Minneapolis and St. Paul, Minnesota; La Crosse, Wisconsin; Memphis, Tennessee; and Convent and New Orleans, Louisiana. The Consent Agreement also requires Holcim to divest its Skyway slag cement plant located in Chicago, Illinois to Eagle Materials Inc. ("Eagle"), its slag cement plant located in Camden, New Jersey and its terminal near Boston, Massachusetts to Essroc Cement Corporation ("Essroc"), and its cement terminals in Grandville and Elmira, Michigan and Rock Island, Illinois to Buzzi Unicem USA ("Buzzi"). Finally, the Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) Holcim's Trident, Montana cement plant and two related terminals in Alberta, Canada, and (2) Holcim's Mississauga cement plant located in Ontario, Canada and related cement terminals in Duluth, Minnesota; Detroit and Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York.

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 decide whether it should withdraw from the Consent Agreement, modify it, or make final the Decision and Order ("Order").

The Transaction

Pursuant to a Combination Agreement dated July 7, 2014, Holcim proposes to acquire 100 percent of the existing shares of Lafarge in a transaction valued at $24.95 billion at that time. 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 certain regional markets in the United States for the manufacture and sale of portland cement and slag cement. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the proposed acquisition.

The Parties

Holcim is a Swiss-based, vertically integrated global building materials company. The company's products include cement, clinker, concrete, lime, and aggregates. In the United States, Holcim currently operates nine portland cement and three slag grinding plants, as well as a large network of distribution assets.

Lafarge is a vertically-integrated global building materials company incorporated in France and headquartered in Paris. Lafarge primarily produces and sells cement, aggregates, and ready-mix concrete. In the United States, Lafarge currently operates six portland cement and three slag cement grinding plants as well as numerous distribution terminals.

The Relevant Products And Structure Of The Markets

In the United States, both parties manufacture and sell portland cement. Portland cement is an essential ingredient in making concrete, a cheap and versatile building material. Because portland cement has no close substitute and the cost of cement usually represents a relatively small percentage of a project's overall construction costs, few customers are likely to switch to other products in response to a small but significant increase in the price of portland cement.

Both parties also manufacture and sell ground, granulated blast furnace slag ("slag cement"), a specialty cement product with unique characteristics that can serve as a partial substitute for portland cement. Customers add slag cement to portland cement to enhance the physical properties of a concrete mixture. It is appropriate to treat slag cement as a separate relevant product because an insufficient number of purchasers would switch to

other products in response to a small but significant increase in the price of slag cement to render such a price increase unprofitable.

The primary purchasers of portland and slag cement are ready-mix concrete firms and producers of concrete products. These customers usually pick up portland and slag cement from a cement company's plant or terminal in trucks. Because portland and slag cement are heavy and relatively cheap commodities, transportation costs limit the distance customers can economically travel to pick up the products. The precise scope of the area that can be served by a particular plant or terminal depends on a number of factors, including the density of the specific region and local transportation costs.

Due to transportation costs, cement markets are local or regional in nature. The relevant geographic markets in which to analyze the effects of the proposed acquisition on portland cement competition are (1) the Minneapolis-St. Paul, Minnesota area; (2) the Duluth, Minnesota area; (3) western Wisconsin; (4) eastern Iowa; (5) the Memphis, Tennessee area; (6) the Baton Rouge, Louisiana area; (7) the New Orleans, Louisiana area; (8) the Detroit, Michigan area; (9) northern Michigan; (10) the Grand Rapids, Michigan area; (11) western Montana; and (12) the Boston, Massachusetts/Providence, Rhode Island area. The proper geographic markets in which to analyze the effects of the proposed transaction on slag cement are (1) the Mid-Atlantic region and (2) the western Great Lakes region.

The relevant markets for portland cement and slag cement are already highly concentrated. For each of the relevant markets, the parties are either the only suppliers in the market, two of only three suppliers, or two of only four suppliers.

Entry

Entry into the relevant portland cement and slag cement markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed transaction. The cost to construct a new portland cement plant of sufficient size to be competitive would likely cost over $300 million and take more than five years to

permit, design, and construct while the expansion of an existing facility would likely cost hundreds of millions of dollars and take four or more years to complete. Building competitive cement distribution terminals is also difficult and time consuming. It can take more than two years to obtain the necessary permits and complete construction of a competitive terminal in the relevant markets. New entrants into slag cement markets face the additional hurdle of having to obtain a cost-effective source for the raw material. There are few domestic sources for granulated blast furnace slag because there are a limited number of active blast furnaces in the United States. Given the difficulties of entry, it is unlikely that any new entry could be accomplished in a timely manner in the relevant markets to defeat a likely price increase caused by the proposed acquisition.

Effects Of The Acquisition

Unless remedied, the proposed merger would likely result in competitive harm in each of the relevant portland and slag cement markets. The merger would eliminate substantial head-to-head competition between the parties in each of these markets and significantly increase market concentration. For many customers in these markets, the merger would combine the two closest competitors for their business, leaving the merged entity with the power to increase prices to these customers unilaterally. Further, because the merger would reduce the number of significant competitors to, at most, two or three in the relevant markets, it would enhance the likelihood of collusion or coordinated action between the remaining competitors by reducing impediments to reaching common terms of coordination and making it easier to monitor and retaliate against potential deviation from a coordinated scheme.

The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Holcim's proposed acquisition of Lafarge by requiring the parties to divest assets in each relevant market. Lafarge is required to divest a cement plant in Buffalo, Iowa and a network of distribution terminals along the Mississippi River in Louisiana, Tennessee, Wisconsin, and Minnesota to Continental. Continental, in turn, will sell its cement terminal located in

Bettendorf, Iowa to Lafarge in order to eliminate the competitive overlap that would otherwise be created by its acquisition of Lafarge's Davenport cement plant. Because Lafarge will be able to supply the Bettendorf terminal at a comparable or lower cost than Continental, the transactions contemplated in the Consent Agreement will maintain the competitive status quo in the eastern Iowa market. Holcim is required to divest distribution terminals in Illinois and Michigan to Buzzi. Holcim is further required to divest a terminal in Massachusetts and a slag plant in New Jersey to Essroc and a slag plant in Illinois to Eagle. Each of the identified buyers possesses the experience and capability to become significant competitors in the relevant markets. The parties must accomplish the divestitures to these buyers within ten days after the proposed acquisition is accomplished.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the proposed acquisition. If the Commission determines that any of the identified buyers is not an acceptable acquirer, the proposed Order requires the parties to divest the assets to a Commission-approved acquirer within 90 days of the Commission notifying the parties that the proposed acquirer is not acceptable. If the Commission determines that the manner in which any divestiture was accomplished is not acceptable, the Commission may direct the parties, or appoint a divestiture trustee, to effect such modifications as may be necessary to satisfy the requirements of the Order.

Finally, the proposed Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) a cement plant in Trident, Montana and two distribution terminals in Alberta, Canada (the "Trident Assets"), and (2) a cement plant in Mississauga, Ontario and cement terminals in Minnesota, Michigan, Ohio, and New York (the "Great Lakes Assets"). The divestiture of the Trident plant would eliminate the proposed merger's potential anticompetitive impact on purchasers of portland cement located in western Montana. The two Alberta terminals distribute cement produced at the Trident plant and are included in the Consent Agreement in order to preserve the viability and marketability of the Trident Assets. Holcim's Mississauga plant supplies portland cement into the United States both directly and via terminals located in Duluth; Detroit;

Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York. The divestiture of the Great Lakes Assets would remedy the proposed merger's anticompetitive effects in the Duluth and Detroit areas. The Cleveland and Buffalo terminals are included in the Consent Agreement in order to preserve the viability and marketability of the Great Lakes Assets. The Trident Assets and Great Lakes Assets are also part of a larger group of Holcim assets located in Canada that the Respondents have agreed to divest in order to resolve competitive concerns raised by the Canadian Competition Bureau ("CCB"). Commission staff worked cooperatively with staff from the CCB to ensure that our respective proposed remedies would be consistent and effective.

The proposed Order provides that Holcim must find a buyer (or buyers) for the Trident Assets and the Great Lakes Assets, at no minimum price, that is acceptable to the Commission, no later than 120 days from the date on which the parties consummate the proposed acquisition. The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to ensure that these assets are held separate and operated independently from the merged company and protect the viability, marketability, and competitiveness of the divestiture asset packages until the assets are divested to a buyer or buyers approved by the Commission.

To ensure compliance with the proposed Order, the Commission has agreed to appoint an Interim Monitor to ensure that Holcim and Lafarge 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 appropriate purchasers.

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.

STATEMENT OF THE COMMISSION

The Federal Trade Commission has voted to accept a settlement to resolve the likely anticompetitive effects of Holcim Ltd.'s ("Holcim") proposed $25 billion acquisition of Lafarge S.A. ("Lafarge"). We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially reduce competition in the manufacture and sale of portland cement and slag cement. As we explain below, we believe the proposed remedy, tailored to counteract the likely anticompetitive effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies, is in the public interest.[1]

Holcim is a Switzerland-based, vertically integrated global building materials company, with products that include cement, clinker, concrete, lime, and aggregates. Lafarge is a France-based, vertically integrated global building materials company that primarily produces and sells cement, aggregates, and ready-mix concrete.

The merged company will be the world's largest cement manufacturer, with combined 2014 revenues of approximately $35 billion and operations in more than 90 countries. Our competitive concerns pertain to specific geographic markets in the United States where Holcim and Lafarge each make significant cement sales. The proposed merger would likely harm competition for the distribution and sale of portland cement, an essential ingredient in making concrete, in 12 local or regional markets. It would also threaten to lessen competition for the distribution and sale of slag cement, a specialty cement product used in certain applications, in two other regional markets.

The merger would create a merger to monopoly in some of the challenged relevant markets, while in others at most three competitors would remain post-merger. Absent a remedy, the Herfindahl-Hirschman Index ("HHI") in each of these markets would exceed 3,400, making every market highly concentrated

[1] Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny join in this statement.

according to the 2010 Horizontal Merger Guidelines.[2] The increase in HHI in each market would exceed 900, well above the 200-point change necessary to trigger the Guidelines' presumption that the merger is "likely to enhance market power."[3] There is no evidence rebutting this presumption. If anything, the evidence suggests that the estimates of market concentration understate our concerns.

In each of the relevant markets at issue, there is evidence that unilateral anticompetitive effects are likely. Substantial evidence demonstrates that, for many customers in the relevant areas, the merging firms are their preferred suppliers and that customers have benefitted from substantial head-to-head competition between the parties in negotiating prices for portland and slag cement. Customers in every single one of the affected markets expressed concern that their inability to play the merging parties off each other would diminish their ability to obtain better prices or other favorable terms. As the Guidelines note, a combination of two competing sellers "can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger."[4] In addition, the evidence demonstrates that not all of the remaining suppliers in the relevant markets provide customers with practical alternatives to the merging parties for a variety of reasons, including capacity constraints, lack of distribution assets to supply new customers, and downstream vertical integration.[5]

The evidence also suggests that the proposed acquisition would increase the ability and incentives of the combined firm and other market participants to engage in coordinated behavior that would result in harm to consumers. The relevant markets have characteristics that make them susceptible to coordination.

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[2] *See* 2010 HORIZONTAL MERGER GUIDELINES § 5.3. The threshold at which a market is considered "highly concentrated" under the Guidelines is 2,500.

[3] *Id*.

[4] *Id*. § 6.2.

[5] For instance, ready-mix concrete producers are often unwilling to purchase cement from their rivals.

They are highly concentrated; the products are homogeneous; overall market elasticity is low; customer switching costs are low; and sales are relatively small, frequent, and usually not made pursuant to long-term contracts. There is also a high degree of transparency in these markets. Competitors are aware of each other's production capacities, costs, sales volumes, prices, and customers. Our concern about the potential for coordinated effects in these markets is heightened by evidence that cement suppliers, including the same global firms that compete in these markets, have expressly colluded in other geographic markets with similar characteristics.[6] By reducing the number of significant competitors to only two or three, the proposed merger would make it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme. We therefore have reason to believe that the merger may enhance the vulnerability to coordinated effects that already exists in the relevant markets.[7]

In his dissent, Commissioner Wright takes issue with our decision to seek a remedy in six markets, going to great lengths to argue that we are improperly relying solely on the increase in market concentration to justify our action, that we are creating new presumptions of harm, that we lack a "credible basis" on

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[6] *See*, *e.g.*, Press Release, European Commission, The Court of Justice Upholds in Substance the Judgment Delivered by the Court of First Instance in 2000 Concerning the Cement Cartel, Jan. 7, 2004, *available at* http://europa.eu/rapid/press-release_CJE-04-2_en.htm (announcing fines of EUR 100 million on cement suppliers for collusion); Press Release, German Federal Cartel Office, Highest fine in Bundeskartellamt History is Final, April 10, 2013, *available at* http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/10_04_2013_BGH-Zement.html (announcing fines of EUR 380 million on Lafarge, Holcim, and others for collusion); Philip Blenkinsop, *Belgian Competition Regulator Fines Cement Groups*, Aug. 31, 2013, *available at* http://www.reuters.com/article/2013/08/31/belgium-cement-idUSL6N0GW05U20130831 (reporting EUR 14.7 million in fines levied by the Belgian Competition Council on Holcim and others for collusion); Press Release, Polish Office of Competition and Consumer Protection, UOKiK Breaks Cement Cartel, Dec. 12, 2013, *available at* https://uokik.gov.pl/news.php?news_id=10754&news_page=1 (announcing decision of Poland's Court of Competition and Consumer Protection to impose fines of PLN 339 million (~$93 million) on cement suppliers for collusion involving Lafarge and others); *see generally* MERGER GUIDELINES § 7.2.

[7] *See* MERGER GUIDELINES § 7.1.

which to conclude that the merger may enhance the vulnerability of the relevant markets to coordination, and that our action is otherwise inconsistent with the Guidelines. We respectfully disagree with Commissioner Wright's various characterizations of the Commission's statement in this matter. The Guidelines make clear that a substantial increase in concentration caused by a merger continues to be a significant factor in merger analysis because highly concentrated markets with only two or three large firms are more likely to lead to anticompetitive outcomes.[8] Economic theory and empirical research bear this out.[9] As a result, we view the evidence in a merger that reduces the number of firms in a relevant market to two or three differently from a merger that only reduces the number of firms to six or seven. Where, as here, a proposed merger significantly increases

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[8] *Id.* § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."). *See also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 708 (2010) (explaining that the Guidelines' flexible approach "certainly does *not* mean that they reject the use of market concentration to predict competitive effects, as can be seen in Sections 2.1.3 and 5," that the Guidelines "recognize that levels and changes in market concentration are more probative in some cases than others," and that "the Agencies place considerable weight on HHI measures in cases involving coordinated effects") (emphasis in original).

[9] *See*, *e.g.*, Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304 ("[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices.… Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*."); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding "clear evidence that there is a qualitative difference between two and four or more firms"); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 1006 (1991) (finding, in a study of tire prices, that "[m]arkets with three or more dealers have lower prices than monopolists or duopolists," and noting that, "while prices level off between three and five dealers, they are higher than unconcentrated market prices").

concentration in an already highly concentrated market, a presumption of competitive harm is justified under both the Guidelines and well-established case law.[10]

Moreover, despite Commissioner Wright's assertion to the contrary, our investigation went beyond consideration of market concentration and application of the Guidelines presumption of competitive harm and, as noted above, produced additional evidence supporting our belief that the effect of the proposed acquisition would be to substantially lessen competition and harm cement customers in the relevant markets. On coordinated effects, we found numerous characteristics of the market making it vulnerable to collusion. It is particularly troubling that existing cement suppliers have expressly colluded in other geographic markets with similar characteristics. We also examined whether other market factors, such as the possibility of entry or expansion, might alleviate our competitive concerns. The evidence demonstrates the presence of high barriers to entry for both portland cement and slag cement, including significant capital costs and regulatory requirements. Entry sufficient to deter or counteract the likely harm from the proposed transaction would thus be neither timely nor likely.

In the face of our competitive concerns, based on what we had learned about the nature and conditions of the relevant markets, the parties proposed divestitures to remedy our concerns in each of those markets. The parties did not comply with our Second Requests. While continued investigation may have produced more evidentiary support for our complaint, including those markets for which Commissioner Wright dissents, we do not think such a course would have been justified. We have ample evidence to support our allegations of anticompetitive harm and

[10] *See* MERGER GUIDELINES § 2.1.3; *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) ("Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

had no reason to burden the parties with the expense and delay of further inquiry for the sole purpose of obtaining additional, cumulative evidence. Nor would further inquiry have been a good use of Commission resources.

Merger analysis is necessarily predictive. The evidence in this case provides us with sufficient reason to believe that the proposed acquisition is likely to substantially reduce competition, and there is no evidence of countervailing efficiencies that weigh against the remedy. We believe that the public interest is best served by remedying the competitive concerns as set forth in our proposed consent order.

DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and a Decision & Order against Holcim Ltd. ("Holcim") and Lafarge S.A. ("Lafarge") to remedy the allegedly anticompetitive effects of the proposed merger of the two companies. I dissent in part from and concur in part with the Commission's decision because the evidence is insufficient to provide a reason to believe the proposed transaction is likely to substantially lessen competition, in violation of Section 7 of the Clayton Act, in several of the portland cement markets identified in the Complaint.[1]

The Commission articulates coordinated effects and unilateral effects theories of harm arising from the proposed transaction in all of the fourteen relevant geographic markets defined in the Complaint (the "Relevant Markets").[2] Additionally, and

[1] As I explain below, I concur with the Commission as to the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region; I dissent with the Commission as to eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids.

[2] *See* Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Holcim Ltd., FTC File No. 141-0129 (May 4, 2015) ("For many

untethered to these two theories of harm articulated in the 2010 *Horizontal Merger Guidelines* ("*Merger Guidelines*"), the Commission asserts that mergers, such as the proposed transaction, that reduce the number of competitors to three or fewer are likely to harm competition. The Commission's structural presumption is economically unfounded and inappropriate in the vast majority of Relevant Markets. Furthermore, there is insufficient evidence to support a coordinated effects theory in any Relevant Market and insufficient evidence to support a unilateral effects theory in several of the Relevant Markets.

In those markets in which I conclude the record evidence supports neither a coordinated nor a unilateral effects theory, the Commission relies upon little more than the change in market structure to support each of its allegations. Without particularized evidence substantiating a unilateral effects or coordinated effects theory of harm arising from the proposed transaction, a structural theory alone cannot provide a sufficient basis to establish reason to believe a transaction violates the Clayton Act. It follows, in my view, that the Commission should refrain from imposing a remedy in the markets for which the evidence is insufficient to support either a coordinated effects theory or a unilateral effects theory.

I. The Commission's Structural Theory And Presumption Are Unsupported By Economic Evidence

The Commission argues mergers that reduce the number of competitors in a relevant market to three or two are unique in the sense that they warrant a presumption of competitive harm and illegality,[3] but it cannot defend its structural presumption upon the basis of economic evidence or accumulated empirical knowledge.

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customers in these markets, the merger would . . . leav[e] the merged entity with the power to increase prices . . . unilaterally. Further, . . . it would enhance the likelihood of collusion or coordinated action between the remaining competitors.").

[3] *Id.* at 3.

The Commission cites in support of its structural theory and presumption three academic articles written by economists.[4] Only two offer economic evidence, and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural markets.[5] It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.[6]

The second article is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result

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[4] *Id.* at 3 n.9.

[5] Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that "whether this pattern appears in other industries remains an open question." *Id.* at 1007.

[6] In earlier research using similar empirical techniques and data – namely, small rural markets – Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: "We do not believe that these markets 'stand in' for highly concentrated industries in the sectors of the economy where competition is national or global." Timothy F. Bresnahan & Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. ACTIVITY 833, 868 (1987).

in anticompetitive coordination.[7] Once again, the authors warn against such an interpretation.[8]

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two mergers are competitively suspect.[9] The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.[10]

There is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers. Indeed, such a presumption would be inconsistent with modern economic theory and the analysis endorsed by the *Merger Guidelines*, which deemphasize inferences of competitive harm arising from market

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[7] Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435 (2004).

[8] *Id*. at 436 ("The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.").

[9] Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/.

[10] Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they "obviously should be based on valid economic analysis, that is, proper economic presumptions," which should be updated "based on new or additional economic factors besides market shares and concentration." *Id.* at 37, 48. I agree. Additionally, Salop explains that "[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis – in conjunction with other factors suggested by the competitive effects theory – but not treated as the sole determinant of post-merger pricing." *Id.* at 13-14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant "*ignoring* market shares and concentration in merger analysis." *Id.* at 12 (emphasis in original).

structure in favor of greater reliance upon particularized evidence of changes in post-merger incentives to compete.[11]

To the contrary, this approach is inconsistent with Agency practice and the letter and spirit of the more economically sophisticated approach adopted in the *Merger Guidelines*.[12] Section 2.1.3 of the *Merger Guidelines* does, as the Commission observes, state that "mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."[13] The *Merger Guidelines* insure against reverting to naked structural analysis by making clear that the role of market shares and market concentration is "not an end in itself," but rather "*one* useful indicator of likely anticompetitive effects," and that market concentration is not to be used to "provide a rigid screen to

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[11] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707-08 (2010) (acknowledging the role of market concentration in the analysis endorsed in the *Merger Guidelines* and observing that they place less weight upon market concentration and market shares, instead emphasizing the importance of direct evidence of changes in post-merger incentives to compete and competitive effects). To the extent the Commission relies upon Shapiro's caveat that "changes in market concentration are more probative in some cases than others," Statement of the Federal Trade Commission 3 n.8, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015), they fail to explain why, nor have I been provided any evidence attempting to establish that, markets for portland or slag concrete fit within the subset of cases for which it has been established that there is a reliable a relationship between market structure and competition. I do not quarrel with the notion that such markets exist. We identify them over time using economic analysis, empirical evidence, and accumulated learning. For example, substantial research has identified empirical regularities in the relationship between structure and price in generic pharmaceutical markets. *See* David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005).

[12] Comments of the ABA Section of Antitrust Law on the Horizontal Merger Guidelines Revision Project (June 4, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00026/548050-00026.pdf (urging the agencies to "remove the presumption of illegality keyed to the level and increase in the HHI" because "[t]he presumption does not reflect how the Agencies conduct investigations [and] is not theoretically warranted").

[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter MERGER GUIDELINES].

separate competitively benign mergers from anticompetitive ones," but rather to provide one way to distinguish competitively benign mergers from *those that warrant closer scrutiny.*[14] To the extent these passages evince an ambiguity in the *Merger Guidelines* with respect to the minimum evidentiary burden that must be satisfied to support a merger challenge, the Commission should embrace the interpretation more consistent with a modern economic approach rather than with the obsolete and discredited structural analysis of a prior era.

Rather than relying upon economic evidence to defend the Commission's structural presumption, the Commission highlights case law supporting a presumption of illegality for mergers to duopoly or that substantially increase concentration.[15] As a preliminary matter, case law that endorses a wholly structural approach to merger analysis – an approach clearly rejected by the *Merger Guidelines* – does not constitute relevant economic evidence. Judicial opinions adopting this approach are orthogonal to the proposition in need of *economic substantiation*: that mergers resulting in three- or two-firm markets are likely to result in coordination. Indeed, one can find a variety of economically dubious propositions adopted in antitrust case law blessed by no less a legal authority than the Supreme Court.[16] But courts' observations about the relationship between market structure and competition are not relevant to the Commission's adoption of a structural presumption in this case.

I therefore find any reliance upon structural changes alone to be economically untenable and insufficient to give me reason to

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[14] *Id.* §§ 4, 5.3.

[15] Statement of the Federal Trade Commission, *supra* note 11, at 3 (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) and *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

[16] For example, well-established case law endorses the economic proposition that mergers that result in post-merger shares of greater than 30% are likely to harm competition, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364-65 (1963), and that mergers resulting in post-merger shares of less than 10% harm competition when coupled with a trend toward concentration, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

believe the proposed transaction will violate Section 7 in the vast majority of Relevant Markets.

II. Coordinated Effects Are Unlikely In Any Relevant Market

The *Merger Guidelines* describe the conditions under which the antitrust agencies will challenge a proposed merger on the basis that it is likely to result in anticompetitive coordination. Specifically, the *Merger Guidelines* articulate three necessary conditions that must *each* be satisfied to support a coordinated effects theory: (1) a significant increase in concentration, leading to a moderately or highly concentrated market, (2) a market vulnerable to coordinated conduct, and (3) a credible basis for concluding the transaction will enhance that vulnerability.[17] Thus, the *Merger Guidelines* establish clearly that a highly concentrated market that is already vulnerable to coordinated conduct is necessary but not sufficient to support a coordinated effects theory. Critically, the Commission must also have evidence sufficient to provide a credible basis to conclude the transaction will *enhance* the market's vulnerability to coordinated conduct. Such evidence must evince a change in the post-merger competitive market dynamics and, in particular, post-merger incentives to engage in coordinated pricing. The *Merger Guidelines* provide the elimination of a maverick firm as an illustrative example of the type of evidence that would satisfy the third condition and warrant a presumption of adverse coordinated effects.[18] Importantly, the *Merger Guidelines* explain evidence that a merger will eliminate a maverick is given weight precisely because it changes post-merger incentives to coordinate.[19]

The first and second elements of the *Merger Guidelines*' coordinated effects analysis are not at issue in this case. The Commission's investigation revealed evidence supporting a conclusion that the Relevant Markets are already highly concentrated and the proposed transaction will increase

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[17] MERGER GUIDELINES, *supra* note 13, § 7.1; *see also* Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013) [hereinafter Wright, *Fidelity Dissent*].

[18] MERGER GUIDELINES, *supra* note 13, § 7.1.

[19] *Id.* § 2.1.5.

concentration.[20] Furthermore, the evidence supports a conclusion that the markets are vulnerable to coordinated conduct.[21] Nevertheless, the investigation failed to uncover any evidence to suggest the proposed transaction will increase post-merger incentives to coordinate – that is, there is no record evidence to provide a credible basis to conclude the merger alters the competitive dynamic in any Relevant Market in a manner that enhances its vulnerability to coordinated conduct.

The Commission asserts that the facts that the market is highly concentrated, that it is vulnerable to coordination, and that the merger reduces "the number of significant competitors to only two or three"[22] jointly satisfy the third necessary element that "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[23] The Commission's analysis can be read in one of two ways. Each is tantamount to the application of a structural presumption for coordinated effects claims involving markets with three or two firms, each is problematic because it adopts an outdated and obsolete structural approach to coordinated effects, and each is in significant tension with the economic approach to coordinated effects embodied in the *Merger Guidelines*.

The first interpretation is that the satisfaction of the first and second elements of the *Merger Guidelines* analysis – and particularly the demonstration that the merger significantly increases concentration in an already concentrated market – is sufficient to simultaneously satisfy the third element that the merger enhance post-merger incentives to coordinate. This interpretation renders the third element of Section 7.1 entirely superfluous. The more logical explanation of the third element is that a crucial, additional type of information is required to illuminate how the merger changes the merged firm's incentives

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[20] *See* Analysis of Agreement Containing Consent Orders to Aid Public Comment, *supra* note 2, at 2.

[21] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 (describing the characteristics of the Relevant Markets that render them vulnerable to coordination).

[22] *Id.* at 2.

[23] MERGER GUIDELINES, *supra* note 13, § 7.1

to coordinate. The Commission's application completely overlooks the economic relevance of the third element.

The second plausible interpretation of the Commission's analysis is that the reduction in the number of competitors in a market is itself sufficient evidence to provide a credible basis that a merger will enhance a market's vulnerability to coordination and thus satisfy the third element of the *Merger Guidelines*' coordinated effects analysis. Under this reading, the Commission relies upon the fact that the proposed transaction reduces the number of competitors in each Relevant Market by one firm, either from four to three or from three to two.[24] For example, the Majority Statement asserts that the proposed transaction might enhance the likelihood of coordination by "mak[ing] it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme."[25] These are generic observations that are true of any merger that reduces the number of firms in a market; they are not particularized to the proposed transaction or to any Relevant Market nor do they establish a credible basis to conclude that post-merger incentives to coordinate will increase. The observation that a market with N firms will, after the merger, have N-1 firms is simply insufficient without more to establish the required credible basis. This is true even when a merger reduces the number of firms from four to three or from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.

As I have stated previously, "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration – without more – will increase post-

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[24] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 (taking the view that a reduction of competitors to three or two firms in the relevant market justify a presumption of competitive harm).

[25] *Id.* at 2.

merger incentives to coordinate."[26] Janusz Ordover, in a leading treatment of the economics of coordinated effects, similarly explains that "[i]t is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it."[27] Without particularized evidence that the proposed transaction will enhance incentives to coordinate post-merger, I am unable to conclude there is reason to believe it is likely to substantially lessen competition in violation of Section 7.

III. Unilateral Effects Are Unlikely In Some Of The Relevant Markets

The Commission alleges the proposed transaction is likely to result in unilateral price effects in the Relevant Markets. Unilateral effects arise when the reduction in direct competition between merging firms is sufficient to create post-merger market power. The *Merger Guidelines* articulate a variety of potential unilateral effects theories, including merger to monopoly, merger of firms producing very close substitutes in a differentiated products market, merger of sellers competing in bargaining and auction markets, and mergers in homogeneous goods markets making post-merger output suppression strategies more profitable.[28] The unifying theme of the unilateral effects analysis contemplated by the *Merger Guidelines* is that a particularized showing that post-merger competitive constraints are weakened or eliminated by the merger is superior to relying solely upon inferences of competitive effects drawn from changes in market structure.[29]

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[26] Wright, *Fidelity Dissent*, *supra* note 17, at 3.

[27] Janusz A. Ordover, *Coordinated Effects*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1367 (ABA Section of Antitrust Law 2008) ("It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.").

[28] MERGER GUIDELINES, *supra* note 13, § 6.

[29] *See* Shapiro, *supra* note 11, Part III (explaining the *Merger Guidelines*' unilateral effects analysis, the types of evidence that support such analysis, and

The potential unilateral effects theories in this case fall broadly within one of three categories. The first category involves straightforward merger-to-monopoly markets. In these markets, the theory of harm is that Holcim and Lafarge are the only two meaningful suppliers for all customers in the Relevant Market. The second category involves markets in which Holcim and Lafarge face some competition, but the proposed transaction will result in a merger to monopoly for a substantial subset of customers and will allow the merged entity to unilaterally increase market prices. The third category includes markets where the proposed transaction will reduce the number of competitors in the Relevant Market to three or two, and the remaining competitors will be unable or unwilling to compete for market share – for example, because of capacity constraints, leaving the merged entity with the ability to unilaterally raise prices. Each of these theories requires particularized evidence sufficient to establish reason to believe the proposed transaction violates Section 7 of the Clayton Act. I conclude the available evidence is sufficient to do so in some Relevant Markets and insufficient in others.

Unilateral price effects are "most apparent in a merger to monopoly in a relevant market."[30] Basic economic theory provides a robust and reliable inference that a merger to monopoly or near monopoly is likely to result in anticompetitive effects. A rational firm with little or no competitive constraints will set prices or choose output to maximize its profits; it can be expected that a rational firm acquiring such monopoly power will adjust prices and output accordingly. No further economic evidence is required to substantiate an enforcement action based upon likely unilateral price effects and to establish reason to believe a merger to monopoly or near monopoly is likely to violate Section 7 of the Clayton Act. This analysis applies to at least one of the Relevant Markets.

The analysis is necessarily more nuanced for theories falling within the second category of theories of unilateral price effects. These theories involve Relevant Markets where the proposed transaction would reduce the number of competitors from four to

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the relative analytical weakness of inferences of competitive harm drawn from changes in market structure).

[30] MERGER GUIDELINES, *supra* note 13, § 6.

three or three to two, and the market share for the merged entity would not be large enough to infer it would have the power to raise market prices unilaterally. In these markets, particularized evidence is required to establish reason to believe the merged firm will gain unilateral pricing power. In many Relevant Markets, staff was successful in uncovering the required evidence. For example, in some Relevant Markets, there was evidence of a significant subset of customers for whom a sole market participant would be the only remaining acceptable supplier, due either to physical proximity or to some other preference rendering alternatives an unacceptable source of portland or slag cement. The Commission's example of ready-mix concrete producers,[31] a relevant subset of customers, is an illustrative example here. In some Relevant Markets, the evidence supports a finding that such customers would continue to find their vertically integrated rivals to be an unacceptable source of portland cement, even if the sole remaining vertically unintegrated portland cement producer raised its prices after the merger. In the Relevant Markets for which credible evidence of this type is available, I find it sufficient to create reason to believe the merger is likely to result in competitive harm. Several other Relevant Markets fall into this category.

In other Relevant Markets, the allegation that there will remain only one acceptable supplier for a significant subset of customers after the proposed transaction lacks evidentiary support. Specifically, in these markets, the record evidence does not indicate that a material number of customers view Holcim and Lafarge as closest supply alternatives or that they view other potential suppliers as unacceptable supply sources and would continue to do so in the face of a post-merger unilateral price increase.[32]

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[31] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 n.5.

[32] The role of ready-mix customers in the competitive analysis is again illustrative. In some Relevant Markets the available evidence indicates there are some ready-mix customers that purchase from rivals and others that do not, but the totality of the evidence fails to establish the existence of a significant set of customers that view vertically integrated suppliers as unacceptable or would continue to do so in the face of a post-merger unilateral price increase.

The final category of potential unilateral effects theories, like the second category, also involves Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, but the post-merger market share would not be large enough to infer it would have the power to raise market prices unilaterally. However, unlike the second category, in these Relevant Markets, it is not customer preference that limits the number of available competitors to one. Rather, in these Relevant Markets, the proposed transaction is effectively a merger to monopoly or near monopoly because alternative suppliers would be unwilling or unable to compete with the merged entity in the face of a price increase. In some Relevant Markets, the investigation uncovered particularized evidence sufficient to establish a reason to believe such unilateral effects are likely, including evidence that other competitors are experiencing, or soon will experience, capacity constraints, rendering them unable or unwilling to compete for market share, or that other suppliers will not constrain the merged entity's prices. Several Relevant Markets fall into this third category.

Relevant Markets where the "reason to believe" standard is not satisfied lacked record evidence necessary to corroborate any of these three theories.[33] Indeed, with respect to the Relevant Markets for which I dissent from the Commission's decision, it is my view that the investigation failed to adduce particularized evidence to elevate the anticipated likelihood of competitive effects from "possible" to "likely" under any of these theories. Without this necessary evidence, the only remaining factual basis upon which the Commission rests its decision is the fact that the merger will reduce the number of competitors from four to three or three to two. This is simply not enough evidence to support a reason to believe the proposed transaction will violate the Clayton Act in these Relevant Markets.

[33] One other potentially plausible theory is that customers refuse to sole source their product, and therefore that two or more competitors are necessary to prevent post-merger unilateral effects. There is insufficient record evidence to indicate customers would be unwilling to switch from dual- to single-sourced supply in the event of a post-merger price increase.

IV. Conclusion

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. A presumption that such reason to believe exists when a merger decreases in the number of competitors in a market to three or two is misguided. Additionally, when the Commission alleges coordinated or unilateral effects arising from a proposed transaction, this standard requires more than a mere counting of pre- and post-merger firms. In particular, reason to believe a proposed transaction is likely to result in coordinated effects requires evidence – absent from the record here – that the merger will *enhance* a market's vulnerability to coordinated pricing, and not just that it takes place in a market that is already concentrated. In the absence of such a particularized showing, the Commission's approach to coordinated effects here reduces to a strict structural presumption unsupported by modern economics and at odds with the *Merger Guidelines*.

Similarly, substantiating a unilateral effects theory requires particularized evidence – also absent from the record here in some Relevant Markets – that a merger will reduce or eliminate competitive constraints, permitting the merged entity to increase prices. Without such evidence, a unilateral effects theory reduces to little more than a complaint about market structure coupled with speculation about the circumstances under which unilateral effects might occur in a post-merger world. The *Merger Guidelines* contemplate a more rigorous analysis.

This is not to suggest the "reason to believe" standard requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request. Rather, the standard requires only evidence sufficient to establish that competitive harm is likely. Such evidence, although quite minimal – indeed, a handful of facts in most instances – is indeed available in some Relevant Markets in this matter, and it is in those markets that I concur with the Commission's decision. While I appreciate the practical complications of requesting additional information during the course of a merger investigation, as well as the desire to conduct

efficient investigations, these important pragmatic considerations do not trump the Commission's primary obligation to collect evidence sufficient to establish reason to believe the merger will harm competition before issuing a complaint and accepting a consent.

For the reasons I explain above, I find reason to believe the proposed transaction is likely to result in unilateral price effects, and thus violate the Clayton Act, in the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region. I conclude there is no reason to believe the proposed transaction will violate Section 7 in eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids; it follows that I believe the Commission should refrain from imposing a remedy in these markets.

Complaint

IN THE MATTER OF

ZF FRIEDRICHSHAFEN AG AND TRW AUTOMOTIVE HOLDINGS CORP.

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

Docket No. C-4520; File No. 141 0235
Complaint, May 5, 2015 – Decision, June 11, 2015

This consent order resolves concerns regarding the $12.4 billion acquisition by ZF Friedrichshafen AG ("ZF") of TRW Automotive Holding Corp ("TRW"). ZF and TRW are two of the world's largest auto parts suppliers, and two of only three North American suppliers of heavy vehicle tie rods. The complaint alleges that the merger would eliminate direct competition between ZF and TRW and that reducing the number of competitors from three to two would increase the likelihood of coordinated interaction between a combined ZF/TRW and its only other competitor for heavy vehicle tie rods in North America. The consent order eliminates the competitive concerns raised by ZF's acquisition of TRW. Under the order, the combined company is required to divest TRW's North American and European linkage and suspension business for heavy and light vehicles (which includes heavy vehicle tie rods). ZF and TRW are also required to preserve the assets until they are divested. A monitor will ensure that the merging parties comply with their obligations.

Participants

For the *Commission: Cem Akleman* and *Stephen Antonio.*

For the *Respondents: Peter Thomas, Simpson Thacher & Bartlett LLP*; and *Steven Holley, Sullivan & Cromwell 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 ZF Friedrichshafen AG ("ZF"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent TRW Automotive Holdings Corp. ("TRW"), 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 ("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 ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public 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 12001 Tech Center Drive, Livonia, MI 48150.

3. Respondent ZF is engaged in, among other activities, the design, manufacture, and sale of powertrain, chassis, and driveline automobile components for both light and heavy vehicles.

4. Respondent TRW is engaged in, among other activities, the design, manufacture, and sale of chassis systems, electronic systems, and passive occupant safety systems for both light and heavy vehicles.

5. Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated September 15, 2014, the parties agreed that ZF would acquire TRW for $105.60 per share in an all-cash deal valued at approximately $12.4 billion ("the Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

7. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is heavy vehicle tie rods. A heavy vehicle is generally defined as one that weighs six tons or more, and a tie rod is a rigid connector that links a vehicle's individual wheels with the steering control mechanism.

8. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the Acquisition on the heavy vehicle tie rod market is North America. The size and weight of heavy vehicle tie rods generally make it uneconomical to ship them long distances.

IV. STRUCTURE OF THE MARKET

9. The market for heavy vehicle tie rods in North America is already highly concentrated. The North American heavy vehicle tie rod market is served primarily by ZF, TRW, and USK Internacional S.A. DE C.V. ("Urresko"). These three firms have a combined share of nearly 99% of the market based on unit sales. The merger would increase the Herfindahl-Hirschman Index from 4,218 to 5,046, an increase of 828 points.

10. Firms other than ZF, TRW, and Urresko account for approximately 1% of the North American heavy vehicle tie rod market.

V. ENTRY CONDITIONS

11. Entry into the heavy vehicle tie rod market is not likely to deter or counteract any anticompetitive effects created by the Acquisition. Entry is unlikely in light of the relatively small market size, extremely strong position of incumbents, capital costs, switching costs, and knowledge barriers that exist.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition in violation of Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would increase the likelihood of coordinated interaction among the remaining competitors in the North American heavy vehicle tie rod market and eliminate direct competition between ZF and TRW, resulting in the increased probability that customers would pay higher prices for heavy vehicle tie rods.

VII. VIOLATIONS CHARGED

13. The allegations contained in Paragraphs 1 through 12 above are hereby incorporated by reference as though fully set forth here.

14. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of May, 2015, issues its Complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent ZF Friedrichshafen AG ("ZF") of Respondent TRW Automotive Holdings Corp. ("TRW"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic

of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public 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 12001 Tech Center Drive, Livonia, MI 48150.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, 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. "ACCO Execution Date" means the date upon which Respondents have executed the Agreement Containing Consent Orders pursuant to which this Order has been issued.

B. "Acquirer" means the Person approved by the Commission to acquire the TRW L&S Business pursuant to this Order.

C. "Acquisition" means the proposed acquisition of TRW by ZF as described and contemplated by the Agreement and Plan of Merger dated September 15, 2014, as amended, between ZF and TRW.

D. "Acquisition Date" means the date the Acquisition is consummated.

E. "Books and Records" means any and all original, copies, drafts, and final versions of all books, records, files, customer files, customer lists, customer

purchasing histories, vendor files, vendor lists, advertising and marketing materials, sales materials, technical information, architectural drawings and blueprints of any kind, databases, financial information, reports, regulatory materials, or documents, information, and files of any kind, regardless of whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media.

F. "Commission" means the Federal Trade Commission.

G. "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, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, non-disclosure agreements, and contracts or agreements of any kind.

H. "DAS" means 100% of the shares of TRW - DAS a.s., a joint stock company, which company owns all of Respondents' rights, title, and interests in the Facility Assets:

1. Located at the real property described in Exhibit 1 to this Decision and Order; and,

2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

I. "Direct Costs" means cost not to exceed the cost of labor, material, travel, freight or other transportation, processing, and other expenditures to the extent the costs are directly incurred to provide Transitional Services or to perform a Transition Required Input Supply Agreement. "Direct Cost" to a Commission-

approved Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

J. "Divestiture Agreement" means one or more agreements approved by the Commission between Respondents and an Acquirer divesting the TRW L&S Business as required by this Order. The Divestiture Agreement includes, but is not limited to, the Dusseldorf Lease, any License Back, any Transition Services Agreement, any Transition Required Inputs Supply Agreement, and any Transition Trademark Assistance Agreement.

K. "Divestiture Date" means the date upon which the divestiture required by this Order is consummated.

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

M. "Dusseldorf Design, Engineering & Sales Support" means:

1. All of Respondents' rights, title, and interests in the Facility Assets:

   a. Located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany (but shall exclude any interest in any owned or leased real property itself, or any buildings or improvements on owned or leased real property, together with all easements, rights of way, and appurtenances); and,

   b. Relating to the research and development, design and engineering support activities for the development of L&S Component designs and process specifications and prototype development, production and testing, as well as purchasing, sales and marketing support activities, undertaken at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany;

Provided, however, Dusseldorf Design, Engineering & Sales Support excludes any Facility Assets related to products other than L&S Components.

N. "Dusseldorf Lease" means an agreement for the Acquirer to lease upon commercially reasonable terms the areas within the buildings located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany which are, as of the ACCO Execution Date, used in the ordinary course for the Dusseldorf Design, Engineering & Sales Support (or which any business plan or other planning document in existence as of the ACCO Execution Date contemplates being accomplished through use of the Dusseldorf Design, Engineering & Sales Support, and to the extent not contemplated to be covered through other assets included in the TRW L&S Business as of the ACCO Execution Date). The term of the Dusseldorf Lease shall not exceed one (1) year; *provided, however,* at the option of the Acquirer, the Dusseldorf Lease may be extended for an additional period of six (6) months but only insofar as the lease covers the right to access and use and produce prototypes and to use testing equipment located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany. The Dusseldorf Lease shall also provide by lease or other written agreement the right for the Acquirer to use fixtures, equipment, utility services, computers, office equipment, and other tangible property of every kind as may be necessary for the Acquirer to use leased areas of the buildings. The Dusseldorf Lease shall also provide easements or other reasonable access across Respondents' real property to allow for the Acquirer to use the leased property in a commercially reasonable manner. All of the terms of the Dusseldorf Lease shall be sufficient to allow the Acquirer to use the leased property in a manner to achieve the purposes of this Order. The Dusseldorf Lease shall include terms to prevent the Acquirer from disclosing and Respondents from acquiring or using Material Confidential Information about the Acquirer's conduct of business at the leased site and shall obligate Respondents and

the Acquirer to comply fully with all terms to ensure that Material Confidential Information will not be exchanged between Respondents and the Acquirer and that Respondents will not use any Material Confidential Information of the TRW L&S Business except as required or permitted by this Decision and Order and Order and the Hold Separate Order.

O. "Equivalent Employee Benefits" means any one or more of the TRW Employee Benefits that Respondents are unable to continue to provide after the Acquisition Date. Equivalent Employee Benefits shall provide substantially the same or greater economic benefit to each of the TRW Employees as provided by the TRW Employee Benefit no longer provided to the TRW Employee. With respect to health insurance benefits or the like, Respondents shall structure, provide, and administer the Equivalent Employee Benefits so as to prevent TRW Employees from the need to satisfy additional annual or other periodic deductibles before coverage begins, from making co-payments for medical, dental, or psychological care greater than those required under the TRW Employee Benefits, and from making greater co-payments for pharmacological products than those required under the TRW Employee Benefits. With respect to any TRW Employee who has the option to acquire stock in TRW as part of the TRW Employee Benefits, Respondent shall provide a financial benefit (without the option to purchase additional TRW stock) to the TRW Employee of substantially equivalent economic value.

P. "Excluded Intellectual Property" means:

1. All Intellectual Property that has not been used or planned to be used by the TRW L&S Business since January 1, 2014; and,

2. All Trademarks, including, without limitation, the TRW trademark.

Q. "Facility Assets" means:

1. All real property interests, including rights, title, and interests in and to owned or leased property (subject to the terms of such lease agreements), together with all easements, rights of way, buildings, improvements, and appurtenances;

2. All applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, necessary for the operations of, and conduct of business at, such applicable facility, 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 and reasonably assist the Acquirer in securing any federal, state, and local regulatory agency registrations, permits, and applications whose transfer is not permitted by law; and

3. All fixtures, equipment, machinery, tools, vehicles, personal property, or tangible property of any kind located at such applicable facility that is owned or leased by Respondents, or that Respondents have the legal right to use, or to have the custody or control of (but subject to the terms of such lease or use agreements), that is used in the TRW L&S Business.

R. "Governmental Entity" means any federal, provincial, state, county, local, or other political subdivision of the United States, any European country, or any other country, or any department or agency thereof.

S. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets (including any modifications thereto) issued by the Commission in this matter.

T. "Hold Separate Monitor" means the Person approved by the Commission to serve as a Hold Separate Monitor pursuant to the Hold Separate Order issued by the Commission.

U. "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, 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); (iii) all Trademarks, brand names, commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered Trademarks, trade dress, logos, slogans, service marks, internet website content and internet domain names, together with all translations, adaptions, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (iv) all copyrightable works, all registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith; (v) all computer software (including source code, executable code, data, databases, and related documentation); (vi) all advertising and promotional materials; and (vii) all rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

V. "Inventories" means:

1. All supplies and inventory of one or more of any of the L&S Components; and,

2. All supplies and inventory of raw materials and supplies (including, but not limited to, Required Inputs) relating to the research, engineering, manufacture, marketing, and sale of any one or more of the L&S Components.

W. "License Back" means a perpetual, royalty-free license from the Acquirer for Respondents to use Intellectual Property, which Intellectual Property was delivered to or used by TRW businesses other than the TRW L&S Business prior to March 12, 2015 (which is described in Confidential Appendix A to this Decision and Order), as needed for the sole purpose of the research, development, production, manufacture, marketing, and sale of products and for such fields of use as follows:

1. Tie rods used in TRW's non-competing steering business currently at TRW's Schalke facility (located at Freiligrathstrasse 8-28, D-45881, Gelsenkirchen, Germany) which manufactures tie rods for steering gears, but only insofar as TRW's production of tie rods for steering gears at the Schalke facility is exclusively for captive use by TRW's steering business and is not used to supply any third-party customers; and,

2. L&S Components used in TRW's independent aftermarket business, but only insofar as such L&S Components are not sold in competition with products produced by the TRW L&S Business and sold to original equipment manufacturers or original equipment suppliers.

The License Back may not be assigned or sublicensed except to a wholly owned subsidiary or division of Respondents, except in connection with the sale of substantially all of the assets of Respondents related to the business for which the License Back is granted. Nothing contained in this Decision and Order shall prevent Respondents and the Acquirer from agreeing in the Divestiture Agreement to license back additional TRW L&S Intellectual Property, *provided, however,* that any such agreement remains subject to Commission approval.

X. "L&S Components" means linkage and suspension components for light vehicles and heavy vehicles for which research, engineering, marketing, manufacture

and sale is performed at or from TRW L&S Facilities, including but not limited to control arms, ball joints, stabilizer links, tie rods, conventional steering linkage, drag links, V-links, and radius rods. For purposes of this Decision and Order, L&S Components includes I-shafts but only I-shafts for heavy vehicles manufactured at the Portland Facility.

Y. "Know-how" means know-how, trade secrets, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other similar information.

Z. "Krefeld-Gellep Facility" means all of Respondents' rights, title, and interests in the Facility Assets:

1. Located at the real property described in Exhibit 2 to this Decision and Order; and,

2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

AA. "Material Confidential Information" means any material non-public information relating to the TRW L&S Business either prior to or after the Divestiture Date, including, but not limited to, business and strategic plans, customer or supplier lists, customer or supplier contract terms, historical information about sales to customers or purchases from suppliers, manufacturing costs, price lists, marketing methods, patents, technologies, processes, or other trade secrets, relating to the TRW L&S Business and:

1. Obtained by Respondents prior to the Divestiture Date; or,

2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents' obligations under any Divestiture Agreement or the Hold Separate Order;

Provided, however, that Material Confidential Information shall not include:

x. Information that is in the public domain when received by Respondents;

y. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;

z. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and,

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

BB. "Order Date" means the date upon which this Order was issued by the Commission.

CC. "Patent" 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 Effective Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, restorations, 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.

DD. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Governmental Agency, and any subsidiaries, divisions, groups, or affiliates thereof.

EE. "Portland Facility" means all of Respondents' rights, title, and interests in the Facility Assets:

1. Located at the real property described in Exhibit 3 to this Decision and Order; and,

2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

FF. "Required Inputs" means any raw materials or partially machined parts used in the research, development, manufacture, or production of any one or more of the L&S Components that TRW has researched, engineered, manufactured, marketed or sold at any time since January 1, 2014 if the substitution of such inputs with new materials or the source of supply of such inputs would:

1. Render any L&S Components non-conforming with, in breach of, or otherwise unacceptable under any Contract with any customer; or,

2. Provide any customer with the right to examine, test, or otherwise qualify any L&S Components prior to accepting L&S Components made with substituted raw material inputs or partially machined parts, or made with such inputs from a substituted source of supply.

GG. "Retained Tillsonburg Facility" means the Facility Assets located at 101 Spruce St., Tillsonburg, Ontario, N4G 4J1, Canada.

HH. "St. Catharines Facility" means all of Respondents' rights, title, and interests in the Facility Assets:

1. Located at the real property described in Exhibit 4 to this Decision and Order; and,

2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

II. "Tillsonburg Facility" means all of Respondents' rights, title, and interests in the Facility Assets:

1. Located at the real property described in Exhibit 5 to this Decision and Order; and,

2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

JJ. "Tillsonburg Production Lines" means the equipment, machinery, and tools currently used in the production of control arms for the General Motors Silverado and Sierra platforms and the Ford Raptor platform, located at 101 Spruce St., Tillsonburg, Ontario, N4G 4J1, Canada.

KK. "Trademarks" means a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others.

LL. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between one or both Respondents and the Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, all services (or training for the Acquirer to provide services for itself) reasonably necessary to transfer administrative support services to the Acquirer of each of the assets divested under this Order. The services which may be the subject of a Transition Services Agreement include, but are not limited to, payroll, employee benefits, accounts receivable, accounts payable, utility services, heating and air conditioning services and systems, and other logistical and administrative support. The Transition Services Agreement shall provide that, at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of the Transition Services Agreement as provided by Paragraph II.B.1.b. of this Order.

MM. "Transition Required Input Supply Agreement" means an agreement that receives the prior approval of the Commission between one or both Respondents and the Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, sufficient quantities of Required Inputs to the Acquirer for the Acquirer to fully perform all Contracts for the sale of L&S Components to any Person (including, but not limited to, increasing the number of units of L&S Components sold to such Person to the Contract maximum quantities) by:

1. Assigning to the Acquirer some or all of Respondents' rights to purchase or otherwise receive any Required Input sold or provided to Respondents under one or more existing supply agreements between Respondents and any Person;

2. Selling to the Acquirer any Required Inputs; or,

3. Otherwise supplying the Acquirer with any Required Input by commercially reasonable means.

The Transition Required Input Supply Agreement shall provide that, at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of the Transition Required Input Supply Agreement in accordance with the proviso to Paragraph II.B.3.b of this Order.

NN. "Transition Trademark Assistance Agreement" means an agreement by which TRW grants the Acquirer, on a transitional basis and for a limited period of time mutually agreed upon with the Acquirer, a royalty-free, fully paid-up, non-exclusive, non-transferable right and license to use the TRW trademark as defined in such agreement to the extent such trademark appears on (a) signs, letterhead, advertisements, promotional materials and other tangible assets included in the purchased assets, and (b) solely on L&S Components held, manufactured or sold by the

Acquirer or its affiliates in connection with the operation of the TRW L&S Business.

OO. "TRW Employee Benefits" means all employee benefits offered by Respondents or available to TRW Employees as of the ACCO Execution Date, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits.

PP. "TRW Employees" means the TRW Key Employees and the TRW Workforce Employees.

QQ. "TRW Key Employees" means the Persons identified on Confidential Appendix B to this Order.

RR. "TRW L&S Business" means all of Respondents' legal and equitable rights, title, and interests in all tangible and intangible property of any kind used for or relating to the research, engineering, manufacture, marketing, and/or sale of L&S Components (a) at or from the TRW L&S Facilities and (b) TRW L&S Books and Records, TRW L&S Contracts, TRW L&S Intellectual Property, and TRW L&S Inventories. *Provided, however*, the TRW L&S Assets shall not include the following:

1. The Excluded Intellectual Property; and,

2. Any additional assets identified in the Divestiture Agreement as excluded from the divestiture, if the Acquirer does not want such assets and if the Commission approves the Divestiture Agreement without such assets.

SS. "TRW L&S Books and Records" means all Books and Records relating to:

1. The research, engineering, manufacture, marketing, and sale of L&S Components by TRW; or,

2. The TRW L&S Business.

TT. "TRW L&S Contracts" means all Contracts relating to:

1. The research, engineering, manufacture, marketing, and sale of L&S Components by TRW; or,

2. The TRW L&S Business.

UU. "TRW L&S Facilities" means DAS, the Dusseldorf Design, Engineering & Sales Support, the Krefeld-Gellep Facility, the Portland Facility, the St. Catharines Facility, and the Tillsonburg Facility.

VV. "TRW L&S Intellectual Property" means all Intellectual Property that is related to the research, engineering, manufacture, marketing, and sale of L&S Components by TRW. TRW L&S Intellectual Property includes, but is not limited to, the Patents listed on Confidential Appendix C to this Order.

WW. "TRW L&S Inventories" means all Inventories in which the TRW L&S Business owns a legal or equitable interest and which the TRW L&S Business has not yet sold to customers, including TRW, as of the Divestiture Date.

XX. "TRW Workforce Employees" means all part-time and full-time employees of the TRW L&S Business who are paid hourly or by salary, but excluding the TRW Key Employees.

II.

IT IS FURTHER ORDERED that:

A. No later than six (6) months from the ACCO Execution Date, Respondents shall divest the TRW L&S Business, absolutely and in good faith and at no minimum price, to an Acquirer who receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

B. At the option of the Acquirer, and subject to the prior approval of the Commission, Respondents shall include in the Divestiture Agreement:

1. The Dusseldorf Lease;

2. A Transition Services Agreement relating to the TRW L&S Business for a term of up to two (2) years, which agreement may be terminated at any time by the Acquirer without penalty upon commercially reasonable notice to Respondents;

3. A Transition Required Input Supply Agreement:

   a. For an initial term of up to one (1) year; and,

   b. At the option of the Acquirer, for an additional term that is the greater of (i) one (1) year, or (ii) the time the Acquirer estimates in its reasonable judgment is required to examine, test or otherwise qualify L&S Components made with substituted raw material inputs or partially machined parts or made from such inputs from a substituted source of supply;

   provided, however, that such additional term shall not exceed one (1) year without the prior approval of the Commission, which approval shall be sought no later than forty five (45) days prior to the expiration of the initial term; and,

4. A Transition Trademark Assistance Agreement relating to the TRW L&S Business for a term not to exceed the term agreed between Respondents and the Acquirer.

C. At the option of Respondents and subject to the prior approval of the Commission, Respondents and an Acquirer may enter into a License Back.

D. Prior to the Divestiture Date:

1. Respondents shall secure at their sole expense:

a. Consents from all Persons that relate to or are necessary to divest the TRW L&S Business to the Acquirer and for the Acquirer to operate any tangible or intangible assets of the TRW L&S Business in a manner that will achieve the purposes of this Order; and,

b. Consents from all Persons necessary for the assignment or transfer to the Acquirer of all of the TRW L&S Contracts, other than contracts identified in Confidential Appendix D to this Order;

provided, however, Respondents shall not be required to secure the consent of any Governmental Agency relating to any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer; and,

provided further, however, the failure of Respondents or the Acquirer to obtain any consents that relate to or are necessary to divest the TRW L&S Business shall not extend the date by which Respondents must divest the TRW L&S Business.

2. Respondents shall use best efforts to assist the Acquirer to obtain the transfer from Respondents or issuance to the Acquirer of any permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.

E. Respondents shall include in the Divestiture Agreement provisions that promote achieving the purposes of the Order allocating and providing for indemnification of any liabilities and direct or indirect damages and claims of customers or any other Persons (including, but not limited to, environmental liabilities, product liabilities, and product recalls) related to the operation of the TRW L&S Business prior to the Divestiture Date

F. At its sole cost and expense, Respondents shall disassemble the Tillsonburg Production Lines from the Retained Tillsonburg Facility, and transport the Tillsonburg Production Lines to and reassemble the Tillsonburg Production Lines at the Tillsonburg Facility. The disassembly, transportation, and reassembly of the Tillsonburg Production Lines shall be conducted in the manner and completed upon the schedule outlined in Confidential Appendix E to this Order. Respondents' obligations under this Paragraph II.E. of this Order shall not be complete until the Tillsonburg Production Lines have produced commercially acceptable quantities of the L&S Components (including the receipt from customers of any approvals or product qualifications permitted or required under TRW L&S Contracts) as set forth on Confidential Appendix E to this Order. Respondents shall hold the Acquirer harmless from all liabilities and all direct or indirect damages and claims of customers or any other Persons arising from Respondents' failure to complete the disassembly, transportation and reassembly of the Tillsonburg Production Lines in the manner and upon the schedule outlined in Confidential Appendix E to this Order.

G. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a violation of this Order. 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. 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 Respondents to meet any condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any

modification of the Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order, 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).

H. The purpose of the divestiture is to ensure the continuation of the TRW L&S Business as an ongoing, viable and effective competitor in the North American market for the research, engineering, manufacture, marketing, and sale of tie rods for heavy vehicles, 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 cooperate with and assist the Acquirer of the TRW L&S Business to evaluate independently and retain the TRW Employees, such cooperation to include at least the following:

1. Not later than forty five (45) days before the Divestiture Date, Respondents shall, to the extent permitted by law: (i) provide to the proposed Acquirer, at the Acquirer's option, either access to and an opportunity to copy personnel files of all TRW Employees; or, a list of all TRW Employees by employee number, seniority date, original hire date, job title, work location, and material terms of employment including current salary, accrued vacation pay and entitlement to commissions bonus (whether monetary or otherwise), and the status and classification (as "salaried," "direct," or "indirect"); and, (ii) allow the proposed Acquirer a reasonable opportunity to interview any TRW Employees;

2. Not later than thirty (30) days before the Divestiture Date, to the extent permitted by

applicable law, Respondents shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the TRW Employees; and (ii) to make offers of employment to any of the TRW Employees;

3. Respondents shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the TRW Employees, directly or indirectly attempt to persuade any one or more of the TRW Employees to decline any offer of employment from the Acquirer, or offer any incentive to any TRW Employees to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any TRW Employees from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that directly or indirectly relate to the TRW L&S Business; and (iii) either continue to provide the same TRW Employee Benefits or provide Equivalent Employee Benefits until the Divestiture Date; and,

4. Respondents shall cooperate with the Acquirer to provide reasonable financial incentives as set forth in the Hold Separate Order to encourage TRW Key Employees to continue in his or her position with the TRW L&S Business until the Divestiture Date.

B. For a period of two (2) years from the Divestiture Date, Respondents shall not, directly or indirectly, solicit, negotiate, hire, or enter into any arrangement for the services of any TRW Key Employee who has accepted an offer of employment with, or who is employed by, the Acquirer.

Provided, however, a violation of this provision will not occur if:

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

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or,

3. Respondents hire a TRW Key Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

C. For a period of one (1) year from the Divestiture Date, Respondents shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any TRW Workforce Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however,* a violation of this provision will not occur if:

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

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or,

3. Respondents hire a TRW Workforce Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall not:

1. Provide, disclose, or otherwise make available any Material Confidential Information to any Person

except as required or permitted by this Order or the Hold Separate Order; or

2. Use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order or the Hold Separate Order.

B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order or the Hold Separate Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondents' computers or computer networks. Except as provided by Paragraph IV.D. of this Order and the Hold Separate Order, Respondents shall redact all Material Confidential Information from its Book and Records not divested to the Acquirer.

C. Respondents no less than annually shall provide written or electronic instructions to any and all of its officers, directors, employees, or agents who have custody or control of any Material Confidential Information concerning the limitations placed by this Order on the distribution and use of Material Confidential Information. Respondents shall require such officers to acknowledge in writing or electronically their receipt and understanding of these written or electronic instructions. Respondents shall maintain custody of these written or electronic instructions and acknowledgments for inspection upon request by the Commission.

D. Notwithstanding Paragraph IV.A. of this Order and subject to the Hold Separate Order, Respondents may use Material Confidential Information:

1. For the purpose of performing Respondents' obligations under this Order, the Hold Separate Order, or the Divestiture Agreements;

2. To ensure compliance with legal and regulatory requirements including, but not limited to:

   a. Retaining a copy of Material Confidential Information for the sole purpose of complying with any applicable law, regulations, and other legal obligations; and,

   b. Requirements of the rules and regulations of the Securities and Exchange Commission and of any stock on any exchange, the performance of necessary audits and the maintenance of effective internal controls and procedures for required disclosures of financial information;

3. To provide accounting, information technology, and credit-underwriting services;

4. To provide legal services associated with actual or potential litigation and transactions;

5. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or,

6. As otherwise provided by this Order and the Hold Separate.

V.

IT IS FURTHER ORDERED that:

A. The Commission appoints Competition Rx as Monitor and approves the Monitor Agreement between Competition Rx and Respondents, attached as Appendix F.

B. Respondents shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Monitor and Respondents.

C. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:

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

2. The Monitor shall serve until the earlier of the date this Order terminates by its terms and such time as Respondents have complied fully with all of their obligations under the Divestiture Agreement;

3. The Monitor shall have the power and authority to Monitor Respondents' compliance with Paragraphs II. through IV. of the Order and with the Divestiture Agreement;

4. The Monitor shall have power and authority to review and audit, at the Respondents' sole cost and expense, the books and records of Respondents to determine whether Respondents have complied fully with their obligations under the Order and with the Divestiture Agreement;

5. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission and its staff;

6. The Monitor shall review all reports submitted to the Commission by Respondents pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, and upon request of the Commission or its staff, report in writing to the Commission concerning performance by Respondents of their obligations under Paragraphs II. through IV. of this Order and with the Divestiture Agreement; and,

7. During the term of any Dusseldorf Lease, Transition Services Agreement, Transition Required Input Supply Agreement or Transition

Trademark Assistance Agreement, the Monitor shall provide the Commission with written reports at least every sixty (60) days sufficient to determine if Respondents are complying fully with the terms of any Dusseldorf Lease, Transition Services Agreement, Transition Required Input Supply Agreement or Transition Trademark Assistance Agreement, and with the terms of this Order (including the Divestiture Agreement). Thereafter, the Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.

D. Respondents 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. 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 Paragraphs II. through IV. of this Order and with the Divestiture Agreement;

2. Subject to any demonstrated legally recognized privilege, Respondents shall provide the Monitor 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 Paragraphs II. through IV. of this Order and with the Divestiture Agreement;

3. Within five (5) calendar days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondents shall deliver a copy of such report to the Monitor;

4. Except as otherwise set forth in this Order, the Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;

5. 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 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 Respondents the substance of communications to or from the Commission, its staff, or the Acquirer.

E. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

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 Commission materials and information received in connection with the performance of the Monitor's duties.

G. 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 Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed 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 the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to

permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Divestiture Agreement in a manner consistent with the purpose of this Order. If a substitute Monitor is appointed, Respondents shall consent to the terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor as set forth in this Paragraph.

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 the Order.

I. A Monitor appointed pursuant to this Order may be, but need not be, the same Person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order and the same Person appointed as Hold Separate Monitor under the Hold Separate Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations of Paragraph II. of this Order, whether or not all Government Agency consents have been obtained, the Commission may appoint a Divestiture Trustee to divest the TRW L&S Business, enter into a Transition Services Agreement and Transition Required Input Supply Agreement, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. If Respondents have not fully complied with the obligations imposed by Paragraph II. of this Order, the Divestiture Trustee shall divest the TRW L&S Business 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, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph 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 Respondents to comply with this Order.

B. The Commission may select a Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Commission may appoint a Divestiture Trustee to divest the TRW L&S Business and perform Respondents' other obligations in a manner that satisfies the requirements of Paragraph II. of this Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their 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.

1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures 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, Paragraph II. of this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

2. 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:

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

   b. 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.

   c. Subject to any demonstrated legally recognized privilege, any 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. Respondents shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's

accomplishment of the divestiture. Any delays caused by Respondents 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.

d. Any 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 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 any Divestiture Trustee receives bona fide offers for any 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 Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

e. Any 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. Any 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. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of 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.

f. Respondents shall indemnify any 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.

g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

i. 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.

C. 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.

D. 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 divestitures required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate, and 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, and every thirty (30) days thereafter until the Divestiture Date of the divestiture required by Paragraph II. of this Order, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order, and the Hold Separate Monitor appointed under the Hold Separate 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 each 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. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda reviewing or evaluating possible acquirers or divestiture proposals, a copy of the written instructions and acknowledgments concerning Material Confidential Information required by Paragraph IV. of this Order, and all reports and recommendations concerning completing the obligations.

B. Within thirty (30) days after the date that the initial term of the first of any Transition Services Agreement or Transition Required Input Supply Agreement commences, and every sixty (60) days thereafter until the date upon which the last of any Transition Services Agreement or Transition Required Input Supply Agreement terminates, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order) a verified written report. Each verified written report under this paragraph VII.B. shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with any Transition Services Agreement or Transition Required Input Supply Agreement. For the period covered by each report, the report shall include, but not be limited to (among other things that are required from time to time), the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced) that one or more Respondents have failed to comply fully with either any Transition Services Agreement or Transition Required Input Supply Agreement, briefly describe the Person's claim, and provide copies of any written communications

between Respondents and the Person concerning the claim.

C. On the first anniversary of the Order Date, and thereafter on each subsequent anniversary until Respondents have satisfied in full all of their obligations under Paragraph II of this Order and all of the Divestiture Agreement (including any Transition Services Agreement and Transition Required Input Supply Agreement), 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. For the period covered by each such report, Respondents shall state the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced) that one or more Respondents have failed to comply fully with the Order (including any Divestiture Agreement made a part thereof), briefly describe the Person's claim, and provide copies of any written communications between Respondents and the Person concerning the claim.

VIII.

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

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 Respondents made to either Respondent's principal United States offices, registered office of its United States subsidiary, or its headquarters address, 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 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. 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 June 11, 2025.

By the Commission, Commissioner Wright dissenting.

APPENDIX A

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

APPENDIX B

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

APPENDIX C

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

APPENDIX D

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

APPENDIX E

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

Decision and Order

APPENDIX F

Monitor Agreement

FTC MONITOR AGREEMENT

BETWEEN:

1. **ZF Friedrichshafen AG** (hereafter "**ZF**"), a company organized under the laws of Germany, which has its registered seat at Graf-von-Soden-Platz 1, 88046 Friedrichshafen, Germany,
2. **TRW Automotive Holdings Corp.** (hereafter "**TRW**"), a public 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 12001 Tech Center Drive, Livonia, MI 48150, United States of America,

ZF and TRW are hereafter referred to as the "**Respondents**".

AND:

3. **CompetitionRx Ltd,** a company organized under the laws of the United Kingdom, which has its registered offices at 35 Ballards Lane, London, N3 1XW, United Kingdom, represented by Thomas Hoehn, (hereafter the "**Monitor**").

WHEREAS:

The Federal Trade Commission ("**FTC**") has initiated an investigation of the acquisition by ZF of TRW. ZF and TRW have executed an Agreement Containing Consent Orders ("**Consent Agreement**") with ZF and TRW consenting to the issuance of an Order to Hold Separate and Maintain Assets (the "**Hold Separate Order**"), and a Decision and Order (the "**D&O,**" and together with the Hold Separate Order, the "**Orders**"). The Orders contain, inter alia, the obligations of ZF and TRW to divest the TRW L&S Business (as defined in the Orders) to an Acquirer, who receives the prior approval of the FTC and in a manner that receives the prior approval of the FTC, and to hold separate and maintain the TRW L&S Business pending the divestiture.

In the Orders, the FTC will appoint the Monitor as Monitor (as defined in the D&O) and Hold Separate Monitor (as defined in the Hold Separate Order).

Decision and Order

APPENDIX F

IT HAS BEEN AGREED AS FOLLOWS:

Section A: Engagement of Monitor

1. ZF hereby engages the Monitor in his capacity as the Hold Separate Monitor effective when the Hold Separate Order becomes final, and as the Monitor under the D&O when the D&O becomes final.
2. The Monitor hereby accepts the said engagement as Hold Separate Monitor and Monitor.

Section B: Duties, Rights, and Obligations of the Hold Separate Monitor and Respondents under the Hold Separate Order

1. The Hold Separate Monitor shall:
   a. monitor the organization and operations of the Hold Separate Business;
   b. supervise the management of the Hold Separate Business by TRW Key Employees;
   c. maintain the independence of the Hold Separate Business; and
   d. monitor Respondents' compliance with their obligations pursuant to the Orders.
2. Respondents hereby transfer to and confer upon the Hold Separate Monitor all rights, powers and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to the Hold Separate Order and in a manner consistent with the purposes of the Orders and in consultation with the Commission staff.
3. The Hold Separate Monitor shall carry out the Hold Separate Monitor's duties and responsibilities as outlined in the Hold Separate Order, including submitting periodic reports to the Commission concerning the efforts to accomplish the purposes of the Hold Separate Order and Respondents' compliance with its obligations under the Orders.

Section C: Duties, Rights, and Obligations of the Monitor and Respondents under the D&O

1. Respondents shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in the D&O, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in the D&O or any agreement between the Monitor and Respondents.
2. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:
   a. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
   b. The Monitor shall have the power and authority to monitor Respondents' compliance with Paragraphs II. through IV. of the Order and with the Divestiture Agreement, including, but not limited to, any Transition Services Agreement or Transition Required Input Supply Agreement;
   c. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission and its staff;

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APPENDIX F

d. The Monitor shall review all reports submitted to the Commission by Respondents pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, and upon request of the Commission or its staff, report in writing to the Commission concerning performance by Respondents of their obligations under Paragraphs II. through IV. of this Order and with the Divestiture Agreement; and,

e. During the term of any Transition Services Agreement or Transition Required Input Supply Agreement, the Monitor shall provide the Commission with written reports at least every sixty (60) days sufficient to determine if Respondents are complying fully with the terms of any Transition Services Agreement and Transition Required Input Supply Agreement, and with the terms of this Order (including the Divestiture Agreement). Thereafter, the Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.

3. Respondents hereby 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:

   a. 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 Paragraphs II. through IV. of this Order and with the Divestiture Agreement;

   b. Within five (5) calendar days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondents shall deliver a copy of such report to the Monitor;

Section D: General Duties, Rights, and Obligations of the Monitor and Respondents under the Orders

1. Subject to applicable laws and regulations, the Monitor shall have full and complete access to the personnel, books, records, document and facilities of the TRW L&S Business, and to any other relevant information as the Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the TRW L&S Business. Respondents shall develop such financial or other information as the Monitor may reasonably request and shall cooperate with the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information. The Monitor shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of its duties and responsibilities under the Orders.

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APPENDIX F

2. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants (the "**Monitor's Consultants**") as are reasonably necessary to carry out the Monitor's duties and responsibilities.

Section E: Confidentiality

1. The Monitor shall:
   a. maintain the confidentiality of all Confidential Business Information, and any other information provided to the Monitor by Respondents, any Prospective Acquirer, any Acquirer, any Commission approved Acquirer, the Commission, or any employee, representative or advisor thereof, and shall use such information only for the purpose of performing his duties and responsibilities as Monitor and not for any other purpose, including, but not limited to, any other business or personal purpose. The Monitor may disclose Confidential Business Information only to:
      i. persons engaged, employed by, or working with the Monitor;
      ii. any Acquirer or Commission-approved Acquirer to the extent such information is of a non-privileged nature; and
      iii. persons employed at the Commission who are working on this matter.
   b. require any Monitor's Consultant to execute a confidentiality agreement that requires such persons to treat confidential information, including any Confidential Business Information, with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement, provided, however, that such confidentiality agreement shall not restrict the Monitor from providing any information to the Commission or its staff. The Monitor shall maintain a record of persons engaged by the Monitor to whom Confidential Business Information has been disclosed;
   c. maintain the confidentiality after the termination of this Agreement of all other aspects of the performance of the Monitor's duties and responsibilities under this Agreement and shall not disclose any confidential or proprietary information relating thereto; and
   d. upon termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor, for ten (10) years after termination of this Agreement.

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Section F: Remuneration and Indemnification

1. Respondents shall pay the Monitor in accordance with the Fee Schedule attached hereto as Confidential Exhibit A for all time spent in the performance of the Monitor's duties and responsibilities and in the performance of the Monitor's duties and responsibilities, and all reasonable and necessary travel time. In addition, Respondents will pay the Monitor in accordance with the attached Fee Schedule (i) all out-of-pocket expenses incurred by the Monitor in the performance of the Hold Separate Monitor's and Monitor's duties, including any travel, and (ii) all fees and disbursements incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's and Monitor's duties.
2. Respondents hereby confirm their obligations to indemnify the Monitor acting as the Hold Separate Monitor and Monitor, and any Monitor's Consultant retained by the Monitor in the fulfillment of the Monitor's duties and responsibilities and hold the Monitor and the Monitor's Consultants harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties hereunder, 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 Monitor.

Section G: General Provisions

1. This FTC Monitor Agreement ("**Agreement**") may not be modified without the prior approval of the Commission
2. In the performance of its functions and duties as Hold Separate Monitor and Monitor, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.
3. In the event that a disagreement or dispute should arise between Respondents and the Monitor concerning Respondents' obligations under the Orders, and in the event that such disagreement cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.
4. In the event that either Respondents or the Monitor determine that there is a possible conflict between the Monitor's duties, responsibilities, or obligations under the Orders and under the EC Commitments or the EC Mandate, the Monitor or Respondents promptly shall notify the Commission and the European Commission in writing and consult with them about the possible conflict.
5. This Agreement shall terminate the earlier of
   a. thirty (30) days following the termination date set forth in the applicable Order;
   b. Respondents' 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 Respondents and to the Commission, upon resignation of the Monitor; or
   d. when Respondents' last obligation under the Orders and the Divestiture Agreement that pertain to the Monitor's service have been fully performed; provided, however, that the Commission may require that Respondents extend

Decision and Order

APPENDIX F

this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders.

6. If the Monitor becomes aware during the term of this Agreement that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance of any of its duties or responsibilities under this Agreement, the Monitor shall promptly inform Respondents and the Commission of any such conflict.
7. The Monitor shall provide written notice to Respondents and to the Commission if the Monitor:
   a. enters into any written or oral Material Agreement with any of the Respondents, any Person named as a Proposed Acquirer in any application filed by the Respondents with the Commission for the approval of the divestiture of the TRW L&S Business, or any Person approved by the Commission as the Acquirer of the TRW L&S Business; or
   b. acquires a Material Financial Interest in any of the Respondents, any Person named as a Proposed Acquirer in any application filed by the Respondents with the Commission for the approval of the divestiture of the TRW L&S Business, or any Person approved by the Commission as the Acquirer of the TRW L&S Busines.
8. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to choice of law principles thereof).
9. All notices under this FTC Monitor Agreement shall be provided as follows:
   a. To the Commission
      Office of the Secretary
      Federal Trade Commission
      600 Pennsylvania Avenue, NW
      Washington, DC 20580
      United States of America
      and
      By email to: bccompliance@ftc.gov

   b. To the European Commission
      European Commission
      DG Competition
      Unit B-3: Mergers/Energy and Environment
      MADO 24/043
      Place Madou 1
      B-1049 Brussels/Belgium
      and
      By email to: Henri.PIFFAUT@ec.europa.eu

   c. To the Monitor
      CompetitionRx Ltd
      Attn: Thomas Hoehn
      47 Dorset Street
      London, W1U 7ND
      United Kingdom
      and
      By email to: thomas.hoehn@competitionrx.com

Decision and Order

APPENDIX F

d. To Respondent TRW
TRW Automotive Holdings Corp.
Attn: Jeff Cooper
12001 Tech Center Drive
Livonia, MI 48150,
United States of America
and
By email to: Jeff.Cooper@trw.com

e. To Respondent ZF
ZF Friedrichshafen AG
Department FM
Attn: Dr. Martin Grabolle
Graf-von-Soden-Platz 1
88046 Friedrichshafen
Germany
and
By email to: martin.grabolle@zf.com

Section H: Definitions

As used in this Agreement, the following definitions, and all other definitions used in the Orders, shall apply:

1. **"EC Commitments"** means the Commitments entered by ZF to the EU Commission on February 19, 2015.
2. **"EC Mandate"** means the EU Trustee Mandate executed between ZF and the Monitor on April 9, 2015.
3. **"Material Agreements"** means any agreement or contract pursuant to which the Monitor
   a. has or accepts any employment by or is or accepts any appointment as Member of the Board or member of other management bodies of the Respondents other than appointments pertaining to the establishment and performance of the EC Mandate;
   b. has or accepts any assignments or other business relationships with or financial interests in the Respondents that might lead to a Conflict of Interest; or
   c. has or accepts any other appointments, assignments or other business relationships that may, in view of the circumstances of the particular case, be regarded as impairing the Monitor's objectivity and independence in discharging its duties under the Agreement.

APPENDIX F

4. **"Material Financial Interest"** means any assignment or other business relationship between the Monitor and the Respondents or investments by the Monitor in the stock or securities of the Respondents if such assignments, business relationships or investments are outside the normal course of business and are material to the Monitor or the Respondents.

April 21, 2015

On behalf of **ZF Friedrichshafen AG**

By: DIETER ECKHARDT
Title: VP M&A / COOPERATIONS

By: Young Sunwoo
Title: Sr. Manager M&A / Cooperations

On behalf of **TRW Automotive Holdings Corp.**

By:
Title: EXECUTIVE VICE PRESIDENT & CFO

On behalf of **CompetitionRx Ltd.**

By:
Title:

Decision and Order

APPENDIX F

4. **"Material Financial Interest"** means any assignment or other business relationship between the Monitor and the Respondents or investments by the Monitor in the stock or securities of the Respondents if such assignments, business relationships or investments are outside the normal course of business and are material to the Monitor or the Respondents.

April 21, 2015

On behalf of **ZF Friedrichshafen AG**

By: DIETER ECKHARDT
Title: VP M&A / COOPERATIONS

By: Young Sunwoo
Title: Sr. Manager M&A / Cooperations

On behalf of **TRW Automotive Holdings Corp.**

By:
Title:

On behalf of **CompetitionRx Ltd.**

By: THOMAS HEATH
Title: DIRECTOR

EXHIBIT 1

TRW's manufacturing facility in Dačice, Czech Republic is located at:

Strojírenská 160
380 01 Dačice
Czech Republic

* * * * *

The boundaries and location of the Dačice facility are also depicted in the attached site plan.

Decision and Order

EXHIBIT 1

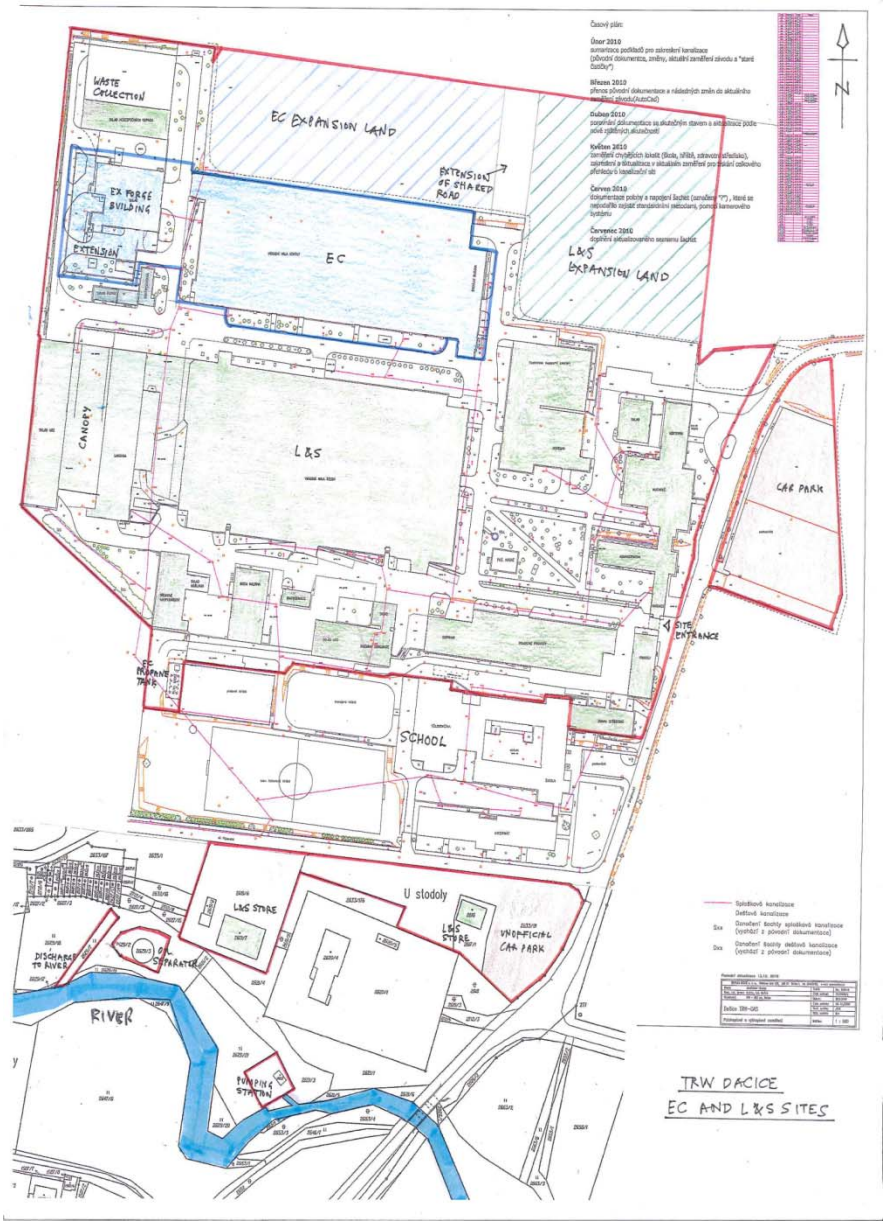


EXHIBIT 2

TRW's manufacturing facility in Krefeld, Germany is located at:

Heidbergsweg 100
47809 Krefeld
Germany

* * * * *

The boundaries and location of the Krefeld-Gellep facility are also depicted in the attached survey.

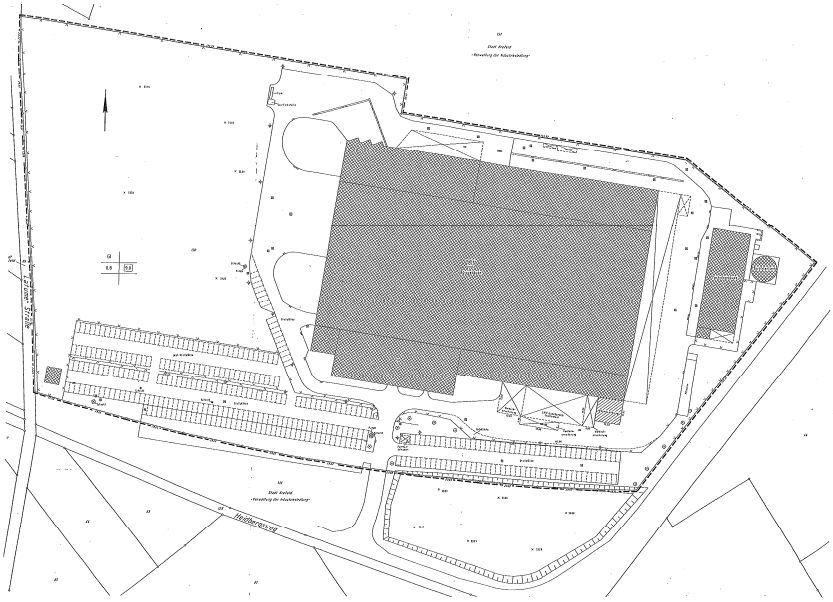


EXHIBIT 3

The legal description of TRW's manufacturing facility in Portland, Michigan located at 902 Lyons Road is as follows:

Situated in the Township of Portland & City of Portland, County of Ionia, State of Michigan:

COMMENCING AT A POINT ON THE SECTION LINE BETWEEN SECTIONS 21 AND 28 IN TOWNSHIP 6 NORTH OF RANGE 5 WEST WHICH POINT IS 47.16 RODS EAST OF THE NORTHWEST CORNER OF SAID SECTION 28, AND RUNNING THENCE SOUTH ON A LINE PARALLEL WITH THE WEST LINE OF SAID SECTION TO THE NORTH LINE OF THE PERE MARQUETTE RAILROAD RIGHT-OF WAY (FORMERLY THE DETROIT, LANSING AND LAKE MICHIGAN RAILROAD); THENCE NORTHWESTERLY ALONG THE NORTH LINE OF SAID RAILROAD TO ITS INTERSECTION WITH THE CENTER OF THE PORTLAND AND LYONS HIGHWAY (SO-CALLED); THENCE SOUTHEASTERLY ALONG THE CENTER OF PORTLAND AND LYONS HIGHWAY (SO-CALLED) TO ITS INTERSECTION WITH THE NORTHEAST AND WEST 1/8 LINE OF SAID SECTION NUMBER 28; THENCE EAST ON SAID 1/8 LINE TO THE GRAND RIVER; THENCE NORTH AND NORTHWESTERLY ALONG THE WESTERLY AND SOUTHWESTERLY LINE OR BANK OF SAID GRAND RIVER TO A POINT WHICH IS 47.16 RODS EAST OF THE WEST LINE OF SAID SECTION 21; THENCE SOUTH ON A LINE PARALLEL WITH THE WEST LINE OF SAID SECTION 21 TO THE PLACE OF BEGINNING; ALWAYS EXCEPTING THEREFROM THE RIGHT-OF-WAY OF THE PERE MARQUETTE RAILROAD COMPANY, SAID ABOVE-DESCRIBED LAND BEING ON THE NORTH ½ OF THE NORTHWEST $^{1}/_{4}$ OF SAID SECTION 28 AND ON THE SOUTHWEST FRACTION OF THE SOUTHWEST ¼ OF SECTION 21, BOTH IN TOWNSHIP 6 NORTH OF RANGE 5 WEST.

ALL OF THE SOUTH ½ OF THE NORTHWEST $^{1}/_{4}$ OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST LYING EAST OF THE LAND OF THE PERE MARQUETTE RAILROAD COMPANY, AND ALL OF THE SOUTH ½ OF THE NORTHEAST $^{1}/_{4}$ OF SECTION 28, TOWNSHIP 6 NORTH, RANGE 5 WEST LYING WEST OF GRAND RIVER, LOCATED IN AND ADJACENT TO THE VILLAGE OF PORTLAND.

ALSO THE EAST 20 ACRES OF THOSE LANDS DESCRIBED AS: COMMENCING AT THE CORNER OF SECTIONS 20, 21, 28 AND 29; THENCE SOUTH ALONG THE LINE BETWEEN SECTIONS 28 AND 29, 7 CHAINS, 37 LINKS TO THE CENTER OF THE ROAD; THENCE SOUTH 40 DEGREES 10 MINUTES EAST ALONG THE ROAD, 6 CHAINS, 83 LINKS TO THE RAILROAD; THENCE SOUTHEASTERLY ALONG THE RAILROAD 7 CHAINS, 64 LINKS TO AN IRON STAKE; THENCE NORTH OR PARALLEL WITH THE LINE BETWEEN SECTIONS 20 AND 21, 30 CHAINS AND 52 LINKS TO THE SOUTH BANK OF GRAND RIVER, THENCE DOWN ALONG THE SOUTH BANK OF GRAND RIVER TO THE SECTION LINE BETWEEN SECTIONS 20 AND 21, THENCE SOUTH ALONG SAID LINE 29 CHAINS AND 54 LINKS TO THE PLACE OF BEGINNING. ALL BEING IN SECTIONS 21 AND 28, TOWN 6 NORTH OF RANGE 5 WEST.

EXCEPT, COMMENCING AT A POINT ON THE NORTH CORPORATION LINE OF THE VILLAGE OF PORTLAND AND ON THE WEST BANK OF GRAND RIVER, SAID CORPORATION LINE BEING THE NORTH, EAST AND WEST 1/8 LINE OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST; THENCE FROM SAID POINT OF BEGINNING NORTH 88 DEGREES 21 MINUTES WEST ON SAID NORTH, EAST AND WEST 1/8 LINE 350 FEET; THENCE SOUTH 85 DEGREES 51 MINUTES EAST 260.8 FEET; THENCE SOUTH 0 DEGREES 51 MINUTES WEST 300 FEET; THENCE SOUTH 26 DEGREES 51 MINUTES WEST 321.4 FEET TO THE NORTHEASTERLY RIGHT-OF-WAY OF THE C & O RAILROAD; THENCE ALONG THE RAILROAD

RIGHT-OF-WAY ON A CHORD OF THE RAILROAD CURVE, SAID CHORD BEING SOUTH 31 DEGREES 04 MINUTES EAST 568.8 FEET TO THE EAST AND WEST ¼ LINE OF SECTION 28; THENCE SOUTH 88 DEGREES 21 MINUTES EAST ON SAID ¼ LINE 2424.6 FEET TO THE SOUTHWESTERLY BANK OF GRAND RIVER; THENCE NORTHERLY AND WESTERLY ALONG THE SOUTHERLY AND WESTERLY BANK OF GRAND RIVER TO THE POINT OF BEGINNING.

ALSO EXCEPT, PART OF THE NORTHWEST ¼ OF SECTION 28, AND PART OF THE SOUTHWEST ¼ OF SECTION 21, TOWN 6 NORTH, RANGE 5 WEST DESCRIBED AS: BEGINNING AT A POINT ON THE SOUTH LINE OF SECTION 21, NORTH 89 DEGREES 11 MINUTES 49 SECONDS EAST 391.77 FEET FROM THE SOUTHWEST CORNER OF SECTION 21; THENCE NORTH 00 DEGREES 52 MINUTES 15 SECONDS WEST 1356.20 FEET ALONG THE EAST LINE OF THE RECORDED PLAT OF F & H INDUSTRIAL PARK TO A POINT ON THE SOUTH BANK OF THE GRAND RIVER; THENCE ALONG A TRAVERSE LINE ALONG THE SOUTH BANK OF THE GRAND RIVER SOUTH 21 DEGREES 58 MINUTES 50 SECONDS EAST 150.90 FEET, AND SOUTH 31 DEGREES 04 MINUTES 05 SECONDS EAST 129.45 FEET AND SOUTH 58 DEGREES 14 MINUTES 48 SECONDS EAST 270.83 FEET TO THE END OF SAID TRAVERSE LINE; THENCE SOUTH 32 DEGREES 08 MINUTES 56 SECONDS WEST 181.83 FEET; THENCE SOUTH 34 DEGREES 16 MINUTES 55 SECONDS EAST 269.06 FEET; THENCE SOUTH 00 DEGREES 39 MINUTES 36 SECONDS EAST 1570.03 FEET ALONG THE EAST LINE AS SURVEYED AND ESTABLISHED BY C.M. MONNINGH MARCH 5, 1953 TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF THE FORMER C & O RAILROAD; THENCE NORTHWESTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE ON A CURVE TO THE LEFT AN ARC DISTANCE OF 418.59 FEET, SAID CURVE WITH A RADIUS OF 2421.53 FEET, A DELTA ANGLE OF 09 DEGREES 54 MINUTES 15 SECONDS, AND A LONG CHORD AND BEARING OF NORTH 70 DEGREES 18 MINUTES 22 SECONDS WEST 418.07 FEET; THENCE NORTH 00 DEGREES 48 MINUTES 37 SECONDS WEST 539.62 FEET; THENCE NORTH 00 DEGREES 52

MINUTES 15 SECONDS WEST 303.07 FEET ALONG THE EAST LINE OF SAID F & H INDUSTRIAL PARK TO THE POINT OF BEGINNING. THIS PARCEL INCLUDES THE AREA BETWEEN THE TRAVERSE LINE AND THE WATERS EDGE OF THE GRAND RIVER.

ALSO, EXCEPT, PART OF THE NORTHWEST ¼ OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST DESCRIBED AS: COMMENCING AT THE NORTHWEST CORNER OF SECTION 28; THENCE NORTH 89 DEGREES 11 MINUTES 49 SECONDS EAST 391.77 FEET ALONG THE NORTH LINE OF SECTION 28; THENCE SOUTH 00 DEGREES 52 MINUTES 15 SECONDS EAST 303.07 FEET ALONG THE EAST LINE OF THE RECORDED PLAT OF F AND H INDUSTRIAL PARK; THENCE SOUTH 00 DEGREES 48 MINUTES 37 SECONDS EAST 625.70 FEET TO THE CENTERLINE OF LYONS ROAD; THENCE SOUTH 41 DEGREES 56 MINUTES 07 SECONDS EAST 32.03 FEET ALONG SAID CENTERLINE TO THE POINT OF THIS DESCRIPTION; THENCE SOUTHEASTERLY ALONG THE SOUTH RIGHT-OF-WAY OF THE FORMER C & O RAILROAD ON A CURVE TO THE RIGHT AN ARC DISTANCE OF 344.79 FEET, SAID CURVE WITH A RADIUS OF 2321.53 FEET, A DELTA ANGLE OF 08 DEGREES 30 MINUTES 34 SECONDS, AND A LONG CHORD AND BEARING OF SOUTH 69 DEGREES 46 MINUTES 22 SECONDS EAST 344.48 FEET; THENCE SOUTH 28 DEGREES 26 MINUTES 47 SECONDS WEST 170.77 FEET TO THE CENTERLINE OF LYONS ROAD; THENCE ALONG SAID CENTERLINE NORTH 41 DEGREES 56 MINUTES 07 SECONDS WEST 361.95 FEET TO THE POINT OF BEGINNING.

* * * * *

The boundaries and location of the Portland facility are also depicted in the attached survey.

Decision and Order

EXHIBIT 3

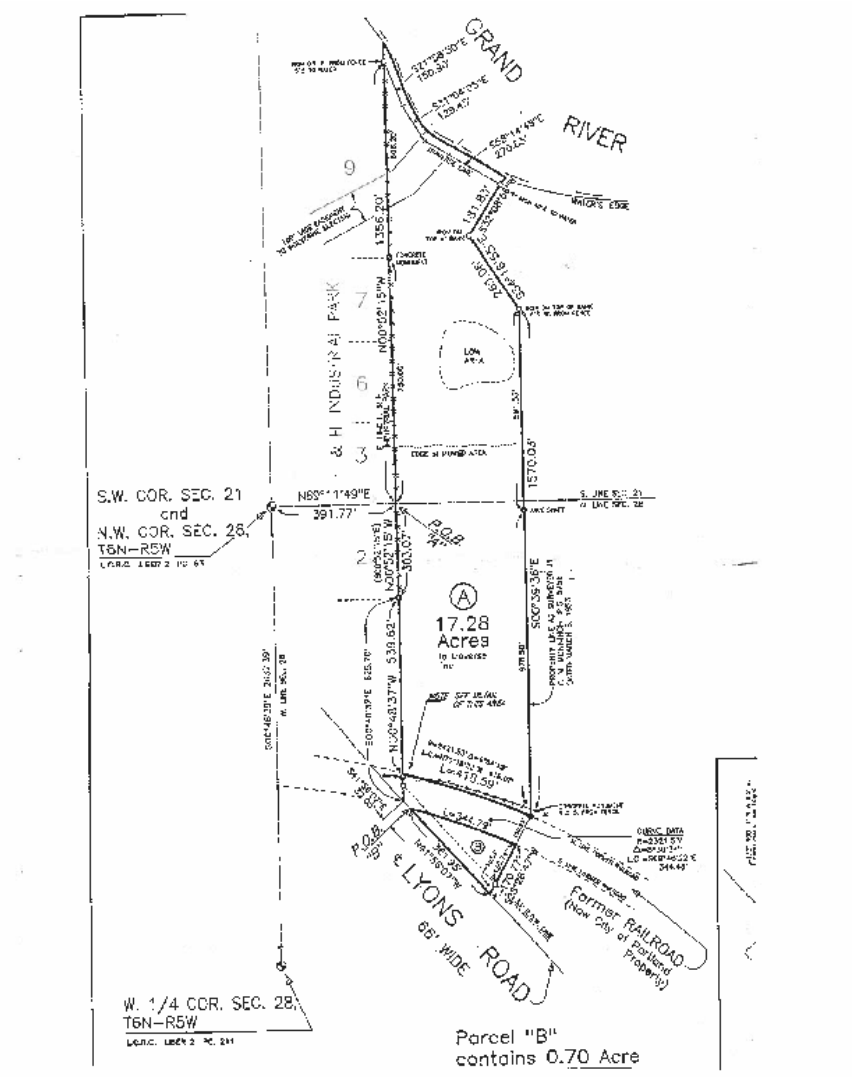


EXHIBIT 4

The legal description of TRW's manufacturing facility in St. Catharines, Ontario, Canada located at 230 and 235 Louth Street is as follows:

For 230 Louth Street:

FIRSTLY:
Part of Lot 21, Concession 7, former geographical Township of Grantham, now in the City of St. Catharines, Regional Municipality of Niagara, designated as Parts 1, 3 and 5, Plan 30R-7311; EXCEPT Part 1, Plan 30R-9891; Parts 1 and 2, Plan 30R-10216; Parts 2-7, Plan 30R-10702; and Parts 2-6, Plan 30R-10813;

AND SUBJECT to an easement over Part 3, Plan 30R-7311 as in Instrument No. R0134973.
PIN 46156-0180 (LT)

SECONDLY:
Part of Lot 21, Concession 7, former geographical Township of Grantham, now in the City of St. Catharines, Regional Municipality of Niagara, as in Remainder of Instrument No. R0626671

(Thirdly);

EXCEPT Parts 1-6, Plan 30R-7311; Part 1, Plan 30R-9891; Parts 1-6, Plan 30R-10813; Part 1, Plan 30R-4789; and, Part 1, Plan 30R-4441;

AND SUBJECT to an easement over Part 1, Plan 30R-851 as in Instrument No. R0349385.
PIN 46156-0178 (LT)

* * * * *

For 235 Louth Street:

FIRSTLY:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines, in the Regional Municipality of Niagara and Province of Ontario, being formerly in the County of Lincoln and being composed of Part of Lots 1439, 1440 and 1441 as shown on a compiled Plan registered in the Registry Office for the Registry Division of the County of Lincoln as Corporation Plan No. 2 for the said City of St. Catharines and being more particularly described as follows:

COMMENCING at a point in the Northerly boundary of St. Paul Street West distant therein North 64 degrees, 32 minutes East, 10.9 feet from the Easterly boundary of Louth Street said streets as established by Municipal Survey No. 791;

THENCE North 64 degrees, 32 minutes East along the Northerly boundary of St. Paul Street West, 535.7 feet to an angle therein;

THENCE North 64 degrees, 26 minutes East along said Northerly boundary, 515.8 feet to an angle therein;

THENCE North 63 degrees, 24 minutes East along said Northerly boundary, 402.4 feet;

THENCE North 58 degrees, 38 minutes and 45 seconds West, 88.55 feet;

THENCE North 11 degrees, 51 minutes East, 95.0 feet to the Southerly boundary of the lands of the Canadian National Railway;

THENCE North 77 degrees, 54 minutes West along said Southerly boundary, 941.0 feet;

THENCE North 78 degrees, 13 minutes West along said Southerly boundary, 375.3 feet to a point in the Easterly boundary of Louth Street as widened to 60.0 feet;

THENCE South 1 degree, 50 minutes East along said last mentioned Easterly boundary, 1047.7 feet more or less to the Point of Commencement.

Decision and Order

SUBJECT TO an easement over said Lot 1441 and being in perpetuity to enter upon the lands hereinafter described for the purpose of laying down, constructing, installing and maintaining underground radials necessary to insure the satisfactory performance of a "non-directional beacon" to be erected by the Grantee herein on the lands hereinbefore described and for such purpose the Grantee shall have access to the lands hereinafter described at, any time for itself and its servants, employees, workmen and assigns: it being understood and agreed that the Grantee herein will replace either sod or asphalt, or both so that the grounds within the area of the easement as hereinafter described are returned to the same condition in which they were found prior to the commencement of construction and it being also understood and agreed that the Grantor shall have the right fully to use and enjoy the said lands hereinafter described, subject always to and so as not to interfere with the easements, rights and privileges hereby granted and conferred upon the Grantee. The said lands to be affected by this easement are:

COMMENCING at an iron bar planted in the northwesterly limit of St. Paul Street, the said iron bar being located as follows:

STARTING at the intersection of the northwesterly limit of St. Paul Street with the southerly limit of Great Western Street, as established by Municipal Survey No. 791;

THENCE South 61 degrees, 44 minutes West along the said northwesterly limit, a distance of 244.3 feet to an iron bar planted;

THENCE South 63 degrees, 24 minutes West continuing along the said northwesterly limit, a distance of 191.51 feet to the Point of Commencement;

THENCE South 63 degrees, 24 minutes West continuing along the said northwesterly limit, a distance of 115.0 feet to a point;

THENCE North 26 degrees, 36 minutes West, a distance of 109.96 feet to a point;

THENCE North 11 degrees, 5I minutes East, a distance of 109.96 feet to a point in the Northerly boundary of said Lot 1441, the said boundary being along a line drawn parallel to and distant 50.0 feet measured southerly at right angle from the centre line of the East bound main line track of the Canadian National Railway;

THENCE South 78 degrees, 09 minutes East along the said Northerly boundary, a distance of 74.91 feet to an iron bar planted;

THENCE South 11 degrees, 51 minutes West, a distance of 95.00 feet to an iron bar planted;

THENCE South 58 degrees, 38 minutes and 45 seconds East, a distance of 88.55 feet, more or less to the Point of Commencement;

SECONDLY:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines in the Regional Municipality of Niagara and Province of Ontario, being formerly in the Township of Grantham and the County of Lincoln, being composed of Part of Lot 21 in the Sixth Concession in said Township of Grantham and being more particularly described as follows:

COMMENCING at the Southwest angle of said Lot 21:

THENCE North 1 degree, 38 minutes East along the Westerly boundary of said Lot, 522.95 feet to the Southerly boundary of the lands of the Canadian National Railways;

THENCE South 78 degrees, 10 minutes East along said Southerly boundary, 762.65 feet to the Southerly boundary of said Lot;

THENCE South 63 degrees, 27 minutes West along said Southerly boundary, 818.05 feet more or less to the Point of Commencement.

THIRDLY:

Decision and Order

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines, in the Regional Municipality of Niagara and Province of Ontario, being formerly in the Township of Grantham and the County of Lincoln, being composed of Part of Lot 21 in the Seventh Concession in said Township of Grantham and being more particularly described as follows:

COMMENCING at a point in the Northerly boundary of St. Paul Street West as shown on a plan of former Highway No. 8 registered in the Registry Office for the Registry Division of the County of Lincoln as Highway Plan No. 112 distant therein South 54 degrees, 17 minutes and 40 seconds West, 31.3 feet from the Easterly boundary of said Lot 21;

THENCE South 54 degrees, 17 minutes and 40 seconds West along said Northerly boundary, 455.7 feet to the beginning of a curve to the right having a radius of 1095.8 feet;

THENCE Southwesterly along said last mentioned curve, an arc distance of 373.52 feet;

THENCE North 11 degrees, 27 minutes West, 234.6 feet;

THENCE South 73 degrees, 01 minutes West, 189.2 feet;

THENCE North 10 degrees, 43 minutes West, 187.7 feet;

THENCE South 76 degrees, 17 minutes West, 365.9 feet to the Westerly boundary of said Lot;

THENCE North 1 degree, 38 minutes West along said Westerly boundary, 590.0 feet to an angle therein;

THENCE North 1 degree, 51 minutes West, 331.3 feet along said Westerly boundary, 331.3 feet to the Northwest angle of said Lot;

THENCE North 63 degrees, 17 minutes East along the Northerly boundary of said Lot, 926.1 feet to the Southerly boundary of the lands of the Canadian National Railways;

THENCE South 78 degrees, 10 minutes East along said Southerly boundary, 500.0 feet to the Westerly boundary of Louth Street as widened to 60.0 feet;

THENCE South 1 degree, 50 minutes East along said Westerly boundary, 1073.6 feet more or less to the Point of Commencement.

* * * * *

The boundaries and locations of the St. Catharines facility are also depicted in the attached property index maps.

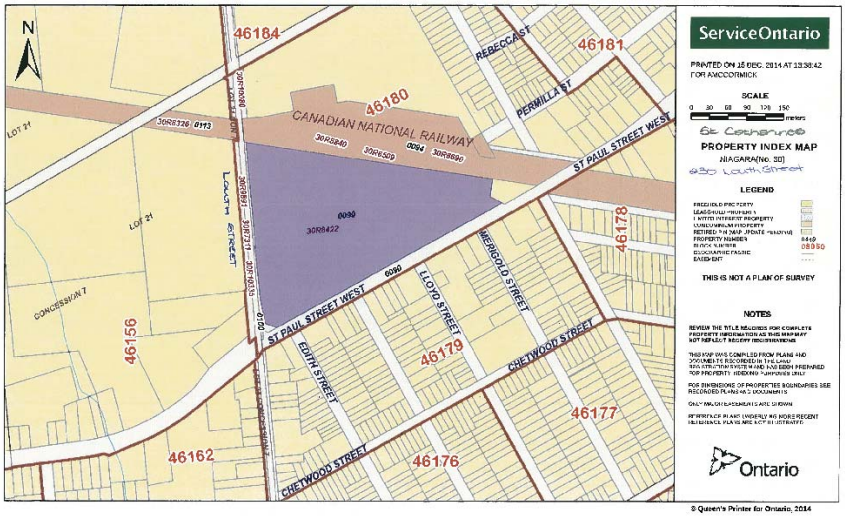


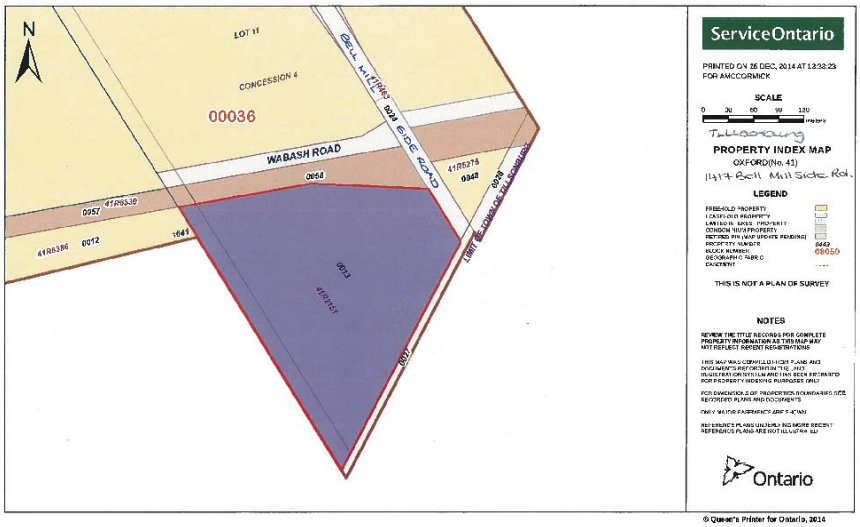
EXHIBIT 5

The legal description of TRW's manufacturing facility in Tillsonburg, Ontario, Canada located at 1417 Bell Mill Side Road is as follows:

Part Lot 11, Concession 4 NTR Middleton; Part of Road Allowance between Lots 10 and 11, Concession 4 NTR Middleton closed by A93247, designated as Part 1 on Plan 41R-2151; Tillsonburg being the whole of PIN 00036-0013 (LT).

* * * * *

The boundaries and location of the Tillsonburg facility are also depicted in the attached property index map.



ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by ZF Friedrichshafen AG ("ZF") of TRW Automotive Holdings Corp. ("TRW"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic

of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public 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 12001 Tech Center Drive, Livonia, MI 48150.

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

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Decision and Order" means:

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

2. the Final Decision and Order issued and served by the Commission.

B. "EC Decision" means Case M.7420 – ZF/TRW Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area issued on March 12, 2015.

C. "Hold Separate Business" means the TRW L&S Business.

D. "Hold Separate Business Employee" means any employee or agent of the Hold Separate Businesses (other than a Support Services Employee).

E. "Hold Separate Order Date" means the date this Hold Separate Order is issued.

F. "Hold Separate Period" means the period from the Acquisition Date until the Divestiture Date.

G. "Orders" means the Decision and Order and this Hold Separate Order.

H. "Support Services Employee" means any employee, agent, contractor, or consultant of Respondents performing Support Services, including, but not limited to, the Persons identified in Confidential Appendix B to this Hold Separate Order.

I. "Support Services" means assistance with respect to the operation of the TRW L&S Business, including, but not limited to: (i) human resources and administrative services such as payroll processing and employee benefits; (ii) preparation of tax returns, environmental health and safety services; (iii) financial accounting and reporting services; (iv) legal, licensing, and audit services; (v) licensing and regulatory compliance in any jurisdiction in which it does business; (vi) maintenance and oversight of information technology systems and other computerized or electronic systems and databases; (vii) processing of accounts payable and accounts receivable; (viii) procurement services; (ix) public relations and public affairs services; (x) construction and development services; (xi) safety and security services; and (xii) procurement and renewal of insurance and related services. Support Services includes any assistance provided to the TRW L&S Business at any time within twenty four (24) months prior to the commencement of the Hold Separate Period, and in addition, any other assistance or support reasonably required during the Hold Separate Period to

achieve the purposes of this Hold Separate Order and the Decision and Order.

J. "Tillsonburg Production Line Transfer Expenditures" means all budgeted, planned, or approved expenditures and funding as of the Hold Separate Order Date that are necessary for or related to the timely completion of the transfer of the Tillsonburg Production Line as set forth in Confidential Appendix A to this Hold Separate Order.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

A. Respondents shall:

1. Keep the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business;

2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, the EC Decision, and all applicable laws; and

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of the Hold Separate Business, except for ordinary wear and tear, and shall not sell, transfer,

encumber, or otherwise impair any of the assets of the Hold Separate Business or the Hold Separate Business (except as required by the Decision and Order).

B. The purpose of this Hold Separate Order is to (1) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Material Confidential Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; and (3) prevent interim harm to competition pending the divestiture and other relief.

III.

IT IS FURTHER ORDERED that:

A. The Commission appoints Competition Rx as Hold Separate Monitor to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.

B. Respondents shall enter into the agreement with the Hold Separate Monitor, attached as Appendix C to this Hold Separate Order, that shall become effective no later than one (1) day after the date the Acquisition is completed, and that transfers to and confers upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his or her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission:

Order to Maintain Assets

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by TRW Key Employees; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Monitor may reasonably request.

3. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.

4. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

5. Respondents may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.

6. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

7. Respondents shall indemnify the Hold Separate Monitor and hold it harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate 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 the Hold Separate Monitor's malfeasance, gross negligence, willful or wanton acts, or bad faith.

8. Thirty (30) days after the date the Acquisition is completed, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order.

C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order or with the EC Decision, the

Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:

1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Hold Separate Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform, its, his, or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order.

D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor, (ii) any Hold Separate Business Employee, or (iii) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order.

B. Respondents shall continue to provide, or offer to provide, Support Services and Required Inputs to the Hold Separate Business as were being provided to the Hold Separate Business by Respondents as of the Date of the Merger Agreement;

1. For Support Services and Required Inputs that Respondents provided to the Hold Separate Business as of the Date of the Merger Agreement, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and Required Inputs as of the Date of the Merger Agreement;

2. For any other Support Services and Required Inputs that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services or Required Inputs; and

3. Notwithstanding the above, the Hold Separate Business shall have, in consultation with the Hold Separate Monitor, the ability to acquire Support Services or Required Inputs from Persons other than Respondents.

4. Notwithstanding the above, Respondents' obligation to provide Support Services to the Hold Separate Business shall not include the provision

of legal services in Germany to the extent that the provision of such services is not permitted by law.

C. Respondents shall not permit:

1. Any of its employees, officers, agents, or directors, other than (i) any Hold Separate Employees, and (ii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.

2. Any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.

D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as may be required to fulfill Respondents' obligations and responsibilities under the Orders, and as may reasonably be requested by the Hold Separate Monitor, to:

1. Operate the Hold Separate Business as it was operated as of the Date of the Merger Agreement (including efforts to generate new business) consistent with the practices of the Hold Separate Business in place prior to the Date of the Merger Agreement;

2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;

3. Carry on such capital projects, physical plant improvements, and business plans (including, but not limited to, the Tillsonburg Production Lines as set forth in Confidential Appendix A to this Hold Separate Order) as are already under way or planned for which all necessary regulatory and

legal approvals have been obtained, including, but not limited to, existing or planned renovation, remodeling, and expansion projects; and

4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order, the Hold Separate Monitor may, in consultation with Commission staff, direct the Hold Separate Business Employees to reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

E. Respondents shall provide each Hold Separate Business Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets pending divestiture. Such incentives shall include a continuation of all employee benefits (or employee benefits of substantially equivalent value), including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business until the Closing Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

F. No later than ten (10) days after the date the Acquisition is completed, Respondents shall establish

and implement procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.

G. No later than ten (10) days after the date the Acquisition is completed, Respondents shall circulate to Hold Separate Business Employees, Support Services Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business, a notice of the requirements of this Hold Separate Order, the Decision and Order, and the Consent Agreement, in a form approved by the Hold Separate Monitor in consultation with Commission staff, including copies of the Hold Separate Order and the Decision and Order.

V.

IT IS FURTHER ORDERED that:

A. After the date the Acquisition is completed, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Hold Separate Business except in the course of:

1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;

2. Performing their obligations under the Divestiture Agreements;

3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and

4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Hold Separate Order.

For purposes of this Paragraph V.A., Respondents' employees that provide Support Services or that staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

B. If access to or disclosure of Material Confidential Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph V.A. of this Hold Separate Order, Respondents shall:

1. Implement and maintain a process and procedures, as approved by the Hold Separate Monitor, such approval not to be unreasonably withheld, pursuant to which Material Confidential Information of the Hold Separate Business may be disclosed or used only:

   a. to or by those employees who require such information;

b. to the extent such Material Confidential Information is required; and

c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.

2. Enforce the terms of this Paragraph V. as to any of Respondents' employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph V, including training Respondents' employees and taking all other actions that Respondents would take to protect their own trade secrets and proprietary information.

C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

D. No Hold Separate Business Employee shall receive or have access to, or use or continue to use, any non-public, confidential information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

VI.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, 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 all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

VII.

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

A. Any proposed dissolution of such Respondent;

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

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

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of such 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 such Respondent related to compliance with this Hold Separate Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the

Commission and at the expense of such Respondent; and

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Hold Separate Order.

IX.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after divestiture required by the Decision and Order is completed.

By the Commission, Commissioner Wright dissenting.

CONFIDENTIAL APPENDIX A

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

CONFIDENTIAL APPENDIX B

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted from ZF Friedrichshafen AG ("ZF") and TRW Automotive Holdings Corp. ("TRW"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from ZF's proposed acquisition of TRW.

Pursuant to an Agreement and Plan of Merger dated September 15, 2014, the parties agreed that ZF would acquire TRW for $105.60 per share in an all-cash deal valued at approximately $12.4 billion ("the Acquisition"). The proposed Acquisition would result in a duopoly in the heavy vehicle tie rod market. 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 FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for heavy vehicle tie rods in North America.

Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, the parties are required to divest TRW's Linkage and Suspension Business in a manner, and to an acquirer, that meets Commission approval. The divestiture package includes five manufacturing facilities in North America and Europe, along with related assets including intellectual property. The acquirer also has the option to enter into transitional services and supply agreements. The Consent Agreement provides an acquirer with everything needed to compete effectively in the North American heavy vehicle tie rod market. The parties must complete the divestiture within six months of executing the Consent Agreement.

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 decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

The Parties

Headquartered in Friedrichshafen, Germany, ZF is a privately held global automotive and industrial products manufacturer. ZF makes light and heavy vehicle components for the powertrain, chassis, and driveline. ZF designs, manufacturers, and sells heavy vehicle tie rods, amongst several other products, in its chassis division.

Headquartered in Livonia, Michigan, TRW sells chassis systems, electronic systems, passive occupant safety systems, and other automotive components. Like ZF, TRW designs, manufactures, and sells heavy vehicle tie rods.

The Relevant Product And Market Structure

The relevant line of commerce in which to analyze the effects of the Acquisition is heavy vehicle tie rods. A heavy vehicle is generally defined as one that weighs six tons or more, and a tie rod is a rigid connecter that links a vehicle's individual wheels with the steering control mechanism. Customers and other market participants did not identify any substitutes for heavy vehicle tie rods.

North America is the relevant geographic market in which to analyze the effects of the Acquisition on the heavy vehicle tie rod market. The size and weight of heavy vehicle tie rods generally make it uneconomical to ship them long distances. Customers interviewed primarily consider manufacturers in North America, and have found more distant firms uncompetitive for reasons including: 1) price; 2) logistics; and 3) quality. Therefore, North America is the relevant geographic market.

The market for heavy vehicle tie rods in North America is highly concentrated. It is served primarily by ZF, TRW, and USK Internacional S.A. DE C.V. ("Urresko"). These three firms have a share of nearly 99% of the market based on unit sales. The merger would reduce the number of competitors from three to two, and increase the Herfindahl-Hirschman Index from 4,218 to 5,046, an increase of 828.

Entry

Entry into the North American heavy vehicle tie rod market is not likely to deter or counteract any anticompetitive effects of the proposed Acquisition. Entry is unlikely in light of the relatively small market size, strong position of incumbents, high capital costs, switching costs, and knowledge barriers that exist. The parties did not identify any likely entrants, and those firms best situated for entry – manufacturers of related heavy vehicle components – expressed no interest in entering the North American heavy vehicle tie rod market.

Effects Of The Acquisition

The proposed Acquisition would increase the likelihood of coordinated interaction among the remaining competitors in the North American heavy vehicle tie rod market. The combined company would have only one remaining significant competitor in North America, Urresko. Reducing the number of competitors from three to two would eliminate much uncertainty and make it easier for the remaining firms to reach agreement on terms of coordination, whether the coordination focuses on customer allocation, price, or some other aspect of competition.

Additionally, the proposed Acquisition would eliminate direct competition between ZF and TRW, resulting in the increased probability that customers would pay higher prices for heavy vehicle tie rods. In the past, customers have been able to use competition between ZF and TRW to obtain better prices by obtaining competing bids. Customers have also switched between ZF and TRW. That competition would be lost absent the merger.

The Consent Agreement

The Consent Agreement eliminates the competitive concerns raised by ZF's proposed acquisition of TRW by requiring the parties to divest TRW's North American and European Linkage and Suspension Business ("the L&S Business"). The proposed divestiture includes everything needed for an acquirer to compete effectively in the North American market for heavy vehicle tie rods, and also includes additional products that ensure the business will be viable. Given the robust nature of the divested

business, the Commission is confident that a post-order divestiture is sufficient to protect its interest in restoring competition.

Pursuant to the Order, the parties are required, no later than six months from execution of the Consent Agreement, to divest the L&S Business to a Commission-approved acquirer. That business consists of both heavy and light vehicle components, and includes – in addition to tie rods – control arms, ball joints, stabilizer links, conventional steering linkages, drag links, V-links, radius rods, and I-shafts. The divestiture buyer will receive all rights and assets relating to the L&S Business, including five TRW manufacturing facilities, Portland (US), Tillsonburg-Plant 2 (Canada), St. Catharines (Canada), Dacice (Czech Republic), and Krefeld-Gellep (Germany), as well as leased space previously occupied by L&S research and development at TRW's Dusseldorf Tech Center. The divested assets also include intellectual property rights as well as all books, records, and confidential business information related to the L&S Business.

To ensure that the divestiture is successful, the Order requires the parties to provide transition services such as logistical and administrative support at the option of the acquirer. Moreover, the acquirer will have the option to enter into a transition supply agreement with the parties for key manufacturing inputs necessary to perform existing customer contracts. The Consent Agreement also includes other standard terms designed to ensure the viability of the divestiture, including requirements that the parties assist the acquirer in hiring the existing work force of the business, and refrain from soliciting those employees for up to two years.

Given the robustness of the divested business and the protections contained in the Order, the Commission is confident that a post-order divestiture will be sufficient to preserve competition. The L&S Business has been run largely as a standalone business within TRW, and potential buyers have confirmed that the divested assets include everything necessary to compete effectively as a viable business. Similarly, potential customers have confirmed that an acquirer of the L&S Business would be a workable option as a supplier.

To ensure compliance with the Order, the Commission will appoint an Interim Monitor to oversee ZF's and TRW's

performance of their obligations pursuant to the Consent Agreement, and to keep the Commission informed about the status of the divestiture. The Order also allows the Commission to appoint a Divestiture Trustee to accomplish the divestiture if the parties fail to divest within the required timeframe. Lastly, the Consent Agreement contains standard reporting requirements and terminates in ten years.

The Commission has also issued an Order to Hold Separate and Maintain Assets to protect the assets until they are divested. During the hold separate period, the parties must fund the business' operations, including capital projects, according to existing plans. To ensure compliance with the Hold Separate Order, a Commission-approved Hold Separate Monitor will oversee the L&S Business during the interim period.

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 an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

STATEMENT OF THE COMMISSION

The Commission has issued a proposed complaint and consent order to address narrow competitive concerns associated with ZF Friedrichshafen AG's proposed $12.4 billion acquisition of TRW Automotive Holdings Corp.[1] Specifically, we have reason to believe that this proposed acquisition is likely to substantially reduce competition in the manufacture and sale of heavy vehicle tie rods in North America. The proposed remedy, which involves a divestiture of TRW's linkage and suspension business in North America and Europe, addresses our competitive concerns and will bolster the viability of the divested business in the hands of a buyer, without eliminating efficiencies that otherwise might arise from the combination of the two companies.

ZF and TRW are global automotive parts manufacturers. Both companies manufacture and sell a wide variety of components for discrete systems within a motor vehicle such as the chassis, powertrain, and suspension systems. They each have production facilities located throughout the United States, Canada, and Mexico.

The proposed transaction will create the second-largest global auto parts supplier. Our competitive concerns arise from a limited aspect of the proposed combination, namely, its likely effect in the market for the manufacture and sale of heavy vehicle tie rods for customers in North America. Tie rods are part of a motor vehicle's steering and linkage system; they are rigid connectors that link the wheels to the vehicle's steering control mechanism. To perform their intended function within the linkage systems of vehicles weighing six tons or more, these tie rods have to be large (approximately three to six feet long) and heavy (weighing approximately 50 pounds). This means that tie rods designed for light vehicles are not practical substitutes since they would be too small and light and therefore not as strong structurally. At the same time, tie rods designed for much heavier, industrial vehicles (like mining vehicles weighing hundreds of tons) would not be substitutes either.

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[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Ohlhausen, and McSweeny.

Because of their weight, it is not economical to ship heavy vehicle tie rods over long distances. For this reason, North American customers primarily consider manufacturers with production facilities in the United States, Canada, and Mexico and generally do not regard suppliers outside of North America as viable options for reasons of price, logistics, and quality. As a result, ZF and TRW, together with a Mexican firm, USK Internacional, S.A. de C.V. ("Urresko"), account for virtually all (99%) of the sales of heavy vehicle tie rods in North America. We estimate the market shares of ZF, TRW, and Urresko to be 23%, 18%, and 58%, respectively. Fringe competitors hold the remaining 1% market share.

The parties' proposed combination will therefore reduce the number of significant competitors in the relevant market from three to two and substantially increase concentration in an already highly concentrated market.[2] Based on this increase in concentration and current market conditions, we believe the transaction is likely to produce substantial anticompetitive effects in the relevant market, in particular, by increasing the potential for coordination. Furthermore, there is unlikely to be any entry that would alleviate our competitive concerns. The small market size, the strong position of the incumbents, switching costs, and capital and knowledge barriers, among other factors, would more than likely deter North American manufacturers of related automotive parts—the most logical candidates for entry—from expanding their product offerings to include heavy vehicle tie rods. Consequently, we have reason to believe that the proposed combination would substantially lessen competition in the relevant market and harm customers and consumers, thereby violating Section 7 of the Clayton Act.

In light of the foregoing, we respectfully disagree with Commissioner Wright's assertions that we lack a "credible basis" on which to conclude that the merger may enhance the risk of coordination and that our action is otherwise inconsistent with the

[2] The proposed transaction would increase the Herfindahl-Hirschman Index ("HHI") in the relevant market from 4,218 to 5,046. The threshold at which a market is considered "highly concentrated" under the Merger Guidelines is 2,500. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010).

2010 Horizontal Merger Guidelines.[3] Under the 2010 Guidelines, substantial increases in concentration caused by a merger rightly continue to play an important role in our merger analysis.[4] They do so for the simple reason that highly concentrated markets are more conducive to anticompetitive outcomes than less concentrated markets.[5] Accordingly, the lens we apply to the evidence in a merger that reduces the number of firms in a market to three or two is, and should be, different than the lens we apply to a merger that reduces the number of firms to seven or six. Where, as here, a proposed merger significantly increases concentration in an already highly concentrated market, a presumption of competitive harm is justified under both the Guidelines and well-established case law.[6]

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[3] Dissenting Statement of Commissioner Joshua D. Wright at 3−4.

[4] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701 (2010) ("Thus, like the fox, the 2010 Guidelines embrace multiple methods. But this certainly does *not* mean they reject the use of market concentration to predict competitive effects, as can be seen in Sections 2.1.3 and 5."). As Commissioner Wright acknowledges, "The predictive power of market share and market concentration data is informed by economic theory and available empirical evidence." Wright Dissent at 7.

[5] *See, e.g.*, Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304 ("[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices.… Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*."); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding "clear evidence that there is a qualitative difference between two and four or more firms"); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 1006 (1991) (finding, in a study of tire prices, that "[m]arkets with three or more dealers have lower prices than monopolists or duopolists," and noting that, "while prices level off between three and five dealers, they are higher than unconcentrated market prices").

[6] *See* MERGER GUIDELINES § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be

Despite Commissioner Wright's insistence to the contrary, our inquiry extended beyond consideration of market concentration and application of the Guidelines presumption of competitive harm. We also examined the transaction's likely anticompetitive effects, and are satisfied that there is sufficient evidence to support the issuance of our complaint and proposed consent order.[7] As noted above, we are particularly concerned that the transaction is likely to enhance the potential for coordination.[8] As set forth in the Guidelines, the Commission is likely to challenge a merger under a coordinated effects theory if: "(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct []; and (3) the [Commission has] a credible basis on which to conclude that the merger may enhance that vulnerability."[9] We have reason to believe that all three factors are satisfied here.[10]

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rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."); *Chicago Bridge & Iron Co., N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) ("Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

[7] The investigation in this matter did not proceed to a full phase because the parties proposed a remedy soon after second requests had been issued. Consequently, the quantum of evidence is not the same as if the agency had completed a full-phase investigation. But that does not mean, as Commissioner Wright suggests, that we are lowering our reason-to-believe standard when a remedy is proposed during the course of an investigation. Wright Dissent at 9. We believe our complaint is well supported and meets the same reason-to-believe standard we always apply. We simply do not think it would have been appropriate to subject the parties to the added expense and delay of a full-phase investigation. It would not have been a good use of Commission resources either.

[8] Although coordinated effects is the primary basis upon which we found reason to believe that the proposed transaction violates Section 7 of the Clayton Act, we also found evidence of unilateral effects, namely, that in the past, customers have solicited competing bids from ZF and TRW to obtain better prices, and have switched between ZF and TRW as their preferred supplier.

[9] MERGER GUIDELINES § 7.1.

[10] 15 U.S.C. § 45(b) (2013).

First, as noted above, the proposed transaction results in a highly concentrated relevant market.[11] Second, the market is susceptible to coordinated conduct, as evidenced by several recent cases of collusion in the auto parts industry.[12] Third, by reducing the number of significant competitors to only two, the merger would decrease the impediments to reaching common terms of coordination and make it easier to monitor compliance with, and retaliate against potential deviation from, a coordinated scheme. Specifically, as remaining duopolists with nearly equal shares (41% and 58%, respectively), the combined firm and Urresko would have greater incentives to take advantage of a market with relatively few customers that purchase homogeneous products through individual purchase orders rather than long-term supply contracts. They would also find it easier to divide customers and monitor their allocations.

Our concern that the merger may enhance the relevant market's vulnerability to coordination is backed by the well-accepted view that markets with only two or three firms are more conducive to anticompetitive outcomes than markets with four or more firms.[13] The proposed merger would eliminate a third competitor and create greater symmetry between the two remaining firms.

Additionally, there is no evidence that fringe competitors, which have higher prices, or new entrants, which are unlikely to materialize, could disrupt any coordination between the combined firm and Urresko. For these reasons, we have ample basis to

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[11] *See* Shapiro, *supra* note 4, at 708 ("In particular, as the revised Guidelines explain, the Agencies place considerable weight on HHI measures in cases involving coordinated effects.").

[12] Among the Antitrust Division's recent prosecutions of companies and individuals in the automotive parts industry for price-fixing and bid-rigging is an indictment involving TRW in an alleged conspiracy for seat belts, air bags, and steering wheels. *See* Plea Agmt., *United States v. TRW Deutschland Holding GMBH*, Crim. No. 12-20491 (E.D. Mich. Sept. 25, 2012), *available at* http://www.justice.gov/atr/cases/f287600/287657.pdf. *See generally* MERGER GUIDELINES § 7.2 ("Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.").

[13] *See* Salop; Huck et al.; Bresnahan & Reiss, *supra* note 5.

conclude that the merger may enhance the vulnerability to coordinated effects that already exists in the relevant market.[14]

As we noted above, the parties have chosen to address our limited competitive concerns in the heavy vehicle tie rods market through a proposal to divest TRW's linkage and suspension business in North America and Europe. This allows the parties to address our competition concerns, as well as those of the European Commission. The EC has already accepted the proposed settlement and ordered the divestiture of the European assets.[15] Furthermore, there is no evidence that the divestiture of TRW's linkage and suspension business would eliminate any efficiencies that otherwise might result from the parties' proposed combination.

In sum, because we have reason to believe that customers and consumers are likely to suffer a substantial loss of competition as a result of the proposed transaction, and there are no demonstrated countervailing efficiencies, we believe the public interest is best served by accepting the proposed consent order to remedy our competitive concerns.

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[14] *See* MERGER GUIDELINES § 7.1 (recognizing that "the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof"). The Guidelines contemplate that the third factor can be satisfied in several ways; as Commissioner Wright himself notes, an acquisition of a maverick firm is but "one illustrative example of the type of evidence that would satisfy this third condition." Wright Dissent at 3.

[15] *See* Press Release, European Commission, Mergers: Commission Clears Acquisition of Automotive Components Manufacturer TRW by Rival ZF, Subject to Conditions (Mar. 12, 2015), *available at* http://europa.eu/rapid/press-release_IP-15-4600_en.htm.

Concurring Statement

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I voted in favor of issuing for public comment the proposed consent agreement in this matter. As discussed below, there is sufficient evidence to provide me with a reason to believe that, absent a remedy, the transaction is likely to violate Section 7 of the Clayton Act. I also find that the proposed consent, which is intended to remedy any such violation, is in the public interest.

Based on the evidence presented to me – including the evidence discussed in the Analysis to Aid Public Comment and the majority statement in this matter – I am satisfied that the "reason to believe" prong that the Commission must assess in issuing a complaint, including in the consent context, is met here. It is important to note that the Commission makes the reason to believe determination before a full evidentiary and legal record is developed during a trial on the merits, which suggests that the standard must necessarily be lower than what the Commission or a court should apply for finding ultimate liability. Individual Commissioners, of course, have different views on how much evidence is necessary to satisfy the reason to believe standard. Unfortunately, there does not appear to be a consensus view on what the standard requires. I respect Commissioner Wright's view that the standard was not met for him in this case. For the reasons identified in the majority statement in this matter, I determined that there is a credible basis on which to conclude that this merger may enhance the vulnerability to coordinated effects that already exists in the relevant market at issue.[1]

I further view this consent to be in the public interest. In my time as a Commissioner, I have advocated for transparency, predictability, and fairness across a variety of settings.[2] Those

[1] *See* 2010 HORIZONTAL MERGER GUIDELINES § 7.1.

[2] Those settings have included the use of disgorgement in competition cases, the proper scope of our standalone Section 5 authority, the intersection of intellectual property and antitrust, and the treatment of U.S. businesses by foreign antitrust jurisdictions. *See, e.g.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re* Cardinal Health, Inc., FTC File No. 101-0006 (Apr. 17, 2015), *available at* https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-maureen-k-ohlhausen-cardinal-health-inc (dissenting from consent involving disgorgement of profits

three critical goals apply equally to the merger context. A practical problem in our merger review process arises, however, where investigations are cut short by the merging parties, which, for business, strategic, or other reasons, offer staff and then ultimately the Commission a proposed remedy in lieu of responding to a Second Request or other compulsory process. In such cases, the available evidence may be sufficient to provide reason to believe the proposed transaction would violate Section 7, but a full investigation might (or might not) reveal additional evidence sufficient to counterbalance the available evidence and support closing the investigation altogether. In that situation, the goals of predictability and fairness counsel against forcing merging parties (and Commission staff) to incur the significant costs associated with a full-phase investigation. Merging parties also expend non-trivial amounts of time and money in developing and then proposing remedies to FTC staff; those good-faith efforts – particularly ones that involve coordination of remedies across antitrust jurisdictions – should not be discounted. The public interest analysis thus should take into account the need for predictability and fairness for merging parties in these circumstances.

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for alleged Section 2 violation); Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014), *available at* http://www.ftc.gov/public-statements/2013/10/section-5-ftc-act-principles-navigation-0 (advocating for additional guidance on the FTC's use of its standalone Section 5 authority); Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re* Motorola Mobility LLC & Google, Inc., FTC File No. 121-0120 (Jan. 3, 2013), *available at* https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0 (dissenting from consent involving standalone Section 5 claim against holder of standard-essential patents); Testimony of Commissioner Maureen K. Ohlhausen, "The Foreign Investment Climate in China: U.S. Administration Perspectives on the Foreign Investment Climate in China," before the U.S.-China Economic and Security Review Commission (Jan. 28, 2015), *available at* https://www.ftc.gov/public-statements/2015/01/testimony-commissioner-maureen-k-ohlhausen-hearing-foreign-investment (discussing importance of foreign antitrust jurisdictions pursuing the goals of predictability, transparency, and fairness).

Dissenting Statement

STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and Decision & Order against ZF Friedrichshafen AG ("ZF") to remedy the allegedly anticompetitive effects of ZF's proposed acquisition of TRW Automotive Holdings Corp. ("TRW"). I respectfully dissent because the evidence is insufficient to provide reason to believe ZF's acquisition will substantially lessen competition for heavy vehicle tie rods sold in North America. In particular, I believe the Commission has not met its burden to show that the acquisition will result in an increased likelihood of harm from coordinated effects or from unilateral effects. As a consequence, the Commission should close the investigation and allow the parties to complete the proposed transaction without imposing a remedy.

I write separately today to explain my vote and to discuss the quality and quantity of evidence necessary to support a coordinated and unilateral effects challenge under the 2010 *Horizontal Merger Guidelines* ("*Merger Guidelines*").

The Complaint alleges the proposed transaction increases the likelihood of coordinated effects and unilateral effects in the market for heavy vehicle tie rods sold in North America.[1] After the proposed transaction, ZF and TRW would have a combined 41% share. The remaining competitor, Urresko, has a 58% share. Fringe suppliers have a 1% share.

I. Coordinated Effects Are Unlikely In The Relevant Market

The Complaint implicates an important question with regard to coordinated effects: what evidence is necessary to establish reason to believe a proposed transaction may substantially lessen competition by "enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers."[2]

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[1] Compl. ¶ 12, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 5, 2015).

[2] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7 (2010) [hereinafter MERGER GUIDELINES].

The *Merger Guidelines* offer three conditions that, if satisfied, suggest the agency is likely to challenge a merger upon the basis that it will result in an increased likelihood of competitive harm from coordination. The *Merger Guidelines* specify that the agencies are likely to challenge a merger if: (1) "the merger would significantly increase concentration and lead to a moderately or highly concentrated market;"[3] (2) the "market shows signs of vulnerability to coordinated conduct;"[4] and (3) "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[5]

The second and third conditions are at issue here and worthy of further discussion.

The record evidence is mixed with respect to the second condition, whether the market shows signs of vulnerability to coordinated conduct. Evidence that the market is generally conducive to coordinated interaction includes the fact that heavy vehicle tie rods are fairly homogeneous goods and are purchased using relatively short-term contracts.

Also potentially germane to assessing the vulnerability of the relevant market to coordinated conduct are previous episodes of coordination by the same players in different markets. In 2012, a German subsidiary of TRW Automotive, TRW Deutschland Holding GmbH, pled guilty to a conspiracy to fix prices of seatbelts, airbags, and steering wheels sold to two German automobile customers for vehicles manufactured or sold in the United States.[6] While this prior episode does not involve the same relevant product or geographic markets as the current matter, it might suggest some vulnerability to coordination.[7]

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[3] *Id.* § 7.1.

[4] *Id.*

[5] *Id.*

[6] Plea Agreement ¶ 4(e)-(f), United States v. TRW Deutschland Holding GmbH, No. 2:12-cr-20491-GCS-PJK (E.D. Mich. Sept. 25, 2012).

[7] The *Merger Guidelines* state that "The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in

There are other considerations, however, that indicate the market for heavy vehicle tie rods is not particularly vulnerable to coordination. First, while the product might be fairly homogeneous, there are significant switching costs including the time and cost involved with validation testing of the new supplier's tie rods. All else equal, significant switching costs make markets less vulnerable to coordination because they diminish firms' ability to punish effectively deviations from the coordinated price. Second, cost and demand fluctuations appear to be relatively frequent and large, which increase the information costs needed to detect accurately deviations.[8] Third, Urresko is a relatively recent entrant and has become the largest supplier in the market. These types of disruptive market events are generally not conducive to successful coordinated interactions. Finally, there are a number of large buyers, which can result in dramatic market share swings if a supplier loses the majority of a buyer's business. While the record evidence with respect to vulnerability of the relevant market is certainly mixed at best, it would not be

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express collusion affecting the relevant market," but that prior "express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market," and that prior collusion "in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market." MERGER GUIDELINES, *supra* note 2, § 7.2. Thus, I am comfortable with concluding the prior TRW Deutschland price-fixing case is material to our investigation, and that this evidence increases the likelihood of coordination, all things equal. However, without a more detailed assessment of any logical connection between the markets where collusion actually took place and the relevant market here, I am hesitant to give this factor alone substantial weight given observable differences between the markets. For instance, in the markets at issue in that case, the bidding process appeared to be more formal with longer commitments. *See* Information ¶ 8, United States v. TRW Deutschland Holding GmbH, No. 2:12-cr-20491-GCS-PJK (E.D. Mich. July 30, 2012).

[8] For instance, the primary input to produce heavy vehicle tie rods is steel. Looking at the producer price index for steel mill products, the average annual price change over the past ten years is 1.6% with a standard deviation of 6.6%. Some of the specific yearly changes are substantial, e.g., -8.6%, 7.5%, 9.1%, 12.8%. *Producer Price Index - Metals and Metal Products*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/regions/mid-atlantic/data/ProducerPriceIndexMetals_US_Table.htm (last visited May 8, 2015).

unreasonable to find the second prong in the *Merger Guidelines* satisfied.

Ultimately, however, I do not have reason to believe the proposed transaction is likely to result in coordinated effects because the record evidence does not satisfy the third condition – that is, there is no "credible basis on which to conclude that the merger may *enhance*" any pre-merger vulnerability to coordination.

The *Merger Guidelines* provide the acquisition of a maverick firm as one illustrative example of the type of evidence that would satisfy this third condition. There is no evidence that either ZF or TRW is a maverick firm as contemplated by the *Merger Guidelines*.

The sole evidence offered in favor of the proposition that the proposed transaction will *enhance* the market's vulnerability to coordination is that the merger will reduce the number of firms in the relevant market from three to two. I do not agree that a reduction of firms from three to two, without more, is enough to provide "a credible basis to conclude that the merger may *enhance* that vulnerability." The observation that a market with N firms will, after the merger, have N-1 firms, is simply insufficient without more to establish the required credible basis under the *Merger Guidelines*. This is true even when a merger reduces the number of firms from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.[9]

[9] The Commission cites Carl Shapiro to support the proposition that market concentration is relevant to coordinated effects analysis. *See* Statement of the Federal Trade Commission 2 n.4, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (quoting Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 708 (2010) ("In particular, as the revised Guidelines explain, the Agencies place considerable weight on HHI measures in cases involving coordinated effects.")). I agree. The 2010 *Merger Guidelines* establish market

As I have stated previously, "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration—without more—will increase post-merger incentives to coordinate. Thus, the *Merger Guidelines* require the federal antitrust agencies to develop additional evidence that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate."[10] Janusz Ordover, in a leading treatment of the economics of coordinated effects, similarly explains that "It is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it."[11] The required additional evidence needed to satisfy the third condition is absent in this case.

II. Unilateral Effects Are Unlikely in the Relevant Market

The sole evidence offered in favor of the Commission's allegation that the merger will render unilateral price effects likely is that some customers have used the competition between ZF and TRW to obtain better pricing and some customers have switched between the two suppliers.[12] While this is certainly material to our inquiry, this is a thin reed, without more, upon which to base a unilateral price effects case. There is no information on price

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concentration as one of three conditions that must be satisfied to find coordinated effects. What Shapiro does not state, and the proposition the Commission does not otherwise substantiate, is that evidence of changes in market concentration is sufficient to satisfy the third condition along with the first.

[10] Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013).

[11] Janusz A. Ordover, *Coordinated Effects*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1367 (ABA Section of Antitrust Law 2008) ("It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.").

[12] *See* Analysis of Agreement Containing Consent Order to Aid Public Comment 2, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 5, 2015).

effects. Moreover, there is no substantial evidence on the record with respect to the role the market leader, Urresko, plays in disciplining prices. The fact that Urresko is a recent entrant and has become the market leader in a relatively short period of time also renders dubious the proposition that barriers to entry in the relevant market are adequate to sustain a post-merger price increase. Additionally, even with sufficient barriers, Urresko's rapid growth undermines significantly any unilateral effects argument and suggests a post-merger price increase from a merged ZF-TRW would be fragile and potentially unsuccessful. The *Merger Guidelines* contemplate the possibility of intense competition in markets with small numbers of firms, observing that "Even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings."[13]

Moreover, unilateral effects in a homogeneous goods market principally involve reductions in output.[14] In order to be profitable, the reduction in output must not be met by a sufficient supply response by rivals. Thus, absent meaningful capacity constraints, unilateral effects are less likely in homogeneous goods markets. I have seen no evidence that Urresko is capacity constrained.

III. Conclusion

The Commission insists that a different "lens" should be used to evaluate evidence in markets where the number of firms is reduced by merger to three or two.[15] The Commission cites in support of its structural theory and presumption three academic articles written by economists.[16] Only two offer economic evidence and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural

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[13] MERGER GUIDELINES § 5.3, *supra* note 2.

[14] *See id.* § 6.3.

[15] *See* Statement of the Federal Trade Commission, *supra* note 9, at 2.

[16] *Id.* at 2 n.5.

markets.[17] It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.[18]

The second is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result in anticompetitive coordination.[19] Once again, the authors warn against such an interpretation.[20]

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two

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[17] Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that "whether this pattern appears in other industries remains an open question." *Id.* at 1007.

[18] In earlier research using similar empirical techniques and data – namely, small rural markets – Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: "We do not believe that these markets 'stand in' for highly concentrated industries in the sectors of the economy where competition is national or global." Timothy F. Bresnahan & Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. ACTIVITY 833, 868 (1987).

[19] Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435 (2004).

[20] *Id*. at 436 ("The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.").

mergers are competitively suspect.[21] The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.[22] In sum, there is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers.

It is important to note that the Commission and I have no disagreement over the proposition that the number of competitors within a market is a relevant fact to assess the likely competitive effects of a transaction. The relevant question is not whether the number of firms matters but how much it matters—and in particular, whether a movement to three or two firms warrants a generally applicable presumption that a transaction is more likely than not to harm competition. I do not believe it does. The Commission disagrees.

The *Merger Guidelines* make clear that the purpose of market concentration and market shares associated thresholds "is not to provide a rigid screen to separate competitive benign mergers from anticompetitive ones, although high levels of concentration do raise concerns."[23] Rather concentration is but one aspect of the inquiry aimed at better understanding post-merger incentives to

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[21] Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/.

[22] Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they "obviously should be based on valid economic analysis, that is, proper economic presumptions," which should be updated "based on new or additional economic factors besides market shares and concentration." *Id.* at 37, 48. I agree. Additionally, Salop explains that "[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis – in conjunction with other factors suggested by the competitive effects theory – but not treated as the sole determinant of post-merger pricing." *Id.* at 13-14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant "*ignoring* market shares and concentration in merger analysis." *Id.* at 12 (emphasis in original).

[23] MERGER GUIDELINES, *supra* note 2, § 5.3.

compete. The predictive power of market share and market concentration data is informed by economic theory and available empirical evidence. There is no empirical evidence sufficient to establish a generally applicable presumption that mergers that reduce the number of firms to three or two are likely to harm competition.[24] Further, the Commission's reliance upon such shorthand structural presumptions untethered from empirical evidence subsidize a shift away from the more rigorous and reliable economic tools embraced by the *Merger Guidelines* in favor of convenient but obsolete and less reliable economic analysis.

This is not to say that evidence of changes in market structure cannot ever warrant such a presumption. It does when the evidence warrants as much. The Commission has in certain contexts found reason to believe competition would be substantially lessened based simply upon a reduction of firms in the relevant market. See *Actavis plc-Forest Laboratories*[25] and also *Akorn-Hi-Tech Pharmacal*,[26] which both involve generic pharmaceutical markets. The Commission was able to draw conclusions about the relationship between price and the number of firms in generic pharmaceutical markets because substantial research has been done to establish that such a relationship exists.[27] Indeed, the cases in the pharmaceutical industry are the

[24] *See* Statement of Commissioner Joshua D. Wright 3-5, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015).

[25] Analysis of Agreement Containing Consent Orders to Aid Public Comment 2, Actavis plc, FTC File No. 141-0098 (June 30, 2014) ("In generic pharmaceutical product markets, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would likely have a direct and substantial anticompetitive effect on pricing.").

[26] Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Akorn Enterprises, Inc., FTC File No. 131-0221 (Apr. 14, 2014) ("In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply.").

[27] *See* David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005). As an aside, given that we are now ten years removed from the publication of this important study and over twenty years removed from the sample period, it might be worth revisiting this question with fresher data if the Commission intends to continue relying upon inferences of competitive harm from market structure in the generic pharmaceutical market.

exceptions that prove the rule that the Commission needs to do more than count the number of firms in a market to have reason to believe a substantial lessening of competition is likely. No such research has been done in this market. Accordingly, unlike in generic pharmaceutical markets, we have no evidence to conclude that a simple reduction in the number of firms in this market is likely to lead to higher prices and lower output. Simply assuming such a relationship exists in this market without any evidence to suggest that it does harkens back to the bad old days of the first half of the 20th century, when the structure-conduct-performance paradigm was in vogue.

To summarize, there are three-to-two mergers that give rise to unilateral effects, and three-to-two mergers that give rise to coordinated effects. It is our burden to show that *this* three-to-two merger is likely anticompetitive. The Commission must find sufficient evidence to support an inference of likely economic harm to consumers. The heavy degree of reliance upon a structural presumption in this case is not sufficient to do so.

Finally, the Commission and Commissioner Ohlhausen each claim that the quantity, and presumably the quality, of the evidence is not the same for investigations truncated by remedy proposals compared to cases where a full phase investigation is completed or compared to a completed trial, respectively.[28] While this observation is an accurate description of the pragmatic reality of conducting law enforcement investigations, I do not agree with the implication that the quantum and quality of evidence needed to satisfy the "reason to believe" standard should turn on whether and when a remedy proposal is offered during an investigation. The idea is that we should "take into account the need for predictability and fairness for merging parties in these circumstances"[29] and considerations whether it is "appropriate to subject the parties to the added expense and delay of a full phase investigation."[30] I fully support the agency identifying

[28] *See* Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7; *see also* Separate Statement of Commissioner Maureen K. Ohlhausen 1, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015).

[29] Separate Statement of Commissioner Maureen K. Ohlhausen, *supra* note 28, at 2.

[30] Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7.

opportunities to lower the administrative costs of antitrust investigations and believe there to be ample opportunity to do so. But attempts to operate a more efficient law enforcement system must satisfy the constraint, required by law, that there is reason to believe a transaction violates Section 7 of the Clayton Act. That standard sets a relatively low bar for the minimum level of evidence required to substantiate a merger challenge. I reject the view that it should be a standard that should be relaxed because the merging parties offer a remedy.[31] The Commission is primarily a law enforcement agency, albeit one that largely conducts it business by entering into consents with merging parties. Making the consent process more efficient and predictable is a laudable goal; but we must not allow pursuit of a more efficient consent process to distort our evaluation of the substantive merits. To do so, as in my view we have here, risks in the long run reducing the institutional capital of the agency in magnitudes far greater than any potential cost savings from truncating an investigation.

For these reasons, I cannot join my colleagues in supporting the consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

[31] That said, as I stated in *Holcim Ltd.*, I am not suggesting the "reason to believe" standard "requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request." *See* Statement of Commissioner Joshua D. Wright, *supra* note 24, at 11.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

JERK, LLC AND JOHN FANNING

Docket No. 9361. *Order, January 12, 2015.*

Commission order granting a four-day extension of the deadline for complaint counsel to file a reply to respondent's opposition to complaint counsel's motion for summary decision.

COMMISSION ORDER ON COMPLAINT COUNSEL'S UNOPPOSED MOTION TO EXTEND TIME TO REPLY TO RESPONDENT JERK, LLC'S OPPOSITION TO MOTION FOR SUMMARY DECISION

On January 6, 2015, Complaint Counsel moved to extend the time to reply to Respondent Jerk, LLC's ("Jerk's") Opposition to Complaint Counsel's Motion for Summary Decision. Under Commission Rule 3.22(d), the deadline for Complaint Counsel's Reply is January 12, 2015. Complaint Counsel has requested an extension of that deadline to January 16, 2015.

Complaint Counsel explains that the extension would permit it to receive Jerk's responses to long-outstanding discovery requests – expected on or before January 13 – before filing the Reply. Complaint Counsel also maintains that simultaneous filing obligations regarding aspects of the case pending before Chief Administrative Law Judge Chappell leave it "pressed for time." Complaint Counsel states that counsel for Respondents Jerk and John Fanning do not oppose the requested extension.

Under Commission Rule 4.3(b), the Commission, "for good cause shown, may extend any time limit prescribed by the rules . . . ." 16 C.F.R. § 4.3(b). Under the circumstances described above, the four-day extension of time is appropriate. Accordingly, the Unopposed Motion is **GRANTED**; and

IT IS HEREBY ORDERED that the deadline for Complaint Counsel to file a Reply to Respondent Jerk's Opposition to

Complaint Counsel's Motion for Summary Decision shall be January 16, 2015.

By the Commission.

H.I.G. BAYSIDE DEBT & LBO FUND II, L.P.

Docket No. C-4494. Order, February 18, 2015.

Letter approving application to divest the membership interest in the Blue Springs Surgery Center in Orange City, Florida, to Dr. Mark Hollmann.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Stephen C. Wu, Esquire
McDermott Will & Emery LLP

Dear Mr. Wu:

This responds to the Application for Approval of Divestiture ("Application") to Dr. Mark Hollmann filed by H.I.G. Bayside Debt & LBO Fund II, L.P. on November 26, 2014. Pursuant to the Decision and Order in Docket No. C-4494, HIG requests prior Commission approval of its proposal to divest certain assets to Dr. Hollmann. The Application was placed on the public record for comments for thirty days, until January 9, 2015, and one comment was received.

After consideration of the Application and other available information, the Commission has determined to approve the proposed divestiture to Dr. Hollmann as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by HIG and Dr. Hollmann in connection with HIG's Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

COMMUNITY HEALTH SYSTEMS AND HEALTH MANAGEMENT ASSOCIATES

Docket No. C-4427. Order, February 24, 2015.

Letter approving application to divest Riverview Regional Medical Center and its associated assets near Gadsden, Alabama, to Prime Healthcare Services, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Bilal Sayyed, Esquire
Kirkland & Ellis, LLP

Dear Mr. Sayyed:

This responds to the Application for Approval of Proposed Divestiture ("Application") to Prime Healthcare Services, Inc., filed by Community Health Systems on November 24, 2014. Pursuant to the Decision and Order in Docket No. C-4427, Community requests prior Commission approval of its proposal to divest certain assets to Prime. The Application was placed on the public record for comments for thirty days, until January 8, 2015, and no comments were received.

After consideration of the Application and other available information, the Commission has determined to approve the proposed divestiture to Prime as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Community and Prime in connection with Community's Application and has assumed them to be accurate and complete.

This also responds to Community's Petition for Extension of Time ("Petition") filed by Community dated October 14, 2014. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Community requests an extension of time in which to complete the divestiture required by the Decision and Order in this matter. Pursuant to the terms of the Decision and Order, Community was required to complete the divestiture within four months from the date the Commission issued the Order as final, or by October 14, 2014. Rule 4.3(b) provides that "the Commission, for good cause shown, may extend any time limit prescribed by

the rules in this chapter or order of the Commission." Under applicable precedent, Community has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission.

The Commission has reviewed this Petition, Community's compliance reports, and other information, and, after careful consideration, has determined to grant this Petition and extend the time in which Community must complete the divestiture to Prime as approved by the Commission today. Community has shown that it began its divestiture efforts immediately upon reaching the consent agreement with the Commission staff, that it has acted diligently throughout the entire divestiture period and in close communication with the Commission staff to reach a final agreement with Prime, and that the delays in completing negotiations were not due to unreasonable demands or other unreasonable conduct by Community. The Commission expects that Community will complete the divestiture promptly upon the Commission's approval.

By direction of the Commission.

ECM BIOFILMS, INC.

Docket No. 9358. Order, February 25, 2015.

Commission order approving a 2,500-word extension of the word count limitation for both respondent's and complaint counsel's appeal briefs.

COMMISSION ORDER EXTENDING WORD COUNT LIMITATION

On February 24, 2015, the parties filed a Joint Motion for Extension of Word Count Limitation, pursuant to Commission Rules 3.52(c)(2) and 3.52(k). The Joint Motion requests a 2,500-word extension of the limits for opening and answering appeals briefs, for a limit of 16,500 words each. The parties maintain that

in view of the magnitude and technical complexity of the record, undue prejudice will result from the existing word limits.

Commission Rule 3.52(k) provides that "[e]xtensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit." Under the circumstances described by the parties, an extension of the word count limitations is appropriate. Accordingly,

IT IS ORDERED THAT the parties will be permitted to file opening and answering appeals briefs not to exceed 16,500 words in each brief; and

IT IS FURTHER ORDERED THAT the appeals briefs filed in this matter shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

By the Commission.

PHOEBE PUTNEY HEALTH SYSTEM, INC. ET AL.

Docket No. 9348. Order, February 26, 2015.

Commission order permitting the matter to be withdrawn from adjudication for an additional month to facilitate further consideration of a settlement proposal.

COMMISSION ORDER EXTENDING WITHDRAWAL OF MATTER FROM ADJUDICATION UNTIL MARCH 31, 2015

On January 28, 2015, the Commission issued an Order withdrawing this matter from adjudication for the purpose of considering a Consent Proposal. Pursuant to that Order, this matter is scheduled to revert to Part 3 adjudicative status at 11:59 p.m. EST on Friday, February 27, 2015. To facilitate further consideration of the Consent Proposal, the Commission has

decided to extend the withdrawal of this matter from adjudication. Accordingly,

IT IS ORDERED THAT, pursuant to 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b)(2015), this matter will remain withdrawn from adjudication until 11:59 p.m. EST on Tuesday, March 31, 2015, at which time it will return to adjudicative status under Part 3 of the Commission Rules of Practice.

By the Commission, Commissioner Wright and Commissioner McSweeny not participating.

JERK, LLC AND JOHN FANNING

Docket No. 9361. Order, May 28, 2015.

Commission order denying respondents' applications to stay the Commission's final order pending review by the United States Court of Appeals for the First Circuit, as respondents failed to demonstrate the order will cause irreparable injury and as a stay would risk harm to consumers.

COMMISSION ORDER DENYING RESPONDENTS' MOTION TO STAY FINAL ORDER PENDING JUDICIAL REVIEW

Respondent John Fanning has applied for a stay of the Commission's Final Order, pending review by the United States Court of Appeals for the First Circuit. Respondent Jerk, LLC ("Jerk") has filed an application "adopt[ing] and incorporat[ing]" Mr. Fanning's application. Complaint Counsel oppose the requests for stay. For the reasons discussed below, Respondents have not shown that a stay is warranted and we deny their applications.[1]

[1] The Commission's opinion in this matter is available at https://www.ftc.gov/system/files/documents/cases/150325jerkopinion_0.pdf. The order is available at https://www.ftc.gov/system/files/documents/cases/150325jerkorder.pdf.

BACKGROUND

From 2009 to 2013, Respondents operated Jerk.com, a social media website that invited users to create profiles for other people and rate each as a "jerk" or "not a jerk." Op. 1, 2. The site encouraged users to post photos of their friends and acquaintances with comments and reviews about them. Op. 9. Jerk earned revenues from selling "memberships" promising "additional paid premium features," including the ability to dispute information posted on the site. Op. 2. The website contained more than 80 million unique profiles, including several million with pictures of children. Op. 2, 27, 33. The Commission and state law enforcement agencies received hundreds of complaints about Jerk.com from consumers who reported that they spent time and money attempting to get their profiles removed. Op. 33-34.

In 2014, the Commission issued a two-count administrative complaint alleging that Jerk and its member and manager, John Fanning, engaged in deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Count I alleged that Respondents falsely represented that the names, photographs, and other content that appeared on the website were posted by users and reflected users' views of the profiled persons, when in fact Respondents harvested nearly all of the content from Facebook. Count II alleged that Respondents falsely represented that consumers who purchased a $30 "standard membership" would receive benefits, including the ability to dispute information posted on Jerk.com about them. But customers who purchased the memberships received no benefits in return.

On March 13, 2015, we granted summary decision to Complaint Counsel against both Respondents on both counts.[2] With regard to Count I, we held that Jerk's statements on its website constitute an implied representation that Jerk.com

[2] Rule 3.24 of the Commission's Rules of Practice permits the Commission to issue summary decision when it "determines that there is no genuine issue as to any material fact regarding liability or relief." 16 C.F.R. § 3.24(a)(2); *see Polygram Holdings, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002) (Rule 3.24(a)(2) is "virtually identical" to the summary judgment provisions in Federal Rule of Civil Procedure 56).

content, including names and photographs, was created by Jerk users and reflected their views of the profiled individuals. Respondents did not dispute that Jerk itself had taken the "vast majority" of the content from Facebook and posted it on Jerk.com. Respondents also offered nothing to rebut evidence that consumers sought removal of their profiles and purchased memberships because of the "embarrass[ment]" and "alarm[]" that people they knew had created Jerk.com profiles about them. Op. 14, 16. Thus, Complaint Counsel sustained their burden to demonstrate that Respondents' representations about the source of the content on the website were both false and material.

Respondents barely responded to Complaint Counsel's motion for summary decision on Count II. Complaint Counsel produced testimony by consumers (confirmed by an FTC investigator) who bought Jerk.com memberships but were unable to dispute or remove information from their profiles. Respondents did not rebut or address any of that evidence. They offered instead only John Fanning's vague and nonresponsive declaration, which stated that "[a]s far as [he was] aware," Jerk "remove[d] content from Jerk.com whenever it was obligated to do so" and "would refund money to users who claimed they had paid but had not received membership services." Op. 20-21.

Finally, we found beyond genuine dispute Mr. Fanning's individual liability for Jerk's violations. He instructed programmers to create Jerk.com profiles by taking information from Facebook, advocated a business model in which Jerk charged consumers for "dispute resolution" services, and defended these decisions to investors and business partners. Op. 26-28. Mr. Fanning's declaration asserted that he was merely an "advisor" to Jerk, Op. 24, but because the declaration did not provide "*any* evidence to support his bare assertions," we found it did not create a genuine factual dispute. Op. 28.

As a remedy, Paragraph I of the Final Order bars Respondents, "in connection with the marketing, promoting, or offering for sale of any good or service," from misrepresenting the source of any content on a website or the benefits of joining any service. Paragraph II forbids Respondents from disclosing, using, selling, or benefitting from Jerk's customer information or consumers' personal information obtained in connection with

Respondents' operation of Jerk. To ensure that Respondents do not use this information for future deceptive claims, Paragraph II also requires Respondents to dispose of the information within 30 days of the effective date of the Final Order. Paragraphs III through VII contain various recordkeeping, notification, and reporting requirements.

STANDARD FOR A STAY

Section 5(g) of the Federal Trade Commission Act provides that the Commission's cease and desist orders (except divestiture orders) will take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2). Respondents and Respondents' counsel were served with the Order and Final Opinion of the Commission on March 30, 2015. Thus, absent a stay, the Final Order will become effective on May 29, 2015. *See* 15 U.S.C. § 45(g)(2); 16 C.F.R. § 3.56(a).

Under Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. *See* 16 C.F.R. § 3.56(c); *In re McWane, Inc.*, 2014 WL 1630460, at *1 (FTC Apr. 11, 2014); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay." *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006). If the balance of the equities does not support a stay, the movant must make a higher showing of likely success on the merits. *In re North Carolina Board of Dental Examiners*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012). Respondents have not satisfied any of the four factors.

LIKELIHOOD OF SUCCESS ON APPEAL

As to the first factor, Respondents are unlikely to succeed on appeal because their legal claims are without merit.

Respondents first contend that they were deprived of fair notice and "an opportunity to present their objections," Fanning Mtn. to Stay 3, because the Commission found Respondents liable for *implied* misrepresentations whereas (according to Respondents) the Complaint and Complaint Counsel's motion for summary decision predicated liability on a theory of *express* misrepresentations. That claim misstates the record. In fact, Count I of the Complaint alleged that "respondents represented, expressly ***or by implication***, that content on Jerk . . . was created by Jerk users." Compl. ¶ 15 (emphasis added). Consistent with that allegation of implied misrepresentation, Complaint Counsel's motion for summary decision argued that Respondents had violated the FTC Act by making both express *and* implied misrepresentations about the source of the content posted on Jerk.com.[3] Respondents plainly had notice of the implied representation theory because their oppositions to Complaint Counsel's motion for summary decision argued that "[n]othing contained in the homepage disclaimer constitutes a 'claim' about the source of the content, ***either express or implied***, or could possibly be construed as an advertisement intended to lure users to the Jerk.com site."[4] Respondents' notice theory is thus without merit.

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[3] *See* Complaint Counsel's Memorandum in Support of Motion for Summary Decision 20 ("Even if this representation were not disseminated through express statements, it would still be presumptively material because Respondents intended to convey it to consumers visiting Jerk.com."); *see also id.* 7-8 (arguing that Respondents' reposting of photographs from Facebook created an "implication" that Jerk.com's content was user-generated); Complaint Counsel's Reply to Respondent Jerk, LLC's Opposition to Complaint Counsel's Motion for Summary Decision 6 ("Here, it is beyond dispute that Jerk made the misrepresentation alleged in Count I through multiple explicit and clearly implied statements."); *id.* at 9 ("Because the representation alleged in Count I was conveyed through express and conspicuous implied statements, the Commission need not look to extrinsic evidence to unearth a deeper meaning beyond what is plain on its face.").

[4] John Fanning's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision 9 (emphasis added) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)); *see also* Jerk, LLC's Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision 7, 10 (characterizing Complaint Counsel as arguing that (1) the Jerk website's terms and conditions "*implicitly* represented that all profiles on jerk.com were created by jerk.com users," and (2) Respondents' misrepresentations were material because they were made "explicitly or *implicitly* but intentionally." (emphasis added)). Nor does Respondents' notice theory have merit as to Count II,

Respondents next assert that they cannot lawfully be held liable because their misrepresentations that the content on Jerk.com was created by users "could not possibly be construed as an advertisement." Fanning Mtn. to Stay 4-5. As we explained in granting summary decision, however, the Commission's authority to prevent deceptive practices is not limited to "advertising" or "promotional" claims; it applies to *any* type of commercial representation likely to deceive a reasonable consumer. Op. 11-12, citing *FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014) (loan note disclosure); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626, 631 (D. N.J. 2014) (statements on website about privacy policy). In any case, the representation that content was user-generated "drove traffic to the Jerk.com website" and "was indeed promotional." Op. 11-12. This argument, too, is thus meritless**.**

Respondents are also wrong to argue that the Commission improperly granted summary disposition because a "fact question" exists concerning whether they deceived consumers into purchasing Jerk.com memberships by claiming they would receive benefits, including the right to dispute information in their profiles. Fanning Mtn. to Stay 6. Beyond their bare assertion of a factual dispute, Respondents cite no actual evidence demonstrating one. Nor did they cite any such evidence in their opposition to Complaint Counsel's motion for summary decision. Indeed, Jerk did not even address Count II in its brief in opposition, and Mr. Fanning addressed Count II only with a self-serving, conclusory declaration that did not rebut the testimonial and documentary evidence cited by Complaint Counsel. *See* Op. 17-22.

There is also no merit to Respondents' claims concerning the injunctive provisions of the Final Order. Paragraph I prohibits Respondents, "in connection with the marketing, promoting, or offering for sale of any good or service," from misrepresenting (1) "the source of any content on a website, including personal information;" and (2) "the benefits of joining any service." Respondents claim they have an "absolute right" under the First

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regarding which the Commission identified express statements that "represent exactly what the Complaint alleges." Op. 18-19.

Amendment to publish information gathered from public sources and to engage in speech on social media. Fanning Mtn. to Stay 7. But Paragraph I of the Final Order does not apply to non-commercial speech and, even as to commercial speech, does not bar Respondents from disseminating information from public sources or engaging in truthful, non-misleading speech on social media. *See* Op. 31, 33, 36. It merely prohibits misleading commercial speech, which is not protected by the First Amendment. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely."). The Order's ban on misleading commercial speech "merely requires Respondents to follow the law," and is tailored to apply to the types of "speech that ha[ve] been found to be deceptive." *Daniel Chapter One*, 149 F.T.C. at 1598-99. Although Paragraph I prohibits deception concerning websites and services other than Jerk.com, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [I]t must be allowed effectively to close all roads to the prohibited goal . . . ." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). There is thus no basis for Respondents' charge that the Final Order is an infringement of their First Amendment rights.

Finally, Respondents object to the monitoring and recordkeeping provisions in the Final Order. Fanning Mtn. to Stay 7-8. Respondents assert that these provisions are "punitive and not related to the finding of liability based solely on the finding of an implied representation concerning [the] source of website content." Fanning Mtn. to Stay 7. That is incorrect. To begin with, the remedial provisions are not "solely" based on Jerk's misrepresentations about the source of website content. Respondents also deceived consumers into paying "membership" fees based on false representations to consumers that they could remove or modify their Jerk.com profiles, as alleged in Count II. Moreover, all of these violations were knowing, deliberate, and serious, and such practices could be easily repeated in connection with other web-based services. *See* Op. 34 & n.41. The Order's monitoring and recordkeeping requirements therefore bear a "reasonable relation to the unlawful practices found to exist,"

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965), because they are reasonably designed to ensure that Mr. Fanning and Jerk do not commit similar violations in the future. Federal courts routinely uphold similar monitoring and recordkeeping requirements in deception cases. *See, e.g.*, *Dep't of Justice v. Daniel Chapter One*, --- F. Supp. 3d ----, 2015 WL 1502137, at *7 (D.D.C. Mar. 31, 2015); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000).

In sum, Respondents have identified no plausible appellate challenge to the Commission's order. That failure is a sufficient basis for denying their stay requests. In any event, for the reasons discussed below, Respondents do not satisfy the remaining stay factors either.

IRREPARABLE INJURY

Respondents bear the burden of demonstrating irreparable injury that is "both substantial and likely to occur absent the stay." *North Texas*, 141 F.T.C. at 460. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996). Respondents have not met this burden.[5]

Mr. Fanning's principal claim of harm is that the Commission was motivated to proceed against him and Jerk.com because it disliked the website's content and that the allegedly improper motivation somehow deprives him of First Amendment rights. Fanning Mtn. to Stay at 10. The claim does not address any actual effect on Mr. Fanning of the Final Order and does not identify any harm that would be relieved if the Final Order were stayed. It is also wrong. Our opinion makes clear that the Commission has not targeted the content of Jerk.com profiles, and the Final Order does not restrict such content. Mr. Fanning remains free to create websites that "provide[] a platform to exchange opinions in the free-flow of human relationships," Fanning Mtn. to Stay at 10, and the Final Order does not restrict any speech protected by the First Amendment. The Final Order

[5] Although Jerk has joined Mr. Fanning's motion to stay, his motion only claims that Mr. Fanning will suffer irreparable harm, and it thus does not support any claim of injury against Jerk itself.

does prohibit Mr. Fanning, "in connection with the marketing, promoting, or offering for sale of any good or service," from making *misrepresentations* about the source of website contents and the benefits of website membership. As explained above, the First Amendment does not protect such misrepresentations, and Mr. Fanning thus can suffer no cognizable harm from an order restricting them. *See* Op. 30-31.[6]

Mr. Fanning also asserts that the monitoring and compliance reporting provisions will "affect my livelihood[,] . . . will infringe upon my privacy rights, will potentially infringe upon the privacy rights of my clients, and will contravene certain non-disclosure agreements." Declaration of John Fanning in Support of Motion to Stay ¶ 6. But Mr. Fanning provides no facts to support these bare allegations, let alone to demonstrate irreparable harm. A party cannot establish irreparable harm simply by claiming that compliance monitoring will reveal sensitive or confidential information. The FTC Act, as well as the Commission's Rules of Practice, provide Mr. Fanning with ample protection for any sensitive information that his documents might contain. *See, e.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10.

Finally, Mr. Fanning objects to the Final Order's requirement that, for the next ten years, he notify the Commission when becoming affiliated with a new business or employment or when discontinuing any such affiliation. Mr. Fanning asserts that this reporting requirement is "unduly burdensome, as I conduct business with a large number of companies on a regular basis." Fanning Decl. ¶ 7. But Mr. Fanning fails to explain how reporting even a large number of business affiliations could cause him "irreparable harm," especially given the protections offered by the FTC Act and Rules of Practice for commercially sensitive information.

Of course, equitable relief will always impose at least incidental burdens on a person found to violate the law through

[6] Mr. Fanning incorrectly claims that the Final Order prohibits him from making true statements. Declaration of John Fanning in Support of Motion to Stay ¶ 5. As discussed, the Order prohibits only commercial misrepresentations.

deception, and Mr. Fanning is no exception. But he has provided no concrete facts showing that the Final Order will cause irreparable harm.

DEGREE OF INJURY TO OTHER PARTIES AND THE PUBLIC INTEREST

The remaining stay factors concern whether the stay would harm other parties and whether it is in the public interest. The FTC considers these factors together because Complaint Counsel are responsible for representing the public interest by enforcing the law. *Daniel Chapter One*, 149 F.T.C. at 1600; *California Dental*, 1996 FTC LEXIS 277, at *8. We conclude that granting Respondents a stay would risk harm to consumers and therefore is not in the public interest.

The Final Order's prohibitions on misrepresentation, restrictions on the use of consumers' personal data, and required monitoring and recordkeeping measures are necessary to protect consumers. Respondents have injured numerous consumers by (1) creating Jerk.com profiles using information derived from Facebook while passing off such profiles as if they were created by actual Jerk.com users; and (2) offering profiled persons the right to dispute their profiles for a fee and then failing to honor that commitment. *See* Op. 33-34. These practices triggered hundreds of complaints with the Commission and state law enforcement agencies. *Id*. 13, 34 & n.15. Respondents' misrepresentations were knowing, and their violations of the FTC Act were serious, deliberate, and capable of repetition. *See id.* 34.

Mr. Fanning argues that a stay creates "no possible risk of harm" because Jerk.com is "not currently operating." Fanning Mtn. to Stay 12. But the risks to consumers continue even if Jerk.com does not.[1] As we noted in our Opinion, Respondents have a history of making similar misrepresentations and transferring consumers' personal data across various websites. *See* Op. 34 ("When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the

[1] Although Mr. Fanning claims that Jerk.com is inoperative, Complaint Counsel note that, as of May 1, 2015, Jerk.com remains an active website.

same misrepresentations. . . . Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010."). Such practices may continue unless the Final Order becomes effective. Issuing a stay would therefore disserve the public interest.

CONCLUSION

Having considered the factors set forth in Commission Rule 3.56(c), we conclude that John Fanning and Jerk, LLC have not met their burden for showing that a stay of the Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT Respondents' Motions to Stay Enforcement of the Commission's Order Pending Review by the United States Court of Appeals for the First Circuit are **DENIED**.

By the Commission.

ECM BIOFILMS, INC.

Docket No. 9358. Order, May 29, 2015.

Commission order requesting both parties to file briefs with the Commission, limited to specific issues, that supplement the parties' respective statements made during oral argument.

COMMISSION ORDER SCHEDULING SUPPLEMENTAL BRIEFING AND DENYING CORRECTION REGARDING STATEMENTS MADE DURING ORAL ARGUMENT

This matter having been heard by the Commission upon the appeal of ECM Biofilms and the cross-appeal of Complaint Counsel and upon the respective briefs and oral arguments in support of their positions, the Commission has determined that supplemental briefing would assist it in resolving the issues presented. In accordance with Commission Rule 3.54, the

Commission directs supplemental briefing limited to the following issues:

A. Can the survey evidence in the record be interpreted as causal or experimental surveys with appropriate test and control groups? Would it be appropriate to do so? If so, please explain what inferences can be drawn from such an interpretation in light of relevant legal authority and statistical methods. If not, please explain why not.

B. In light of relevant legal authority and statistical methods, what weight should the Commission give to the results of descriptive surveys, which measure an attitude, characteristic, or belief that survey respondents hold, relative to the results of causal surveys or experimental surveys, which use test and control groups to measure the effect of a specific variable?

C. Is it possible to quantify the degree of convergence among the consumer surveys in the record in this case (APCO, Synovate, Frederick, and Stewart) or within any single survey? If so, please calculate the degree of convergence, if any, of these surveys. If not, please explain the significance of the inability to quantify convergence to an issue or issues on appeal.

Accordingly,

IT IS ORDERED THAT:

1. On or before June 22, 2015, ECM and Complaint Counsel shall file briefs, not to exceed 4,000 words (excluding any attachments), addressing *only* the foregoing issues;

2. On or before 14 days after service of the briefs described in Paragraph 1, ECM and Complaint Counsel may file responding briefs not to exceed 2,500 words (excluding any attachments); and

3. Attachments to briefs may include declarations from any experts who testified in this proceeding.

No extensions of time or word limits will be granted.

Additionally, we note that following oral argument, Complaint Counsel submitted a filing entitled Complaint Counsel's Correction Regarding Statements Made During Oral Argument. Respondent thereafter filed an Opposition arguing that Complaint Counsel's filing is not authorized under the Commission's Rules of Procedure. Given the Commission's order for supplemental briefing, the Commission finds Complaint Counsel's submission to be moot and has determined not to consider it.

Therefore,

IT IS FURTHER ORDERED THAT Complaint Counsel's Correction Regarding Statements Made During Oral Argument shall not be considered.

By the Commission.

Interlocutory Orders, Etc.

LABMD, INC.

Docket No. 9357. Order, June 15, 2015.

Commission order denying respondent's motion to disqualify Chairwoman Ramirez based upon statements made to members of Congress regarding the matter during adjudication before the Administrative Law Judge.

COMMISSION ORDER DENYING MOTION TO DISQUALIFY CHAIRWOMAN EDITH G. RAMIREZ AND STATEMENT OF CHAIRWOMAN RAMIREZ

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

Respondent LabMD, Inc. has moved that the Commission, pursuant to 16 C.F.R. § 4.17, disqualify Chairwoman Ramirez from further participation in this administrative proceeding. *See* Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015). Having considered all arguments and exhibits in support of, and in opposition to, the Motion, we deny the Motion.[2] We have also considered Chairwoman Ramirez's May 20, 2015

[1] The Commission approved this Order and Opinion on June 15, 2015. Chairwoman Ramirez did not participate, in accordance with Rule 4.17(b)(3)(ii). Commissioner Brill did not take part in the consideration or decision herein.

[2] Complaint Counsel filed an opposition to the Motion on April 30, 2015. On May 6, 2015, LabMD filed a "Motion to Strike Complaint Counsel's Opposition to Respondent's Motion to Disqualify Chairwoman Edith Ramirez or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez." LabMD argues that the Commission's Rules of Practice do not permit Complaint Counsel to file the Opposition because Rule 4.17 does not contain an express provision allowing responses to a disqualification motion. However, the plain language of the Commission's Rules of Practice provides otherwise. Complaint Counsel's Opposition was properly filed pursuant to Rule 3.22(d), which governs responses to "any written motion" and operates in conjunction with Rule 4.17 and other rules relating to specific motions. *See* 16 C.F.R. § 3.22(d). Accordingly, LabMD's motion to strike is denied. Although Rule 3.22(d) does not provide the moving party with the right to reply, the Commission grants LabMD leave to file a reply and has reviewed its Reply. The Commission also grants LabMD's Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015) and has carefully considered the attachments therein.

statement declining to recuse herself from further participation in this administrative adjudication.[3] As explained below, Chairwoman Ramirez's limited involvement in the agency's responses to an inquiry from a congressional oversight committee has in no way compromised her ability to participate objectively in this proceeding.

LabMD bases its Motion on two grounds. First, LabMD alleges that Chairwoman Ramirez's involvement in responding to an inquiry from the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") has "irrevocably tainted and compromised" her decision-making process in this adjudication. Motion at 1, 7-8. Second, LabMD claims there is a "reasonable suspicion" that Chairwoman Ramirez has prejudged this case. *Id.* at 8-9.

I. INQUIRY FROM THE OVERSIGHT COMMITTEE

The Oversight Committee's former Chairman Darrell Issa sent letters to the agency regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. Chairwoman Ramirez was involved in responding to certain of those letters. LabMD argues that both the Committee's letters and the Chairwoman's participation in the Commission's response to them require disqualification. *See* Motion at 7-8.

A congressional inquiry can taint an adjudicative proceeding when it "focuses directly and substantially upon the mental decisional processes" of the Commission in a pending case, subjecting a commissioner to a "searching examination as to how and why he reached his decision." *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). Thus, when a party alleges that a congressional inquiry has tainted an adjudicative proceeding, courts examine not the mere fact of the inquiry, but whether there is a direct connection between the congressional involvement and the adjudicator's decision-making process. *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011).

[3] Chairwoman Ramirez's statement is hereby placed on the public record as Attachment A to this opinion ("Statement").

Courts typically engage in this analysis only after an agency has reached a merits decision in an adjudication and a party seeks to invalidate it for improper congressional interference. However, the same standard also provides a useful guidepost for assessing a claim that a congressional inquiry threatens to taint a decision an agency may render in the future. In both circumstances, the underlying principles are the same. *See Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169-71(D.C. Cir. 1983) (holding that lower court erred in enjoining a pending adjudicative proceeding because congressional communications did not clearly taint the proceeding). Thus, recusal would be required only if the congressional communications posed a serious likelihood of affecting the agency decision maker's ability to act fairly and impartially in the matter before it.

LabMD's allegation does not meet this standard. Unlike *Pillsbury*, the Oversight Committee's letters did not "directly and substantially" focus upon—or even address—Chairwoman Ramirez's decisionmaking process on the merits of the adjudication. Rather, the letters concerned an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. LabMD infers a connection between the two by speculating that because the Oversight Committee has "questioned [the] FTC's competence . . . only a judgment against LabMD will rescue [the] FTC's reputation[.]" Motion at 8. If that were the case, however, no agency adjudication could ever proceed if there were any congressional involvement that arguably could be seen as calling agency action into question.

LabMD's reliance on *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), is unavailing. In that case, the court found that a congressional letter criticizing the agency's initial determination and urging the Secretary of the Interior to postpone a final decision in the adjudication had "compromised the appearance of the Secretary's impartiality." *Id.* at 610 (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971)). There, however, the letter from Congress requested specific action by the Secretary of the Interior, and the Secretary rendered a decision on the merits consistent with the congressional request a mere two days after receiving the letter. *Id.* No such facts are present here.

Indeed, Chairwoman Ramirez has taken appropriate steps to limit her involvement in responding to the Oversight Committee. As the Chairwoman notes in her Statement, her only role (and that of the staff in her office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As her Statement and the exhibits attached to LabMD's Motion and supplemental filings demonstrate, no evidence shows that she took part in addressing the substantive questions raised by the Oversight Committee or the merits of this case. To the contrary, she carefully restricted her role to the appropriate one of ensuring agency cooperation with Congress. The circumstances provide no basis to believe that the Oversight Committee's inquiry has impaired Chairwoman Ramirez's (or the Commission's) ability to render a fair and impartial decision in this case. *See ATX*, 41 F.3d at 1529 (finding that congressional involvement did not taint an adjudication where agency officials were "non-committal in their reactions to the congressional contacts" and did not "discuss the merits of the case with the congressmen").

Furthermore, the FTC has followed, and will continue to follow, its rules of practice in this administrative adjudication. The Administrative Law Judge is conducting an evidentiary hearing in this adjudicative proceeding and will issue an Initial Decision. Any appeal from that decision will be determined by the Commission based on its consideration of the administrative record in this matter.

II. PREJUDGMENT

LabMD also argues that disqualification is required because there is a "reasonable suspicion" that Chairwoman Ramirez has prejudged this case. Motion at 8-9. In particular, LabMD asserts that the agency's use of the deliberative process privilege to withhold certain documents in response to a Freedom of Information Act ("FOIA") request regarding the Oversight Committee's inquiry creates a "presumption" of prejudgment. *Id.* at 8.

Agency officials are "presumed to be objective and 'capable of judging a particular controversy fairly on the basis of

its own circumstances.'" *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Even if LabMD could show a "reasonable suspicion of unfairness," Motion at 8, which it has not, that would not overcome the presumption of decision-maker objectivity. "Reasonable suspicion" is not enough. A party asserting prejudgment must show that the agency official has "*demonstrably* made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (emphasis added) (internal quotation marks omitted). Disqualification based on prejudgment is required only where "'a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id*. at 1164-65 (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

LabMD's Motion does not meet this standard. The agency's reliance on the deliberative process privilege in a FOIA response does not raise a "reasonable suspicion," let alone a "demonstrable" showing of prejudgment. The deliberative process privilege applies to many types of agency deliberations from officials at various levels within the agency, including recommendations for responding to congressional inquiries. *Judicial Watch Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010) (holding that the privilege applies to deliberative documents used for responding to congressional inquiries); *see also Odland v. FERC*, 34 F. Supp. 3d 3, 16-18 (D.D.C. 2014) (affirming use of the privilege to withhold "emails among lower level agency staff"). Therefore, the agency's invocation of the deliberative process privilege provides no basis for a finding of prejudgment.

III. CONCLUSION

Accordingly,

IT IS ORDERED THAT LabMD's Motion to Disqualify Chairwoman Edith Ramirez is **DENIED.**

By the Commission, Chairwoman Ramirez and Commissioner Brill not participating.

ATTACHMENT A

Statement of Chairwoman Edith Ramirez

The administrative proceeding regarding the complaint against respondent LabMD, Inc. has been pending before Administrative Law Judge D. Michael Chappell since August 2013. In June 2014, the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") began an inquiry regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. By motion filed on April 27 and supplemented on May 15, LabMD seeks to disqualify me from further participation in this matter, arguing that I have been "irrevocably tainted and compromised by" my involvement in the Federal Trade Commission's response to the Oversight Committee's requests for information.[1] The charge is without merit. As I explain below, nothing transpired during the course of the Oversight Committee's inquiry that would warrant my recusal.

The Oversight Committee's review of the role Tiversa played in the Bureau of Consumer Protection's investigation has not compromised in any way my ability to participate objectively in this matter. To the contrary, because the Oversight Committee's requests for information bore some relationship to issues that are being adjudicated in the administrative proceeding before the ALJ and may come before the Commission on any appeal of the ALJ's decision, I was very careful to limit my involvement in the FTC's response to the Oversight Committee's inquiry. My only role (and that of the staff in my office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As part of that effort, I was involved in responding to correspondence from the Oversight Committee's then-Chairman Darrell Issa. However, I took no part in addressing the substantive

[1] *See* Respondent LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015) at 1; *see also* Motion to Strike Complaint Counsel's Opposition to Respondent's Motion to Disqualify Chairwoman Edith Ramirez, or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez (May 6, 2015); Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015).

questions raised by the Oversight Committee, as the exhibits LabMD submitted in support of its motion demonstrate.

In the absence of any evidence that I have been influenced by the Oversight Committee's inquiry or have prejudged this matter, LabMD first suggests that the very fact of the Oversight Committee's inquiry has served to taint my ability to render an objective decision. Specifically, LabMD argues that because the Oversight Committee has "questioned [the] FTC's competence," "only a judgment against LabMD will rescue [the] FTC's reputation."[2] But if that were the case, no administrative adjudication could proceed in the face of congressional involvement in any issue that could arguably be seen as calling into question agency action. That is too thin a reed on which to base recusal, and not surprisingly, there is no legal authority supporting LabMD's position.

LabMD next argues that there is a "reasonable suspicion" that I have prejudged this matter because the FTC withheld certain documents on the basis of the deliberative process privilege in responding to a Freedom of Information Act request about the Oversight Committee's requests for information. This assertion is equally unfounded. Recusal is required only where "'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'"[3] A party seeking disqualification must show that the official has "demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence."[4] LabMD's claim of prejudgment falls far short of this standard. The deliberative process privilege applies to many types of agency determinations reached by officials at various levels within the agency, including recommendations for responding to Congressional inquiries.[5]

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[2] Motion to Disqualify at 8.

[3] *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

[4] *Id.* at 1165 (internal quotation omitted).

[5] *Judicial Watch Inc. v. United States Dep't of Homeland Security*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010).

Accordingly, the FTC's invocation of that privilege provides no basis whatsoever for any claim of prejudgment.

The facts indicate nothing more than that I properly oversaw the FTC's response to the Oversight Committee's requests for information. I therefore decline to recuse myself from participation in this matter.

Interlocutory Orders, Etc.

SYSCO CORPORATION, USF HOLDING CORPORATION, AND US FOODS, INC.

Docket No. 9364. Order, June 30, 2015.

Commission order dismissing administrative complaint issued against respondents in light of respondents' decision to abandon the proposed transaction and to withdraw their Hart-Scott-Rodino filings.

COMMISSION ORDER DISMISSING COMPLAINT

On February 19, 2015, the Federal Trade Commission issued the administrative Complaint in this matter, having reason to believe that the merger agreement between Respondent Sysco Corporation ("Sysco") and Respondents USF Holding Corp. and US Foods, Inc. (collectively, "USF Holding Corp."), pursuant to which Sysco would acquire all of the shares of USF Holding Corp., violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and which, if consummated, would have violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act. Complaint Counsel and Respondents now jointly seek dismissal of the Complaint, on the ground that Respondents have abandoned their proposed merger and withdrawn their Hart-Scott-Rodino Notification and Report Forms.[1]

The Commission has determined to dismiss the Complaint without prejudice, in light of Respondents' decision to abandon the proposed transaction and their withdrawal of their Hart-Scott-Rodino Notification and Report Forms. Respondents would not be able to effectuate the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms. The Commission has therefore determined that the public interest warrants dismissal of the Complaint in this matter.[2] Accordingly,

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[1] *See* Joint Motion To Dismiss Complaint (June 29, 2015), at 1.

[2] *See, e.g.*, *In the Matter of Verisk Analytics, Inc., et al.*, Docket No. 9363, Order Dismissing Complaint (Dec. 19, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/141219veriskeaglevieworder.pdf; *In the Matter of Visant Corp., et al.*, Docket No. 9362, Order Dismissing Complaint (May 7, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140507vaisantjostensorder.pdf.

IT IS ORDERED THAT the Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

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Items in *italics* reflect interlocutory orders.