FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2015 TO DECEMBER 31, 2015

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Took oath of office April 5, 2010.

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Took oath of office April 6, 2010.

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Took oath of office January 3, 2013.

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Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 2015, TO DECEMBER 31, 2015

IN THE MATTER OF

MATT BLATT INC.
AND
GLASSBORO IMPORTS, LLC

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

Docket No. C-4532; File No. 132 3285
Complaint, July 2, 2015 – Decision, July 2, 2015

This consent order addresses Matt Blatt Inc.'s and Glassboro Imports, LLC's sale of the auto payment program to consumers. The complaint alleges that failed to disclose that consumers who enroll in the program are charged fees that in many cases offset any savings under the program, and also failed to disclose the total amount of these fees in violation of Section 5 of the FTC Act. The consent order prohibits respondents 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.

Participants

For the *Commission*: *Daniel Dwyer, Bradley Elbein,* and *Ioana Rusu.*

For the *Respondents*: *Laura D. Ruccolo, Capehart Scatchard, P.A.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Matt Blatt Inc. and Glassboro Imports, 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 Matt Blatt Inc., also doing business as Matt Blatt KIA and as Matt Blatt Egg Harbor Township ("Matt Blatt Inc."), is a New Jersey corporation, with its principal place of business at 6211 Black Horse Pike, Egg Harbor Township, New Jersey 08234. At all times material to this Complaint, Matt Blatt Inc. has advertised, marketed, distributed, or sold a "Biweekly Payment Plan" to consumers who are financing the purchase of an automobile.

2. Respondent Glassboro Imports, also doing business as Matt Blatt Glassboro Suzuki, as Matt Blatt Glassboro, and as Matt Blatt Auto Sales ("Glassboro Imports"), is a New Jersey corporation, with its principal place of business at 501 Delsea Drive North, Glassboro, New Jersey 08028. At all times material to this Complaint, Glassboro Imports has offered automobiles for sale and has advertised, marketed, distributed, or sold a "Biweekly Payment Plan" to consumers who are financing the purchase of an automobile. Respondents Matt Blatt Inc. and Glassboro Imports are commonly owned and controlled.

3. 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.

Business Practices

4. Since at least November 2009, Respondents have advertised, marketed and sold a "Biweekly Payment Plan" (also referred to as the "Biweekly Payment Program") as an add-on service to consumers financing the purchase of automobiles. Under the Biweekly Payment Plan, consumers make payments on their auto financing contract to a third-party company—National Payment Network, Inc. ("NPN")—rather than to their financing entity (*e.g.*, a finance company or a bank), and this third-party company makes payments to the financing entity on the consumers' behalf. In many instances, when enrolling consumers in the Biweekly Payment Plan, Respondents tout the savings it will provide to consumers, but fail to disclose that the significant fees in connection with the program can offset any savings. Respondents also fail to disclose the total amount of these fees, which add up to more than $775 on a standard five-year auto financing contract.

The Biweekly Payment Plan Is a Third-Party Add-On Service

5. Respondents have entered into agreements with NPN that describe the Biweekly Payment Plan, including its associated fees, and authorize Respondents to advertise and sell the Biweekly Payment Plan to consumers. Pursuant to these agreements, Respondents also receive training and marketing materials, as well as in-person training on how to describe and sell the Biweekly Payment Plan. Respondents receive a commission for each consumer that Respondents enroll in a Biweekly Payment Plan. Between July 2011 and December 2013, Respondents enrolled approximately 1,084 consumers in a Biweekly Payment Plan.

6. Most consumers learn about the Biweekly Payment Plan after they have selected a vehicle to buy at Respondents' dealerships. When purchasing a vehicle, consumers sign the legal paperwork to close the transaction with Respondents' Financing and Insurance ("F&I") departments. In many instances, an F&I employee offers consumers other products and services that can be "added on" to the financing contract; these are commonly called "add-on products and services." The Biweekly Payment Plan is one such add-on service.

Biweekly Payment Plan Structure and Fees

7. Under most automotive financing contracts, consumers pay the financing entity a specific amount on a monthly basis. Under the Biweekly Payment Plan sold by Respondents, NPN 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. NPN pays the financing entity on the consumer's behalf on a monthly basis.

8. Under a traditional monthly payment plan, consumers make 12 monthly payments each year to their financing entity. Under the Biweekly Payment Plan sold by Respondents, consumers make 26 biweekly payments each year to NPN, 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.

9. Under the Biweekly Payment Plan sold by Respondents, consumers pay significant fees that they would not pay if they were making payments directly to the financing entity. Specifically, NPN charges fees that total more than $775 on a standard five-year automotive financing contract:

- First, every consumer enrolling in the Biweekly Payment Plan is assessed a "Deferred Enrollment Fee" of $399. NPN debits a portion of this fee from consumers during the first month of the contract, and the remainder from the extra payments made by consumers in the early years of the program by paying biweekly. Only after consumers have paid the entire enrollment fee does NPN send any of the extra payments to the consumers' financing entity.

- In addition to the $399 enrollment fee, in many instances, consumers who enroll in the Biweekly Payment Plan are charged a $25 "cancellation fee" by NPN. This often occurs even when consumers "cancelled" because they had completed the Biweekly Payment Program or had finished paying off their financing contract.

- A processing fee is also added to every debit from consumers' banks accounts through the Biweekly Payment Plan. 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.

Respondents' Enrollment of Consumers in the Biweekly Payment Program

10. As noted above, Respondents sell consumers the Biweekly Payment Plan when consumers finance an automobile through Respondents. Often, Respondents inform consumers about the purported benefits of paying biweekly—that they would save on interest, match payments to paychecks, or eliminate multiple payments at the end of the loan—but not that the fees associated with the Biweekly Payment Plan can offset any savings, nor the

total amount of such fees. Consumers in many instances report that they knew nothing about these fees when enrolling in the program.

11. The description of these fees that appears in the enrollment contracts is in small print, is buried in lengthy paragraphs, and is generally not brought to consumers' attention by Respondents during the automotive financing transaction. For example, in many instances, Respondents present the Biweekly Payment Plan to consumers by providing them with a pre-completed contract and instructing them to sign at the bottom if they would like to make biweekly payments. In addition, some consumers who were enrolled in the program do not recall ever receiving or reviewing an enrollment contract.

12. Respondents' savings claims do not account for the Biweekly Payment Plan's significant fees, which, as noted above, amount to more than $775 on a standard five-year auto financing contract.

13. In many instances, consumers do not save any money with Respondents' Biweekly Payment Plan because they pay more in fees than they would save using the Biweekly Payment Plan.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I: Failure to Disclose Material Information About Fees and Program Effects

14. In numerous instances in connection with the marketing, promotion, offering for sale, or sale of automobiles or the financing of automotive loans, Respondents have represented, directly or indirectly, expressly or by implication, that consumers who enroll in the Biweekly Payment Plan will save money or achieve other benefits.

15. In numerous instances in which Respondents have made the representations described in Paragraph 14, Respondents have failed to disclose or to disclose adequately to consumers that in many instances:

a. Consumers are charged fees under the Biweekly Payment Plan that amount to hundreds of dollars; and

b. Consumers either do not achieve savings overall or end up paying more money than they would under a traditional monthly payment program.

This additional information would be material to consumers in deciding to enroll in the Biweekly Payment Plan offered for sale by Respondents.

16. Respondents' failure to disclose or disclose adequately the material information described in Paragraph 15, in light of the representation described in Paragraph 14, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, this second day of July, 2015, has issued this complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of respondents named in the caption hereof, and respondents 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 respondents with violation of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq.*; and

Respondents 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 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 respondents have 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 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 Matt Blatt Inc., also known as Matt Blatt KIA and as Matt Blatt Egg Harbor Township ("Matt Blatt Inc."), is a New Jersey corporation, with its principal place of business at 6211 Black Horse Pike, Egg Harbor Township, New Jersey 08234.

2. Respondent Glassboro Imports, LLC, also known as Matt Blatt Glassboro Suzuki, as Matt Blatt Glassboro, and as Matt Blatt Auto Sales ("Glassboro Imports"), is a New Jersey corporation, with its principal place of business at 501 Delsea Drive North, Glassboro, New Jersey 08028.

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

ORDER

DEFINITIONS

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

A. **"Add-on product or service"** shall include 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.

B. **"Clearly and conspicuously"** shall mean the following:

1. In textual communications, the disclosure must be in a noticeable type, size, and location, using language and syntax comprehensible to an ordinary consumer;

2. 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;

3. In communications disseminated through video means: (1) written disclosures must be in a form consistent with definition B.1 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 (2) audio disclosures must be consistent with definition B.2; and

4. 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.

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

D. **"Competent and reliable evidence"** shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

E. **"Payment program"** shall mean 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.

F. Unless otherwise specified, **"Respondents"** shall mean Matt Blatt Inc. and Glassboro Imports, corporations, individually or collectively; their successors and assigns; and their officers, agents, representatives, and employees.

G. **"Material"** shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. **"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.

I.

IT IS ORDERED that respondents and their 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 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 respondents and their 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 respondents or a third party in connection with such payment program;

B. The benefits, performance, or efficacy of the payment program; and

C. Any other material fact.

III.

IT IS FURTHER ORDERED that respondents and their 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 or assist others in misrepresenting, in any manner, expressly or by implication:

A. That any person will provide any add-on product or service to any consumer;

B. The total costs to purchase, receive, or use, or the quantity of, the add-on product or service;

C. Any restriction, limitation, or condition on purchasing, receiving, or using the add-on product or service;

D. Any aspect of the performance, efficacy, nature, or characteristics of the add-on product or service;

E. 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;

F. 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; and

G. Any other material fact.

IV.

IT IS FURTHER ORDERED that respondents and their 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, in any manner, expressly or by implication, about the benefits, performance, or efficacy of any payment program or add-on product or service, unless at the time such representation is made, respondents possess and rely upon competent and reliable evidence that substantiates that the representation is true.

V.

IT IS FURTHER ORDERED that respondents shall pay One Hundred Eighty-Four Thousand Two Hundred Eighty Dollars ($184,280.00) as follows:

A. Respondent Glassboro Imports shall pay to the Commission $184,280.00, which, as respondent stipulates, its undersigned counsel holds in escrow for no purpose other than payment to the Commission. Such payment must be made within 7 days of entry of

this order by electronic fund transfer, pursuant to instructions to be provided by a representative of the Commission. If such payment is not made in full within 7 days of entry of this order, the monetary judgment becomes immediately due as to respondent Matt Blatt Inc., and respondent Matt Blatt Inc. shall pay to the Commission the amount specified in this Part, less any payment previously made pursuant to this Part, plus interest computed from the date of service of this order.

B. In the event of default on the obligation pursuant to Part V.A 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.

C. All money paid to the Commission pursuant to 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 respondents' practices alleged in the draft complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Respondents have no right to challenge any actions the Commission or its representatives may take pursuant to this Subpart. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

D. Respondents relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law.

Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.

E. Respondents agree that the facts as alleged in the draft complaint 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. Respondents further agree that the facts alleged in the draft 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.

F. Respondents acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which respondents 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.

G. Proceedings instituted under this Part 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.

H. Respondents agree to provide sufficient customer information to enable the FTC to efficiently administer consumer redress. If a representative of the FTC requests in writing any information related to redress, respondents must provide it, in the form prescribed by the FTC, within 14 days;

VI.

IT IS FURTHER ORDERED that each respondent shall, for five (5) years after the last date of dissemination of any representation regarding any payment program or add-on product or service, 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.

VII.

IT IS FURTHER ORDERED that respondents Matt Blatt Inc. and Glassboro Imports, and their 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. 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.

VIII.

IT IS FURTHER ORDERED that respondents Matt Blatt Inc. and Glassboro Imports, and their 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 *Matt Blatt Inc.*

IX.

IT IS FURTHER ORDERED that respondents Matt Blatt Inc. and Glassboro Imports, and their successors and assigns, 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.

This order will terminate on July 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") has accepted, subject to final approval, an agreement containing a consent order from Matt Blatt Inc., also known as Matt Blatt KIA and as Matt Blatt Egg Harbor Township ("Matt Blatt Inc."), and from Glassboro Imports, LLC, also known as Matt Blatt Glassboro Suzuki, as Matt Blatt Glassboro, and as Matt Blatt Auto Sales ("Glassboro Imports"). 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 respondents are dealerships that offer an auto payment program to consumers financing a motor vehicle. The matter involves the dealerships' sale of the auto payment program to consumers. According to the FTC complaint, respondents have represented that consumers who enroll in its biweekly payment program in order to pay off their auto-financing contract will save money or achieve other benefits through the program. However, respondents failed to disclose that consumers who enroll in the program are 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 the biweekly payment program sold by respondents. The complaint alleges therefore that respondents' failure to disclose the above-mentioned facts is a deceptive practice in violation of Section 5 of the FTC Act.

The proposed order is designed to prevent respondents from engaging in similar deceptive practices in the future. Section I prohibits respondents 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 respondents 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 respondents 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.

Section III of the proposed order prohibits respondents 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 respondents to substantiate any representations about the benefits, performance or efficacy of any add-on product or service or any payment program.

Section V of the proposed order requires respondents to pay to the Commission One Hundred Eighty Four Thousand Two Hundred Eighty dollars ($184,280.00) in monetary relief.

Section VI of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Section VII requires that respondent provide copies of the order to certain of its personnel. Section VIII requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Section IX requires the respondent to file compliance reports with the Commission. Finally, Section X 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

CERBERUS INSTITUTIONAL PARTNERS V, L.P., AB ACQUISITION LLC, AND SAFEWAY INC.

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

Docket No. C-4504; File No. 141 0108
Complaint, January 27, 2015 – Decision, July 2, 2015

The consent order addresses the $9.2 billion acquisition by Cerberus Institutional Partners of certain assets of Safeway. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial supermarket competitor in the 130 local supermarket geographic markets. The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from the Acquisition. Under the terms of the proposed Consent Order, Respondents are required to divest 168 stores and related assets in 130 local supermarket geographic markets in eight states to four Commission-approved buyers. The consent order requires the divestiture of Albertson's or Safeway supermarkets in the relevant markets to four Commission-approved up-front buyers. These proposed buyers serve the purpose of restoring the competition that would be eliminated as a result of the Acquisition.

Participants

For the Commission: Lucas Ballet, Chester Choi, Paul Frangie, Elisa Kantor, Paul Nolan, Sean Pugh, Samuel Sheinberg, and *Joshua Smith.*

For the Respondents: Baker Botts; Paul Denis Jim Fishkin, and *Chris MacAvoy, Dechert LLP; Michael Swartz, Schulte, Roth & Zabel LLP; Richard Weisburg, Weisburg Law.*

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 Respondents AB Acquisition LLC ("Albertson's"), and Cerberus Institutional Partners V, L.P. ("Cerberus"), both subject to the jurisdiction of the Commission, agreed to acquire Respondent Safeway Inc. ("Safeway"), 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 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 Cerberus is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 875 Third Avenue, New York, New York.

2. Respondent Albertson's is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Cerberus, through Albertson's, of which Cerberus is the majority owner, owns and operates a number of supermarkets chains throughout the United States, including supermarkets operating under the Albertsons, Lucky, and United banners.

4. Respondent Safeway is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

5. Respondent Safeway owns and operates a number of supermarket chains throughout the United States, including supermarkets operating under the Safeway, Vons, Pavilions, and Tom Thumb banners.

6. Albertson's and Safeway 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

7. 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 ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014, Albertson's proposes to purchase all of the issued and outstanding common stock of Safeway in a transaction valued at approximately $9.2 billion ("the Acquisition").

IV. THE RELEVANT PRODUCT MARKET

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

10. 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.

11. 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.

12. 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.

13. 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

14. 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.

15. Respondents currently operate supermarkets under the Safeway, Vons, Pavilions, Tom Thumb, Albertsons, and United banners within approximately two-tenths of a mile to ten 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.

16. The 130 geographic markets in which to assess the competitive effects of the Acquisition are localized areas in (1) Anthem, Arizona; (2) Carefree, Arizona; (3) Flagstaff, Arizona; (4) Lake Havasu, Arizona; (5) Prescott, Arizona; (6) Prescott Valley, Arizona; (7) Scottsdale, Arizona; (8) Tucson (Eastern), Arizona; (9) Tucson (Southwest), Arizona; (10) Alpine, California; (11) Arroyo Grande/Grover Beach, California; (12) Atascadero, California; (13) Bakersfield, California; (14) Burbank, California; (15) Calabasas, California; (16) Camarillo, California; (17) Carlsbad (North), California; (18) Carlsbad (South), California; (19) Carpinteria, California; (20) Cheviot Hills/Culver City, California; (21) Chino Hills, California; (22) Coronado Island, California; (23) Diamond Bar, California; (24) El Cajon, California; (25) Hermosa Beach, California; (26) Imperial Beach, California; (27) La Jolla, California; (28) La Mesa, California; (29) Ladera Ranch, California; (30) Laguna Beach, California; (31) Laguna Niguel, California; (32) Lakewood, California; (33) Lemon Grove, California; (34) Lomita, California; (35) Lompoc, California; (36) Mira Mesa (North), California; (37) Mira Mesa (South), California; (38) Mission Viejo/Laguna Hills, California; (39) Mission Viejo (North), California; (40) Morro Bay, California; (41) National City, California; (42) Newbury Park, California; (43) Newport Beach, California; (44) Oxnard, California; (45) Palm Desert/Rancho Mirage, California; (46) Palmdale, California; (47) Paso Robles, California; (48) Poway, California; (49) Rancho Cucamonga/Upland, California; (50) Rancho Santa Margarita, California; (51) San Diego (Clairemont), California; (52) San Diego, (Hillcrest/University Heights), California; (53) San Diego (Tierrasanta), California; (54) San Luis Obispo, California; (55) San Marcos, California; (56) San Pedro, California; (57) Santa Barbara, California; (58) Santa Barbara/Goleta Heights, California; (59) Santa Clarita, California; (60) Santa Monica, California; (61) Santee, California; (62) Simi Valley, California; (63) Solana Beach, California; (64) Thousand Oaks, California; (65) Tujunga, California; (66) Tustin (Central), California; (67) Tustin/Irvine, California; (68) Ventura, California; (69) Westlake Village, California; (70) Yorba Linda, California; (71) Butte,

Montana; (72) Deer Lodge, Montana; (73) Missoula, Montana; (74) Boulder City, Nevada; (75) Henderson (East), Nevada; (76) Henderson (Southwest), Nevada; (77) Summerlin, Nevada; (78) Ashland, Oregon; (79) Baker County, Oregon; (80) Bend, Oregon; (81) Eugene, Oregon; (82) Grants Pass, Oregon; (83) Happy Valley/Clackamas, Oregon; (84) Keizer, Oregon; (85) Klamath Falls, Oregon; (86) Lake Oswego, Oregon; (87) Milwaukie, Oregon; (88) Sherwood, Oregon; (89) Springfield, Oregon; (90) Tigard, Oregon; (91) West Linn, Oregon; (92) Colleyville, Texas; (93) Dallas (Far North), Texas; (94) Dallas (Farmers Branch/North Dallas), Texas; (95) Dallas (University Park/Highland Park), Texas; (96) Dallas (University Park/Northeast Dallas), Texas; (97) McKinney, Texas; (98) Plano, Texas; (99) Roanoke, Texas; (100) Rowlett, Texas; (101) Bremerton, Washington; (102) Burien, Washington; (103) Everett, Washington; (104) Federal Way, Washington; (105) Gig Harbor, Washington; (106) Lake Forest, Washington; (107) Lake Stevens, Washington; (108) Lakewood, Washington; (109) Liberty Lake, Washington; (110) Milton, Washington; (111) Monroe, Washington; (112) Oak Harbor, Washington; (113) Olympia (East), Washington; (114) Port Angeles, Washington; (115) Port Orchard, Washington; (116) Puyallup, Washington; (117) Renton (New Castle), Washington; (118) Renton (East Hill-Meridian), Washington; (119) Sammamish, Washington; (120) Shoreline, Washington; (121) Silverdale, Washington; (122) Snohomish, Washington; (123) Tacoma (Eastside), Washington; (124) Tacoma (Spanaway), Washington; (125) Walla Walla, Washington; (126) Wenatchee, Washington; (127) Woodinville, Washington; (128) Casper, Wyoming; (129) Laramie, Wyoming; and (130) Sheridan, Wyoming. A hypothetical monopolist controlling all supermarkets in these areas could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

17. Under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and relevant case law, the Acquisition is presumptively unlawful in the markets for the retail sale of food and other grocery products in supermarkets in all 130 geographic markets listed in Paragraph 16. Under the Merger Guidelines' standard measure of market concentration, the Herfindahl-

Hirschman Index ("HHI"), an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. The Acquisition would result in market concentration levels well in excess of these thresholds.

18. Post-acquisition HHI levels in the relevant geographic markets would range from 2,562 to 10,000, and the Acquisition would result in HHI increases ranging from 225 to 5,000. Exhibit A presents market concentration levels for each of the relevant geographic markets.

19. The Acquisition would reduce the number of meaningful competitors from two to one in 13 relevant geographic markets, three to two in 42 relevant geographic markets, and 4 to 3 (or greater) in 75 relevant geographic markets.

VII. ENTRY CONDITIONS

20. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the 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

21. The 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 16 in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents Albertson's and Safeway;

b. by increasing the likelihood that Respondent Albertson's 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.

22. The ultimate effect of the 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 geographic markets.

IX. VIOLATIONS CHARGED

23. The agreement described in Paragraph 8 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-seventh day of January, 2015, issues its complaint against said Respondents.

By the Commission

EXHIBIT A

Area Number (See Para. 16 of Complaint)	City	State	Merger Result	HHI (pre)	HHI (post)	Delta
1	Anthem	AZ	4 to 3	2768	3423	655
2	Carefree	AZ	5 to 4	2298	2976	678
3	Flagstaff	AZ	5 to 4	2744	3365	621
4	Lake Havasu	AZ	4 to 3	2609	3401	792
5	Prescott	AZ	4 to 3	2675	3405	730
6	Prescott Valley	AZ	4 to 3	2828	3340	512
7	Scottsdale	AZ	3 to 2	3797	5001	1204
8	Tucson (Eastern)	AZ	4 to 3	3341	4130	789
9	Tucson (Southwest)	AZ	5 to 4	2018	2909	891
10	Alpine	CA	3 to 2	3857	5002	1145
11	Arroyo Grande/ Grover Beach	CA	3 to 2	3690	6864	3174
12	Atascadero	CA	3 to 2	3456	6242	2786
13	Bakersfield	CA	6 to 5	1923	2562	639
14	Burbank	CA	3 to 2	4199	5011	812

15	**Calabasas**	**CA**	**3 to 2**	**3400**	**5415**	**2015**
16	**Camarillo**	**CA**	**5 to 4**	**2950**	**4215**	**1265**
17	**Carlsbad (North)**	**CA**	**4 to 3**	**2977**	**3888**	**911**
18	**Carlsbad (South)**	**CA**	**5 to 4**	**2209**	**3210**	**1001**
19	**Carpinteria**	**CA**	**2 to 1**	**5012**	**10,000**	**4988**
20	**Cheviot Hills/ Culver City**	**CA**	**4 to 3**	**2394**	**3914**	**1520**
21	**Chino Hills**	**CA**	**4 to 3**	**3596**	**4047**	**451**
22	**Coronado Island**	**CA**	**2 to 1**	**5025**	**10,000**	**4975**
23	**Diamond Bar**	**CA**	**3 to 2**	**4466**	**5231**	**765**
24	**El Cajon**	**CA**	**4 to 3**	**2983**	**3597**	**614**
25	**Hermosa Beach**	**CA**	**5 to 4**	**2752**	**4371**	**1619**
26	**Imperial Beach**	**CA**	**2 to 1**	**5869**	**10,000**	**4131**
27	**La Jolla**	**CA**	**3 to 2**	**5505**	**7083**	**1578**
28	**La Mesa**	**CA**	**3 to 2**	**3382**	**5997**	**2615**
29	**Ladera Ranch**	**CA**	**2 to 1**	**5081**	**10,000**	**4919**
30	**Laguna Beach**	**CA**	**3 to 2**	**3335**	**5799**	**2464**

31	**Laguna Niguel**	**CA**	**4 to 3**	**3190**	**3883**	**693**
32	**Lakewood**	**CA**	**6 to 5**	**2073**	**2581**	**508**
33	**Lemon Grove**	**CA**	**3 to 2**	**3581**	**6059**	**2478**
34	**Lomita**	**CA**	**3 to 2**	**3695**	**5040**	**1345**
35	**Lompoc**	**CA**	**4 to 3**	**2566**	**3713**	**1147**
36	**Mira Mesa (North)**	**CA**	**5 to 4**	**2412**	**3808**	**1396**
37	**Mira Mesa (South)**	**CA**	**2 to 1**	**6904**	**10,000**	**3096**
38	**Mission Viejo/ Laguna Hills**	**CA**	**4 to 3**	**3157**	**3784**	**627**
39	**Mission Viejo (North)**	**CA**	**3 to 2**	**3933**	**5012**	**1079**
40	**Morro Bay**	**CA**	**5 to 4**	**2965**	**4056**	**1091**
41	**National City**	**CA**	**3 to 2**	**3748**	**5013**	**1265**
42	**Newbury Park**	**CA**	**3 to 2**	**3629**	**5833**	**2204**
43	**Newport Beach**	**CA**	**5 to 4**	**3160**	**3811**	**651**
44	**Oxnard**	**CA**	**4 to 3**	**2939**	**3375**	**436**
45	**Palm Desert/ Rancho Mirage**	**CA**	**6 to 5**	**2196**	**3094**	**898**

46	**Palmdale**	**CA**	**4 to 3**	**3056**	**4039**	**983**
47	**Paso Robles**	**CA**	**4 to 3**	**2851**	**5427**	**2576**
48	**Poway**	**CA**	**4 to 3**	**2540**	**3526**	**986**
49	**Rancho Cucamonga/ Upland**	**CA**	**4 to 3**	**3266**	**4118**	**852**
50	**Rancho Santa Margarita**	**CA**	**4 to 3**	**2628**	**4300**	**1672**
51	**San Diego (Clairemont)**	**CA**	**3 to 2**	**4066**	**6374**	**2308**
52	**San Diego (Hillcrest/ University Heights)**	**CA**	**3 to 2**	**4436**	**6571**	**2135**
53	**San Diego, CA (Tierrasanta)**	**CA**	**2 to 1**	**5586**	**10,000**	**4414**
54	**San Luis Obispo**	**CA**	**4 to 3**	**2896**	**5306**	**2410**
55	**San Marcos**	**CA**	**3 to 2**	**5991**	**6282**	**291**
56	**San Pedro**	**CA**	**3 to 2**	**3518**	**6442**	**2924**
57	**Santa Barbara**	**CA**	**4 to 3**	**2741**	**3462**	**721**
58	**Santa Barbara/ Goleta**	**CA**	**3 to 2**	**3909**	**7469**	**3560**

59	**Santa Clarita**	**CA**	**4 to 3**	**2646**	**3732**	**1086**
60	**Santa Monica**	**CA**	**4 to 3**	**3293**	**4879**	**1586**
61	**Santee**	**CA**	**3 to 2**	**3477**	**6133**	**2656**
62	**Simi Valley**	**CA**	**5 to 4**	**3633**	**7101**	**3468**
63	**Solana Beach**	**CA**	**3 to 2**	**3830**	**6188**	**2358**
64	**Thousand Oaks**	**CA**	**3 to 2**	**4057**	**6047**	**1990**
65	**Tujunga**	**CA**	**3 to 2**	**3688**	**3969**	**281**
66	**Tustin (central)**	**CA**	**4 to 3**	**3474**	**4348**	**874**
67	**Tustin/Irvine**	**CA**	**4 to 3**	**3939**	**4485**	**546**
68	**Ventura**	**CA**	**4 to 3**	**2732**	**3550**	**818**
69	**Westlake Village**	**CA**	**5 to 4**	**1955**	**3563**	**1608**
70	**Yorba Linda**	**CA**	**4 to 3**	**2803**	**4588**	**1785**
71	**Butte**	**MT**	**3 to 2**	**4701**	**5189**	**488**
72	**Deer Lodge**	**MT**	**2 to 1**	**5000**	**10,000**	**5000**
73	**Missoula**	**MT**	**4 to 3**	**3107**	**4063**	**956**
74	**Boulder City**	**NV**	**2 to 1**	**5051**	**10,000**	**4949**
75	**Henderson (East)**	**NV**	**4 to 3**	**2705**	**3356**	**651**

76	**Henderson (Southwest)**	**NV**	**3 to 2**	**3653**	**5042**	**1389**
77	**Summerlin**	**NV**	**4 to 3**	**3107**	**4367**	**1260**
78	**Ashland**	**OR**	**2 to 1**	**5013**	**10,000**	**4987**
79	**Baker County**	**OR**	**2 to 1**	**5102**	**10,000**	**4898**
80	**Bend**	**OR**	**6 to 5**	**2632**	**3824**	**1192**
81	**Eugene**	**OR**	**5 to 4**	**2392**	**3414**	**1022**
82	**Grants Pass**	**OR**	**4 to 3**	**2769**	**3537**	**768**
83	**Happy Valley/ Clackamas**	**OR**	**2 to 1**	**5006**	**10,000**	**4994**
84	**Keizer**	**OR**	**5 to 4**	**2852**	**3367**	**515**
85	**Klamath Falls**	**OR**	**5 to 4**	**2511**	**2917**	**406**
86	**Lake Oswego**	**OR**	**4 to 3**	**3176**	**5604**	**2428**
87	**Milwaukie**	**OR**	**3 to 2**	**5729**	**6082**	**353**
88	**Sherwood**	**OR**	**3 to 2**	**3989**	**5028**	**1039**
89	**Springfield**	**OR**	**3 to 2**	**4400**	**5197**	**797**
90	**Tigard**	**OR**	**5 to 4**	**2261**	**2984**	**723**
91	**West Linn**	**OR**	**3 to 2**	**3611**	**6268**	**2657**
92	**Colleyville**	**TX**	**5 to 4**	**2686**	**3465**	**779**
93	**Dallas (Far North)**	**TX**	**5 to 4**	**2413**	**2891**	**478**

94	**Dallas (Farmers Branch/ North Dallas)**	**TX**	**4 to 3**	**3746**	**5175**	**1429**
95	**Dallas (University Park/ Highland Park)**	**TX**	**4 to 3**	**2755**	**4261**	**1506**
96	**Dallas (University Park/ Northeast Dallas)**	**TX**	**5 to 4**	**2345**	**3065**	**720**
97	**McKinney**	**TX**	**5 to 4**	**2692**	**3613**	**921**
98	**Plano**	**TX**	**4 to 3**	**3105**	**3541**	**436**
99	**Roanoke**	**TX**	**3 to 2**	**4680**	**5351**	**671**
100	**Rowlett**	**TX**	**3 to 2**	**3386**	**5450**	**2064**
101	**Bremerton**	**WA**	**4 to 3**	**2721**	**3399**	**678**
102	**Burien**	**WA**	**5 to 4**	**1979**	**4489**	**2510**
103	**Everett**	**WA**	**5 to 4**	**2301**	**2586**	**285**
104	**Federal Way**	**WA**	**5 to 4**	**2312**	**2709**	**397**
105	**Gig Harbor**	**WA**	**3 to 2**	**3396**	**5235**	**1839**
106	**Lake Forest Park**	**WA**	**5 to 4**	**3889**	**4352**	**463**
107	**Lake Stevens**	**WA**	**5 to 4**	**2646**	**3455**	**809**
108	**Lakewood**	**WA**	**5 to 4**	**2333**	**3170**	**837**

109	**Liberty Lake**	**WA**	**3 to 2**	**3483**	**5090**	**1607**
110	**Milton**	**WA**	**3 to 2**	**3960**	**5010**	**1050**
111	**Monroe**	**WA**	**4 to 3**	**2911**	**3352**	**441**
112	**Oak Harbor**	**WA**	**3 to 2**	**4296**	**6446**	**2150**
113	**Olympia (East)**	**WA**	**6 to 5**	**2205**	**2566**	**361**
114	**Port Angeles**	**WA**	**3 to 2**	**3773**	**5588**	**1815**
115	**Port Orchard**	**WA**	**4 to 3**	**2747**	**3362**	**615**
116	**Puyallup**	**WA**	**3 to 2**	**4160**	**5072**	**912**
117	**Renton (East Hill-Meridian)**	**WA**	**4 to 3**	**3304**	**3719**	**415**
118	**Renton (New Castle)**	**WA**	**4 to 3**	**4417**	**5274**	**857**
119	**Sammamish**	**WA**	**2 to 1**	**5761**	**10,000**	**4239**
120	**Shoreline**	**WA**	**4 to 3**	**3792**	**4017**	**225**
121	**Silverdale**	**WA**	**4 to 3**	**2845**	**3516**	**671**
122	**Snohomish**	**WA**	**2 to 1**	**5595**	**10,000**	**4405**
123	**Tacoma (Eastside)**	**WA**	**4 to 3**	**3260**	**3727**	**467**
124	**Tacoma (Spanaway)**	**WA**	**5 to 4**	**2707**	**3360**	**653**
125	**Walla Walla**	**WA**	**5 to 4**	**2624**	**3417**	**793**
126	**Wenatchee**	**WA**	**3 to 2**	**3744**	**5047**	**1303**

127	**Woodinville**	**WA**	**3 to 2**	**3568**	**5192**	**1624**
128	**Casper**	**WY**	**4 to 3**	**3816**	**4353**	**537**
129	**Laramie**	**WY**	**3 to 2**	**3793**	**5000**	**1207**
130	**Sheridan**	**WY**	**3 to 2**	**4802**	**5421**	**619**

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondents AB Acquisition LLC ("Albertson's") and Cerberus Institutional Partners V, L.P. ("Cerberus"), of Respondent Safeway Inc. ("Safeway"), 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 Cerberus Institutional Partners V, 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 headquarters and principal place of

business located at 875 Third Avenue, New York, New York.

2. Respondent AB Acquisition LLC is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

4. 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. Respondents shall not 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, and shall not transfer store managers from any Supermarket To Be Maintained to any store that is not part of the Assets To Be Divested. 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 pricing or advertising practices, programs, and policies for each Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with current practice for Supermarkets of the Respondents not being closed, relocated, or sold.

III.

IT IS FURTHER ORDERED that:

A. Richard King shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix V ("Monitor Agreement") and Non-Public Appendix V-1 ("Monitor Compensation") to the Decision and Order. 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 to Maintain Assets, the Decision and Order, and the Remedial Agreement(s);

B. No later than (1) day after the date the Acquisition is consummated, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision

and Order, and the Remedial Agreement(s), in a manner consistent with the purposes of the orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Remedial Agreement(s), and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.

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

3. The Monitor shall serve until at least the latter of (i) the completion of all divestitures required by the Decision and Order, (ii) the end of any Transition Services Agreement in effect with any Acquirer, and (iii) September 30, 2015.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Remedial Agreement(s).

E. 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 to Maintain Assets, the Decision and Order, and the Remedial Agreement(s).

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. 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. For purposes of this Paragraph III.G., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph III.F. of this Order to Maintain Assets.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets or the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order to Maintain Assets and the Decision and Order. Within thirty (30) days from the date the Monitor receives the first such report, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary

confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. 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 a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Remedial Agreement(s) in a manner consistent with the purposes of the orders and in consultation with the Commission.

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

compliance with the requirements of this Order to Maintain Assets.

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

IV.

IT IS FURTHER ORDERED that 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.

V.

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, 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 Order to Maintain Assets. Respondents shall submit at the same time a copy of their reports concerning compliance with this Order to Maintain Assets to the Monitor. 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.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain

Assets, and subject to any legally recognized privilege, and upon written request 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.

VII.

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 Divestiture 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondents AB Acquisition LLC ("Albertson's") and Cerberus Institutional Partners V, L.P. ("Cerberus"), of Respondent Safeway Inc. ("Safeway"), 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 Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, 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 Cerberus Institutional Partners V, 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 headquarters and principal place of business located at 875 Third Avenue, New York, New York.

2. Respondent AB Acquisition LLC is a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 250 Parkcenter Boulevard, Boise, Idaho.

3. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

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

ORDER

I.

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

A. "Cerberus" means Respondent Cerberus Institutional Partners V, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cerberus Institutional Partners V, L.P. (including Respondent Albertson's), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Albertson's" means Respondent AB Acquisition LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by AB Acquisition LLC (including Albertson's LLC, Albertson's Holdings LLC and, after the Acquisition is consummated, Safeway), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Safeway" means Respondent Safeway Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Safeway Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Cerberus, Albertson's, and Safeway, individually and collectively.

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

F. "Acquisition" means Albertson's proposed acquisition of Safeway pursuant to the Acquisition Agreement.

G. "Acquisition Agreement" means the Agreement and Plan of Merger by and among AB Acquisition LLC, Albertson's Holdings LLC, Albertson's LLC, Saturn Acquisition Merger Sub, Inc., and Safeway Inc., dated

as of March 6, 2014, as amended on April 7, 2014, and June 13, 2014.

H. "Assets To Be Divested" means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, 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. Assets To Be Divested includes any of Respondents' other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. 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 the 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 Remedial Agreement(s).

Provided, further, 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.

I. "Associated Food Stores" means Associated Food Stores, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Utah, with its offices and principal place of business located at 1850 West 2100 South, Salt Lake City, Utah.

J. "Associated Food Stores Divestiture Agreement" means the Amended and Restated Asset Purchase Agreement dated as of December 5, 2014, by and between Respondent Albertson's and Associated Food Stores, attached as non-public Appendix I, for the divestiture of the Schedule A Assets.

K. "AWG" means Associated Wholesale Grocers, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kansas, with its offices and principal place of business located at 5000 Kansas Avenue, Kansas City, Kansas, and its direct and indirect subsidiaries, including LAS Acquisitions, LLC.

L. "AWG Divestiture Agreement" means the Amended and Restated Asset Purchase Agreement dated as of December 11, 2014, by and between Respondent Albertson's, AWG, and LAS Acquisitions, LLC (a wholly owned subsidiary of AWG) ("LAS"), attached as non-public Appendix II, for the divestiture of the Schedule B Assets.

M. "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 Associated Food Stores Divestiture Agreement, the AWG Divestiture Agreement, the Haggen Divestiture Agreement, and the Supervalu Divestiture Agreement.

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

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

P. "Haggen" means Haggen Holdings, LLC, a 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 2221 Rimland Drive, Bellingham, Washington.

Q. "Haggen Divestiture Agreement" means the Asset Purchase Agreement dated as of December 10, 2014, by and between Respondent Albertson's and Haggen, attached as non-public Appendix III, for the divestiture of the Schedule C Assets.

R. "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, Associated Food Stores, AWG, Haggen, and Supervalu.

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

1. Any Divestiture Agreement; and

2. Any other agreement between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved

Acquirer), including any Transition Services 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.

T. "Relevant Areas" means: Coconino, Maricopa, Mohave, Pima, and Yavapai Counties in Arizona; Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura Counties in California; Deer Lodge, Missoula, and Silver Bow Counties in Montana; Clark County in Nevada; Baker, Clackamas, Deschutes, Jackson, Josephine, Klamath, Lane, Marion, and Washington Counties in Oregon; Collin, Denton, Dallas, and Tarrant Counties in Texas; Chelan, Clallam, Island, King, Kitsap, Pierce, Snohomish, Spokane, Thurston, and Walla Walla Counties in Washington; and Albany, Natrona, and Sheridan Counties in Wyoming.

U. "Schedule A Assets" means the Assets To Be Divested identified on Schedule A of this Order.

V. "Schedule B Assets" means the Assets To Be Divested identified on Schedule B of this Order.

W. "Schedule C Assets" means the Assets To Be Divested identified on Schedule C of this Order.

X. "Schedule D Assets" means the Assets To Be Divested identified on Schedule D of this Order.

Y. "Supervalu" means Supervalu 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 7075 Flying Cloud Drive, Eden Prairie, Minnesota.

Z. "Supervalu Divestiture Agreement" means the Asset Purchase Agreement dated as of December 5, 2014, by

and between Respondent Albertson's and Supervalu, attached as non-public Appendix IV, for the divestiture of the Schedule D Assets.

AA. "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.

BB. "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.

CC. "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.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Supermarket businesses, as follows:

1. Within 60 days of the date the Acquisition is consummated, the Schedule A Assets shall be divested to Associated Food Stores pursuant to and in accordance with the Associated Food Stores Divestiture Agreement;

2. Within 60 days of the date the Acquisition is consummated, the Schedule B Assets shall be divested pursuant to and in accordance with the AWG Divestiture Agreement to either (i) LAS or (ii) RLS Supermarkets, LLC (d/b/a Minyard Food Stores) (as LAS's assignee, pursuant to the acquisition agreement between LAS and RLS Supermarkets, LLC);

3. Within 150 days of the date the Acquisition is consummated, the Schedule C Assets shall be divested to Haggen pursuant to and in accordance with the Haggen Divestiture Agreement;

Provided, however, that if any permit or license necessary for the divestiture of pharmacy assets has not been secured by Haggen as of the divestiture deadline, then the pharmacy assets may be divested following receipt of the necessary permit(s) and/or license(s), pursuant to and in accordance with the terms of the Pharmacy Transitional Services Agreement (attached as Exhibit 9(a) to the Haggen Divestiture Agreement);

4. Within 100 days of the date the Acquisition is consummated, the Schedule D Assets shall be divested to Supervalu pursuant to and in

accordance with the Supervalu Divestiture Agreement.

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 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 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 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 Respondents 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 Remedial 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 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.

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. Respondents shall provide sufficient 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 or all of the employees of the Supermarket Assets To Be Divested pursuant to the Divestiture Agreement; and

b. Make offers of employment to any or all 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, or who has accepted an offer of employment, from such 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 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 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. 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, Respondents 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 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.

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, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant 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 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 Respondents' 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 Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. 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(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 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 required to be divested by this Order.

8. 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 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. Richard King shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and 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, the Order to Maintain Assets, and the Remedial Agreement(s);

B. No later than one (1) day after the date the Acquisition is consummated, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), in a manner consistent with the purposes of the orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, the Order to Maintain Assets, and the Remedial Agreement(s), and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.

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

3. The Monitor shall serve until at least the latter of (i) the completion of all divestitures required by this Order, (ii) the end of any Transition Services Agreement in effect with any Acquirer, and (iii) September 30, 2015.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their

obligations under this Order, the Order to Maintain Assets, and the Remedial Agreement(s).

E. 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, the Order to Maintain Assets, and the Remedial Agreement(s).

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. 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. For purposes of this Paragraph IV.G., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IV.F. of this Order.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the

Order to Maintain Assets. Within thirty (30) days from the date the Monitor receives the first such report, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

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

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

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. 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 a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit

the Monitor to monitor Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Remedial Agreement(s) in a manner consistent with the purposes of orders and in consultation with the Commission.

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

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

V.

IT IS FURTHER ORDERED that: if Associated Food Stores purchases the Schedule A Assets pursuant to Paragraph II.A.1, Associated Food Stores shall not sell or otherwise convey, directly or indirectly, any of the Schedule A Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided, however,* that prior approval of the Commission is not required for the following buyers to acquire the following Supermarkets:

A. Missoula Fresh Market LLC may acquire Safeway Store Nos. 1573 and 2619, pursuant to the assignment and assumption agreement between Missoula Fresh Market LLC and Associated Food Stores;

B. Ridley's Family Markets, Inc. may acquire Albertson's Store No. 2063 and Safeway Store Nos. 433, 2468, and 2664, pursuant to the assignment and assumption agreement between Ridley's Family Markets and Associated Food Stores; and

C. Stokes Inc. may acquire Albertson's Store No. 2007 and Safeway Store No. 3256, pursuant to the assignment and assumption agreement between Stokes Inc. and Associated Food Stores.

Associated Food Stores shall comply with this Paragraph until three (3) years after the date this Order is issued.

VI.

IT IS FURTHER ORDERED that: if LAS purchases the Schedule B Assets pursuant to Paragraph II.A.2, LAS shall not sell or otherwise convey, directly or indirectly, such Schedule B Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. *Provided, however,* that prior approval of the Commission is not required for RLS Supermarkets, LLC (d/b/a Minyard Food Stores) to acquire the Schedule B Assets, pursuant to the acquisition agreement between RLS Supermarkets, LLC and LAS. LAS shall comply with this Paragraph until three (3) years after the date this Order is issued.

VII.

IT IS FURTHER ORDERED that: if Supervalu purchases the Schedule D Assets pursuant to Paragraph II.A.4, Supervalu shall not sell or otherwise convey, directly or indirectly, any of the Schedule D Assets, except to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Supervalu shall comply with this Paragraph until three (3) years after the date this Order is issued.

VIII.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years commencing on the date this Order is issued, Respondents 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 Respondents' offer to purchase or lease such facility.

Provided, further, that advance written notification shall not be required for acquisitions resulting in total holdings of one (1) percent or less of the stock, share capital, equity, or other interest in an 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.

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 Respondents and not of any other party to the transaction. Respondents 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), Respondents shall not consummate the transaction

until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested 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.

IX.

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 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 submit at the same time a copy of their reports concerning compliance with this Order to the Monitor. 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 is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting

forth in detail the manner and form in which they have complied and are complying with this Order.

X.

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.

XI.

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.

XII.

IT IS FURTHER ORDERED that: this Order shall terminate on July 2, 2025.

By the Commission.

Schedule A Assets

Montana Stores:

1.Safeway Store No. 1573, located at 3801 S. Reserve Street, Missoula, Montana (Missoula County).

2.Albertson's Store No. 2007, located at 1301 Harrison Avenue, Butte, Montana (Silver Bow County).

3.Safeway Store No. 2619, located at 800 W. Broadway Street, Missoula, Montana (Missoula County).

4.Safeway Store No. 3256, located at 1525 West Park, Anaconda, Montana (Deer Lodge County).

Wyoming Stores:

5.Albertson's Store No. 2063, located at 3112 East Grand Avenue, Laramie, Wyoming (Albany County).

6.Safeway Store No. 433, located at 1375 Cy Avenue, Casper, Wyoming (Natrona County).

7.Safeway Store No. 2468, located at 300 S.E. Wyoming Boulevard, Casper, Wyoming (Natrona County).

8.Safeway Store No. 2664, located at 169 Coffeen, Sheridan, Wyoming (Sheridan County).

Schedule B Assets

Texas Stores:

1.Albertson's Store No. 4182, located at 3630 Forest Lane, Dallas, Texas (Dallas County).

2.Albertson's Store No. 4132, located at 6464 E. Mockingbird Lane, Dallas, Texas (Dallas County).

3.Albertson's Store No. 4134, located at 4349 W. Northwest Highway, Dallas, Texas (Dallas County).

4.Albertson's Store No. 4140, located at 7007 Arapaho Road, Dallas, Texas (Dallas County).

5.Albertson's Store No. 4149, located at 1108 N. Highway 377, Roanoke, Texas (Denton County).

6.Albertson's Store No. 4168, located at 3524 McKinney Avenue, Dallas, Texas (Dallas County).

7.Albertson's Store No. 4197, located at 8505 Lakeview Parkway, Rowlett, Texas (Dallas Counties).

8.Albertson's Store No. 4297, located at 10203 E. Northwest Highway, Dallas, Texas (Dallas County).

9.Safeway (Tom Thumb) Store No. 2568, located at 4836 West Park Boulevard, Plano, Texas (Collin County

10.Safeway (Tom Thumb) Store No. 3555, located at 3300 Harwood Road, Bedford, Texas (Tarrant County).

11.Safeway (Tom Thumb) Store No. 3573, located at 3001 Hardin Boulevard, McKinney, Texas (Collin County).

12.Safeway (Tom Thumb) Store No. 3576, located at 4000 William D. Tate Avenue., Grapevine, Texas (Tarrant County).

Schedule C Assets

Arizona Stores:

1.Albertsons Store No. 967, located at 1416 E Route 66, Flagstaff, Arizona (Coconino County).

2.Albertsons Store No. 979, located at 34442 N. Scottsdale Road, Scottsdale, Arizona (Maricopa County).

3.Albertsons Store No. 983, located at 11475 E. Via Linda, Scottsdale, Arizona (Maricopa County).

4.Safeway Store No. 1726, located at 3655 W. Anthem Way, Anthem, Arizona (Maricopa County).

5.Albertsons Store No. 1027, located at 1980 McCulloch Boulevard, Lake Havasu City, Arizona (Mohave County).

6.Safeway Store No. 234, located at 8740 East Broadway, Tucson, Arizona (Pima County).

7.Safeway Store No. 2611, located at 10380 East Broadway Boulevard, Tucson, Arizona (Pima County).

8.Albertsons Store No. 972, located at 1350 N. Silverbell Road, Tucson, Arizona (Pima County).

9.Albertsons Store No. 953, located at 174 East Sheldon Street, Prescott, Arizona (Yavapai County).

10.Albertsons Store No. 965, located at 7450 E. Highway 69, Prescott Valley, Arizona (Yavapai County).

California Stores:

11.Albertsons Store No. 6323, located at 3500 Panama Lane, Bakersfield, California (Kern County).

12.Albertsons Store No. 6325, located at 7900 White Lane, Bakersfield, California (Kern County).

13.Albertsons Store No. 6379, located at 8200 East Stockdale Highway, Bakersfield, California (Kern County).

14.Albertsons Store No. 6315, located at 3830 W. Verdugo Avenue, Burbank, California (Los Angeles County).

15.Albertsons Store No. 6168, located at 3443 S. Sepulveda Boulevard, Los Angeles, California (Los Angeles County).

16.Albertsons Store No. 6169, located at 8985 Venice Boulevard Suite B, Los Angeles, California (Los Angeles County).

17.Safeway (Vons) Store No. 2062, located at 240 S. Diamond Bar Boulevard, Diamond Bar, California (Los Angeles County).

18.Albertsons Store No. 6329, located at 5038 W. Avenue North, Palmdale, California (Los Angeles County).

19.Albertsons Store No. 6107, located at 2130 Pacific Coast Highway, Lomita, California (Los Angeles County).

20.Albertsons Store No. 6127, located at 1516 S. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).

21.Albertsons Store No. 6138, located at 615 N. Pacific Coast Highway, Redondo Beach, California (Los Angeles County).

22.Albertsons Store No. 6153, located at 21035 Hawthorne Boulevard, Torrance, California (Los Angeles County).

23.Albertsons Store No. 6189, located at 2115 Artesia Boulevard, Redondo Beach, California (Los Angeles County).

24.Albertsons Store No. 6160, located at 1636 W. 25th Street, San Pedro, California (Los Angeles County).

25.Albertsons Store No. 6164, located at 28090 South Western Avenue, San Pedro, California (Los Angeles County).

26.Albertsons Store No. 6388, located at 5770 Lindero Canyon Road, Westlake Village, California (Los Angeles County).

27.Albertsons Store No. 6397, located at 6240 Foothill Boulevard, Tujunga, California (Los Angeles County).

28.Albertsons Store No. 6162, located at 2627 Lincoln Boulevard, Santa Monica, California (Los Angeles County).

29.Albertsons Store No. 6154, located at 6235 East Spring Street, Long Beach, California (Los Angeles County).

30.Safeway (Vons) Store No. 2031, located at 23381 Mulholland Drive, Woodland Hills, California (Los Angeles County).

31.Safeway (Vons) Store No. 1669, located at 26518 Bouquet Canyon Road, Saugus, California (Los Angeles County).

32.Safeway (Pavilions) Store No. 1961, located at 27095 McBean Parkway, Santa Clarita, California (Los Angeles County).

33.Safeway (Pavilions) Store No. 2703, located at 25636 Crown Valley Parkway, Ladera Ranch, California (Orange County).

34.Albertsons Store No. 6575, located at 30922 Coast Highway, Laguna Beach, California (Orange County).

35.Safeway (Vons) Store No. 1676, located at 30252 Crown Valley Parkway, Laguna Niguel, California (Orange County).

36.Safeway (Vons) Store No. 1670, located at 28751 Los Alisos Boulevard, Mission Viejo, California (Orange County).

37.Albertsons Store No. 6517, located at 25872 Muirlands Boulevard, Mission Viejo, California (Orange County).

38.Albertsons Store No. 6504, located at 3049 Coast Highway, Corona Del Mar, California (Orange County).

39.Safeway (Pavilions) Store No. 2822, located at 3901 Portola Parkway, Irvine, California (Orange County).

40.Albertsons Store No. 6510, located at 21500 Yorba Linda Boulevard, Yorba Linda, California (Orange County).

41.Albertsons Store No. 6521, located at 21672 Plano Trabuco Road, Trabuco Canyon, California (Orange County).

42.Safeway (Vons) Store No. 2146, located at 550 E. First Street, Tustin, California (Orange County).

43.Safeway (Vons) Store No. 2324, located at 17662 17th Street, Tustin, California (Orange County).

44.Safeway (Vons) Store No. 2383, located at 72675 Highway 111, Palm Desert, California (Riverside County).

45.Safeway (Pavilions) Store No. 3218, located at 36-101 Bob Hope Drive, Rancho Mirage, California (Riverside County).

46.Safeway (Vons) Store No. 2597, located at 4200 Chino Hills Parkway Suite 400, Chino Hills, California (San Bernardino County).

47.Albertsons Store No. 6523, located at 8850 Foothill Boulevard, Rancho Cucamonga, California (San Bernardino County).

48.Albertsons Store No. 6589, located at 1910 N. Campus Avenue, Upland, California (San Bernardino County).

49.Albertsons Store No. 6701, located at 955 Carlsbad Village Drive, Carlsbad, California (San Diego County).

50.Albertsons Store No. 6720, located at 7660 El Camino Real, Carlsbad, California (San Diego County).

51.Safeway (Vons) Store No. 2006, located at 505 Telegraph Canyon Road, Chula Vista, California (San Diego County).

52.Safeway (Vons) Store No. 2336, located at 360 East H Street, Chula Vista, California (San Diego County).

53.Safeway (Vons) Store No. 3063, located at 870 Third Avenue, Chula Vista, California (San Diego County).

54.Albertsons Store No. 6747, located at 150 B Avenue, Coronado, California (San Diego County).

55.Albertsons Store No. 6771, located at 1608 Broadway Street, El Cajon, California (San Diego County).

56.Safeway (Vons) Store No. 2064, located at 2800 Fletcher Parkway, El Cajon, California (San Diego County).

57.Safeway (Vons) Store No. 2137, located at 5630 Lake Murray Boulevard, La Mesa, California (San Diego County).

58.Albertsons Store No. 6741, located at 14837 Pomerado Road, Poway, California (San Diego County).

59.Albertsons Store No. 6763, located at 12475 Rancho Bernardo Road, Rancho Bernardo, California (San Diego County).

60.Albertsons Store No. 6760, located at 10633 Tierrasanta Boulevard, San Diego, California (San Diego County).

61.Albertsons Store No. 6714, located at 2235 University Avenue, San Diego, California (San Diego County).

62.Albertsons Store No. 6715, located at 422 W. Washington Street, San Diego, California (San Diego County).

63.Albertsons Store No. 6742, located at 7895 Highland Village Place, San Diego, California (San Diego County).

64.Albertsons Store No. 6770, located at 10740 Westview Parkway, San Diego, California (San Diego County).

65.Albertsons Store No. 6772, located at 14340 Penasquitos Drive, San Diego, California (San Diego County).

66.Albertsons Store No. 6788, located at 730 Turquoise Street, San Diego, California (San Diego County).

67.Albertsons Store No. 6781, located at 5950 Balboa Avenue, San Diego, California (San Diego County).

68.Safeway (Vons) Store No. 2174, located at 671 Rancho Santa Fe Road, San Marcos, California (San Diego County).

69.Albertsons Store No. 6727, located at 9870 Magnolia Avenue, Santee, California (San Diego County).

70.Albertsons Store No. 6702, located at 2707 Via De La Valle, Del Mar, California (San Diego County).

71.Safeway (Vons) Store No. 2365, located at 3681 Avocado Avenue, La Mesa, California (San Diego County).

72.Albertsons (Lucky) Store No. 6228, located at 350 W. San Ysidro Boulevard, San Ysidro, California (San Diego County).

73.Safeway (Vons) Store No. 2333, located at 13439 Camino Canada, El Cajon, California (San Diego County).

74.Albertsons Store No. 6304, located at 1132 West Branch Street, Arroyo Grande, California (San Luis Obispo County).

75.Albertsons Store No. 6390, located at 8200 El Camino Real, Atascadero, California (San Luis Obispo County).

76.Safeway (Vons) Store No. 2312, located at 1130 Los Osos Valley Road, Los Osos, California (San Luis Obispo County).

77.Safeway (Vons) Store No. 2317, located at 1191 E. Creston Road, Paso Robles, California (San Luis Obispo County).

78.Albertsons Store No. 6372, located at 771 Foothill Boulevard, San Luis Obispo, California (San Luis Obispo County).

79.Albertsons Store No. 6409, located at 1321 Johnson Avenue, San Luis Obispo, California (San Luis Obispo County).

80.Safeway (Vons) Store No. 2425, located at 850 Linden Avenue, Carpinteria, California (Santa Barbara County).

81.Albertsons Store No. 6339, located at 1500 North H Street, Lompoc, California (Santa Barbara County).

82.Albertsons Store No. 6351, located at 2010 Cliff Drive, Santa Barbara, California (Santa Barbara County).

83.Albertsons Store No. 6352, located at 3943 State Street, Santa Barbara, California (Santa Barbara County).

84.Safeway (Vons) Store No. 2048, located at 163 S. Turnpike Road, Goleta, California (Santa Barbara County).

85.Safeway (Vons) Store No. 2691, located at 175 N. Fairview Avenue, Goleta, California (Santa Barbara County).

86.Albertsons Store No. 6369, located at 1736 Avenida De Los Arboles, Thousand Oaks, California (Ventura County).

87.Albertsons Store No. 6318, located at 7800 Telegraph Road, Ventura, California (Ventura County).

88.Albertsons Store No. 6317, located at 5135 Los Angeles Avenue, Simi Valley, California (Ventura County).

89.Albertsons Store No. 6363, located at 2800 Cochran Street, Simi Valley, California (Ventura County).

90.Safeway (Vons) Store No. 2163, located at 660 E. Los Angeles Avenue, Simi Valley, California (Ventura County).

91.Albertsons Store No. 6385, located at 2400 East Las Posas Road, Camarillo, California (Ventura County).

92.Albertsons Store No. 6217, located at 920 N. Ventura Road, Oxnard, California (Ventura County).

93.Safeway (Vons) Store No. 1793, located at 2100 Newbury Road, Newbury Park, California (Ventura County).

Nevada Stores:

94.Safeway (Vons) Store No. 2391, located at 1031 Nevada Highway, Boulder City, Nevada (Clark County).

95.Albertsons Store No. 6028, located at 2910 Bicentennial Parkway, Henderson, Nevada (Clark County).

96.Safeway (Vons) Store No. 1688, located at 820 S. Rampart Boulevard, Las Vegas, Nevada (Clark County).

97.Safeway (Vons) Store No. 2392, located at 7530 W. Lake Mead Boulevard, Las Vegas, Nevada (Clark County).

98.Safeway (Vons) Store No. 2395, located at 1940 Village Center Circle, Las Vegas, Nevada (Clark County).

99.Albertsons Store No. 6014, located at 575 College Drive, Henderson, Nevada (Clark County).

100.Albertsons Store No. 6019, located at 190 North Boulder Highway, Henderson, Nevada (Clark County).

Oregon Stores:

101.Albertsons Store No. 261, located at 1120 Campbell Street, Baker City, Oregon (Baker County).

102.Albertsons Store No. 503, located at 14800 S.E. Sunnyside Road, Clackamas, Oregon (Clackamas County).

103.Albertsons Store No. 521, located at 16199 Boones Ferry Road, Lake Oswego, Oregon (Clackamas County).

104.Albertsons Store No. 506, located at 1855 Blankenship Road, West Linn, Oregon (Clackamas County).

105.Albertsons Store No. 566, located at 10830 S.E. Oak Street, Milwaukie, Oregon (Clackamas County).

106.Albertsons Store No. 587, located at 1800 N.E. 3rd Street, Bend, Oregon (Deschutes County).

107.Albertsons Store No. 588, located at 61155 S. Highway 97, Bend, Oregon (Deschutes County).

108.Safeway Store No. 4292, located at 585 Siskiyou Boulevard, Ashland, Oregon (Jackson County).

109.Albertsons Store No. 501, located at 340 N.E. Beacon Drive, Grants Pass, Oregon (Josephine County).

110.Albertsons Store No. 537, located at 1690 Allen Creek Road, Grants Pass, Oregon (Josephine County).

111.Safeway Store No. 1766, located at 2740 S. 6th Street, Klamath Falls, Oregon (Klamath County).

112.Safeway Store No. 4395, located at 211 North Eighth Street, Klamath Falls, Oregon (Klamath County).

113.Albertsons Store No. 507, located at 1675 W. 18th Avenue, Eugene, Oregon (Lane County).

114.Albertsons Store No. 568, located at 3075 Hilyard Street, Eugene, Oregon (Lane County).

115.Safeway Store No. 311, located at 5415 Main Street, Springfield, Oregon (Lane County).

116.Albertsons Store No. 562, located at 5450 River Road North, Keizer, Oregon (Marion County).

117.Albertsons Store No. 559, located at 8155 S.W. Hall Boulevard, Beaverton, Oregon (Washington County).

118.Albertsons Store No. 565, located at 16200 S.W. Pacific Highway, Tigard, Oregon (Washington County).

119.Albertsons Store No. 576, located at 14300 S.W. Barrows Road, Tigard, Oregon (Washington County).

120.Albertsons Store No. 579, located at 16030 S.W. Tualatin Sherwood Road, Sherwood, Oregon (Washington County).

Washington Stores:

121.Albertsons Store No. 244, located at 1128 N. Miller, Wenatchee, Washington (Chelan County).

122.Albertsons Store No. 404, located at 114 E. Lauridsen Boulevard, Port Angeles, Washington (Clallam County).

123.Safeway Store No. 3518, located at 31565 SR 20 #1, Oak Harbor, Washington (Island County).

124.Albertsons Store No. 411, located at 15840 1st Avenue South, Burien, Washington (King County).

125.Albertsons Store No. 473, located at 12725 First Avenue South, Burien, Washington (King County).

126.Albertsons Store No. 425, located at 17171 Bothell Way NE, Seattle, Washington (King County).

127.Albertsons Store No. 470, located at 14215 SE Petrovitsky Road, Renton, Washington (King County).

128.Safeway Store No. 1468, located at 4300 N.E. 4th Street, Renton, Washington (King County).

129.Albertsons Store No. 403, located at 3925 236th Avenue NE, Redmond, Washington (King County).

130.Safeway Store No. 442, located at 15332 Aurora Avenue North, Shoreline, Washington (King County).

131.Albertsons Store No. 496, located at 31009 Pacific Highway South, Federal Way, Washington (King County).

132.Albertsons Store No. 443, located at 2900 Wheaton Way, Bremerton, Washington (Kitsap County).

133.Albertsons Store No. 492, located at 2222 NW Bucklin Hill Road, Silverdale, Washington (Kitsap County).

134.Safeway Store No. 1082, located at 3355 Bethel Road SE, Port Orchard, Washington (Kitsap County).

135.Safeway Store No. 2949, located at 4831 Point Fosdick Drive NW, Gig Harbor, Washington (Pierce County).

136.Albertsons Store No. 472, located at 2800 Milton Way, Milton, Washington (Pierce County).

137.Albertsons Store No. 468, located at 11012 Canyon Road East, Puyallup, Washington (Pierce County).

138.Safeway Store No. 551, located at 15805 Pacific Avenue South, Tacoma, Washington (Pierce County).

139.Albertsons Store No. 498, located at 111 S. 38th Street, Tacoma, Washington (Pierce County).

140.Albertsons Store No. 465, located at 8611 Steilacoom Boulevard SW, Tacoma, Washington (Pierce County).

141.Safeway Store No. 517, located at 7601 Evergreen Way, Everett, Washington (Snohomish County).

142.Albertsons Store No. 476, located at 19881 SR 2, Monroe, Washington (Snohomish County).

143.Albertsons Store No. 401, located at 17520 SR 9 Southeast, Snohomish, Washington (Snohomish County).

144.Safeway Store No. 1741, located at 1233 N. Liberty Lake Road, Liberty Lake, Washington (Spokane County).

145.Albertsons Store No. 415, located at 3520 Pacific Avenue SE, Olympia, Washington (Thurston County).

146.Albertsons Store No. 225, located at 450 N. Wilbur Avenue, Walla Walla, Washington (Walla Walla County).

Schedule D Assets

Washington Stores:

1.Albertson's Store No. 459, located at 14019 Woodinville-Duvall Road, Woodinville, Washington (King County).

2.Albertson's Store No. 477, located at 303 91st Avenue NE, Lake Stevens, Washington (Snohomish County).

APPENDIX I

Associated Food Stores Divestiture Agreement

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

APPENDIX II

AWG Divestiture Agreement

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

APPENDIX III

Haggen Divestiture Agreement

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

APPENDIX IV

Supervalu Divestiture Agreement

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

Analysis to Aid Public Comment

APPENDIX V

Monitor Agreement

APPENDIX V-1

Monitor Compensation

[Redacted From the Public Record Version]

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 Order ("Consent Order") from Cerberus Institutional Partners V, L.P. ("Cerberus"), its wholly owned subsidiary, AB Acquisition, LLC ("Albertson's"), and Safeway Inc. ("Safeway") (collectively, the "Respondents"). On March 6, 2014, Albertson's and Safeway entered into a merger agreement whereby Albertson's agreed to purchase 100% of the equity of Safeway for approximately $9.2 billion (the "Acquisition"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from the Acquisition. Under the terms of the proposed Consent Order, Respondents are required to divest 168 stores and related assets in 130 local supermarket geographic markets (collectively, the "relevant markets") in eight states to four Commission-approved buyers. The divestitures must be completed within a time-period ranging from 60 to 150 days following the date of the Acquisition.

Finally, the Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture store in the normal course of business, through the date the store is ultimately divested to a buyer.

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 any comments received, and decide whether it should withdraw the Consent Order, modify the Consent Order, or make it final.

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 removing an actual, direct, and substantial supermarket competitor in the 130 local supermarket geographic markets. The elimination of this competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices above competitive levels, unilaterally or by coordinating with remaining market participants. Similarly, absent a remedy, there is significant risk that the merged firm may decrease quality and service aspects of their stores below competitive levels. The proposed Consent Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in the relevant markets because of the Acquisition.

II. THE RESPONDENTS

AB Acquisition, LLC, owned by New York-based private equity firm Cerberus Capital Management, L.P., is the parent company of Albertson's LLC and New Albertson's, Inc. (together "Albertson's"). As of March 19, 2014, Albertson's LLC operated 630 supermarkets, primarily under its Albertson's banner. Presently, Albertson's stores are located in Arkansas, Arizona, California, Colorado, Florida, Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. Albertson's LLC also operates supermarkets in Texas under the Market Street, Amigos, and

United Supermarkets banners. United Supermarkets is a traditional grocery store, while Market Street offers specialty and "whole-health" products, and Amigos has an international and Hispanic format. As of March 19, 2014, New Albertson's, Inc., owned and operated 445 supermarkets under the Jewel-Osco, ACME, Shaw's, and Star Market banners, dispersed throughout Iowa, Illinois, Indiana, Delaware, Maryland, Pennsylvania, New Jersey, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.

As of December 2013, Safeway owned 1,332 supermarkets, making it one of the largest food and drug retailers in the United States. Stores are operated under the Safeway banner in Alaska, Arizona, California, Colorado, District of Columbia, Delaware, Hawaii, Idaho, Maryland, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Virginia, Washington, and Wyoming. Safeway also operates stores under the following banners: Pavilions, Pak 'n Save, and The Market in California; Randall's and Tom Thumb in Texas; Genuardi's in Pennsylvania; Vons in California and Nevada; and Carr's in Alaska.

III. RETAIL SALE OF FOOD AND OTHER GROCERY PRODUCTS IN SUPERMARKETS

The Acquisition presents substantial antitrust concerns for the retail sale of food and other grocery products in supermarkets. 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 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 hard discounters, limited assortment stores, natural and organic markets, ethnic specialty stores, and club stores – also sell food and grocery items. These types of retailers, however, are not in the relevant product market because they offer a more limited range of products and services than supermarkets and because they appeal to a distinct customer type. Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets.[1] Further, although these other types of retailers offer some competition, 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 excluded from the relevant product market.[2]

The relevant geographic markets in which to analyze the effects of the Acquisition are areas that range from a two- to ten-mile radius around each of the Respondents' supermarkets, depending on factors such as population density, traffic patterns, and unique characteristics of each market. Where the Respondents' supermarkets are located in rural, isolated areas, the

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

[2] *See, e.g.*, Bi-Lo Holdings, LLC/Delhaize America, LLC, Docket C-4440 (February 25, 2014); AB Acquisition, LLC, Docket C-4424 (December 23, 2013); Konkinlijke Ahold N.V./Safeway Inc., Docket C-4367 (August 17, 2012); Shaw's/Star Markets, Docket C-3934 (June 28, 1999); Kroger/Fred Meyer, Docket C-3917 (January 10, 2000); Albertson's/American Stores, Docket C–3986 (June 22, 1999); Ahold/Giant, Docket C-3861 (April 5, 1999); Albertson's/Buttrey, Docket C-3838 (December 8, 1998); Jitney-Jungle Stores of America, Inc., Docket C-3784 (January 30, 1998). *But see* Wal-Mart/Supermercados Amigo, Docket C-4066 (November 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).

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 grocery products in supermarkets in each relevant area could profitably impose a small but significant non-transitory increase in price.

The 130 geographic markets in which to analyze the effects of the Acquisition are local areas in and around: (1) Anthem, Arizona; (2) Carefree, Arizona; (3) Flagstaff, Arizona; (4) Lake Havasu, Arizona; (5) Prescott, Arizona; (6) Prescott Valley, Arizona; (7) Scottsdale, Arizona; (8) Tucson (Eastern), Arizona; (9) Tucson (Southwest), Arizona; (10) Alpine, California; (11) Arroyo Grande/Grover Beach, California; (12) Atascadero, California; (13) Bakersfield, California; (14) Burbank, California; (15) Calabasas, California; (16) Camarillo, California; (17) Carlsbad (North), California; (18) Carlsbad (South), California; (19) Carpinteria, California; (20) Cheviot Hills/Culver City, California; (21) Chino Hills, California; (22) Coronado, California; (23) Diamond Bar, California; (24) El Cajon, California; (25) Hermosa Beach, California; (26) Imperial Beach, California; (27) La Jolla, California; (28) La Mesa, California; (29) Ladera Ranch, California; (30) Laguna Beach, California; (31) Laguna Niguel, California; (32) Lakewood, California; (33) Lemon Grove, California; (34) Lomita, California; (35) Lompoc, California; (36) Mira Mesa (North), California; (37) Mira Mesa (South), California; (38) Mission Viejo/Laguna Hills, California; (39) Mission Viejo (North), California; (40) Morro Bay, California; (41) National City, California; (42) Newbury, California; (43) Newport, California; (44) Oxnard, California; (45) Palm Desert/Rancho Mirage, California; (46) Palmdale, California; (47) Paso Robles, California; (48) Poway, California; (49) Rancho Cucamonga/Upland, California; (50) Rancho Santa Margarita, California; (51) San Diego (Clairemont), California; (52) San Diego (Hillcrest/University Heights), California; (53) San Diego (Tierrasanta), California; (54) San Luis Obispo, California; (55) San Marcos, California; (56) San Pedro, California; (57) Santa Barbara, California; (58) Santa Barbara/Goleta, California; (59) Santa Clarita, California; (60) Santa Monica, California; (61) Santee, California; (62) Simi Valley, California; (63) Solana Beach, California; (64) Thousand

Oaks, California; (65) Tujunga, California; (66) Tustin (Central), California; (67) Tustin/Irvine, California; (68) Ventura, California; (69) Westlake Village, California; (70) Yorba Linda, California; (71) Butte, Montana; (72) Deer Lodge, Montana; (73) Missoula, Montana; (74) Boulder City, Nevada; (75) Henderson, (East), Nevada; (76) Henderson (Southwest), Nevada; (77) Summerlin, Nevada; (78) Ashland, Oregon; (79) Baker County, Oregon; (80) Bend, Oregon; (81) Eugene, Oregon; (82) Grants Pass, Oregon; (83) Happy Valley/Clackamas, Oregon; (84) Keizer, Oregon; (85) Klamath Falls, Oregon; (86) Lake Oswego, Oregon; (87) Milwaukie, Oregon; (88) Sherwood, Oregon; (89) Springfield, Oregon; (90) Tigard, Oregon; (91) West Linn, Oregon; (92) Colleyville, Texas; (93) Dallas (Far North), Texas; (94) Dallas (Farmers/Branch/North Dallas), Texas; (95) Dallas (University Park/Highland Park), Texas; (96) Dallas (University Park/Northeast), Texas; (97) McKinney, Texas; (98) Plano, Texas; (99) Roanoke, Texas; (100) Rowlett, Texas; (101) Bremerton, Washington; (102) Burien, Washington; (103) Everett, Washington; (104) Federal Way, Washington; (105) Gig Harbor, Washington; (106) Lake Forest Park, Washington; (107) Lake Stevens, Washington; (108) Lakewood, Washington; (109) Liberty Lake, Washington; (110) Milton, Washington; (111) Monroe, Washington; (112) Oak Harbor, Washington; (113) Olympia (East), Washington; (114) Port Angeles, Washington; (115) Port Orchard, Washington; (116) Puyallup, Washington; (117) Renton (East Hill-Meridian), Washington; (118) Renton (New Castle), Washington; (119) Sammamish, Washington; (120) Shoreline, Washington; (121) Silverdale, Washington; (122) Snohomish, Washington; (123) Tacoma (Eastside), Washington; (124) Tacoma (Spanaway), Washington; (125) Walla Walla, Washington; (126) Wenatchee, Washington; (127) Woodinville, Washington; (128) Casper, Wyoming; (129) Laramie, Wyoming; and (130) Sheridan, Wyoming.

Each of the relevant geographic markets is highly concentrated and the Acquisition would significantly increase market concentration and eliminate substantial direct competition between two significant supermarket operators. The post-Acquisition HHI levels in the relevant markets vary from 2,562 to 10,000 points, and the HHI deltas vary from 225 to 5,000 points. Under the 2010 Department of Justice and Federal Trade

Commission Horizontal Merger Guidelines ("Merger Guidelines"), an acquisition that results in an HHI in excess of 2,500 points and increases the HHI by more than 200 points is presumed anticompetitive. Thus, the presumptions of illegality and anticompetitive effects are easily met, and often far exceeded, in the relevant geographic markets at issue.

The relevant markets are also highly concentrated in terms of the number of remaining market participants post-Acquisition. Of the 130 geographic markets, the acquisition will result in a merger-to-monopoly in 13 markets and a merger-to-duopoly in 42 markets. In the remaining markets, the Acquisition will reduce the number of market participants from four to three in 43 markets, five to four in 27 markets, and six to five in five markets.[3]

The anticompetitive implications of such significant increases in market concentration are reinforced by substantial evidence demonstrating that Albertson's and Safeway are close and vigorous competitors in terms of price, format, service, product offerings, promotional activity, and location in each of the relevant geographic markets. Absent relief, the Acquisition would eliminate significant head-to-head competition between Albertson's and Safeway and would increase the ability and incentive of Albertson's to raise prices unilaterally post-Acquisition. The Acquisition would also decrease incentives to compete on non-price factors, such as service levels, convenience, and quality. Lastly, the high levels of concentration also increase the likelihood of competitive harm through coordinated interaction in markets in which Albertson's will face only one other traditional supermarket competitor post-Acquisition. Given the transparency of pricing and promotional practices among supermarkets and that supermarkets "price check" competitors in the ordinary course of business, the Acquisition increases the possibility that Albertson's and its remaining competitor could simply follow each other's price increases post-Acquisition.

New entry or expansion in the relevant markets is unlikely to deter or counteract the anticompetitive effects of the Acquisition.

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[3] *See* Exhibit A.

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. As a result, new entry sufficient to achieve a significant market impact and act as a competitive constraint is unlikely to occur in a timely manner.

IV. THE PROPOSED CONSENT ORDER

The proposed remedy, which requires the divestiture of Albertson's or Safeway supermarkets in the relevant markets to four Commission-approved up-front buyers (the "proposed buyers") will restore fully the competition that otherwise would be eliminated in these markets as a result of the Acquisition. Specifically, Respondents have agreed to divest:

- 146 stores and related assets in Arizona, California, Nevada, Oregon, and Washington to Haggen, Inc. ("Haggen");

- Two stores in Washington to Supervalu, Inc. ("Supervalu");

- 12 stores and related assets in Texas to Associated Wholesale Grocers ("AWG"); and

- Eight stores and related assets in Montana and Wyoming to Associated Food Stores ("Associated").

The proposed buyers appear to be highly suitable purchasers and are well positioned to enter the relevant geographic markets and prevent the increase in market concentration and likely competitive harm that otherwise would have resulted from the Acquisition. The supermarkets currently owned by any of the proposed buyers are all located outside the relevant geographic markets in which they are purchasing divested stores.

Haggen is a regional supermarket chain with 18 supermarkets in Washington and Oregon. Haggen will purchase all but two of the divested stores in Washington, because Haggen already

operates stores in those two geographic markets. Supervalu will purchase the two stores in Washington that Haggen is not purchasing. Supervalu is a wholesale distributor that also operates 190 corporate-owned supermarkets and previously owned these two Washington stores. AWG is a member-owned cooperative grocery wholesaler supplying nearly 3,000 supermarkets in 33 states. Although AWG does not currently own or operate any supermarkets, AWG has owned and operated corporate-owned supermarkets in the past. Finally, Associated is a member-owned cooperative grocery wholesaler that supplies and operates retail supermarkets. Associated's members operate approximately 424 grocery stores in ten states, and the cooperative, through a subsidiary, owns and operates 43 corporate-owned supermarkets located in Utah and Nevada. It is expected that AWG will assign its operating rights in the 12 Texas stores it is acquiring to RLS Supermarkets, LLC (d/b/a Minyard Food Stores) and that Associated will assign its rights in the eight Montana and Wyoming stores it is acquiring to Missoula Fresh Market LLC, Ridley's Family Markets, Inc., and Stokes Inc.

The Proposed Consent Order requires Respondents to divest: (a) the Arizona, California, Nevada, Oregon, and Washington assets to Haggen within 150 days from the date of the Acquisition; (b) the two stores in Washington to Supervalu within 100 days of the date of the Acquisition; (c) the Texas assets to AWG within 60 days of the date of the Acquisition; and (d) the Montana and Wyoming assets to Associated within 60 days of the date of the Acquisition. If, at the time before the Proposed Consent Order is made final, the Commission determines that any of the proposed buyers are not acceptable buyers, Respondents must immediately rescind the divestiture(s) and divest the assets to a different buyer that receives the Commission's prior approval.

The proposed Consent Order contains additional provisions designed to ensure the adequacy of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will be issued at the time the Proposed Consent Order is accepted for public comment. The Order to Maintain Assets requires Albertson's and Safeway to operate and maintain each divestiture store in the normal course of business, through the date

the store is ultimately divested to a buyer. Since the divestiture schedule runs for an extended period of time (potentially up to 150 days following the Acquisition date), the Proposed Consent Order appoints Richard King as a Monitor to oversee the Respondents' compliance with the requirements of the Proposed Consent Order and Order to Maintain Assets. Mr. King has the experience and skill-set to be an effective Monitor, no identifiable conflicts, and sufficient time to dedicate to this matter through its conclusion. Lastly, for a period of ten years, Albertson's is required to give the Commission prior notice of plans to acquire any interest in a supermarket that has operated or is operating in the counties included in the relevant markets.

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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.

Exhibit A

Area #	City	State	Merger Result	HHI (pre)	HHI (post)	Delta	Divested Store(s)
1	Anthem	AZ	4 to 3	2768	3423	655	SFY 1726
2	Carefree	AZ	5 to 4	2298	2976	678	ALB 979
3	Flagstaff	AZ	5 to 4	2744	3365	621	ALB 967
4	Lake Havasu	AZ	4 to 3	2609	3401	792	ALB 1027

5	**Prescott**	**AZ**	**4 to 3**	**2675**	**3405**	**730**	**ALB 953**
6	**Prescott Valley**	**AZ**	**4 to 3**	**2828**	**3340**	**512**	**ALB 965**
7	**Scottsdale**	**AZ**	**3 to 2**	**3797**	**5001**	**1204**	**ALB 983**
8	**Tucson (Eastern)**	**AZ**	**4 to 3**	**3341**	**4130**	**789**	**SFY 234 & 2611**
9	**Tucson (Southwest)**	**AZ**	**5 to 4**	**2018**	**2909**	**891**	**ALB 972**
10	**Alpine**	**CA**	**3 to 2**	**3857**	**5002**	**1145**	**SFY 2333**
11	**Arroyo Grande/ Grover Beach**	**CA**	**3 to 2**	**3690**	**6864**	**3174**	**ALB 6304**
12	**Atascadero**	**CA**	**3 to 2**	**3456**	**6242**	**2786**	**ALB 6390**
13	**Bakersfield**	**CA**	**6 to 5**	**1923**	**2562**	**639**	**ALB 6323, 6325 & 6379**
14	**Burbank**	**CA**	**3 to 2**	**4199**	**5011**	**812**	**ALB 6315**
15	**Calabasas**	**CA**	**3 to 2**	**3400**	**5415**	**2015**	**SFY 2031**
16	**Camarillo**	**CA**	**5 to 4**	**2950**	**4215**	**1265**	**ALB 6385**
17	**Carlsbad (North)**	**CA**	**4 to 3**	**2977**	**3888**	**911**	**ALB 6701**

18	**Carlsbad (South)**	**CA**	**5 to 4**	**2209**	**3210**	**1001**	**ALB 6720**
19	**Carpinteria**	**CA**	**2 to 1**	**5012**	**10,000**	**4988**	**SFY 2425**
20	**Cheviot Hills/ Culver City**	**CA**	**4 to 3**	**2394**	**3914**	**1520**	**ALB 6168 & 6169**
21	**Chino Hills**	**CA**	**4 to 3**	**3596**	**4047**	**451**	**SFY 2597**
22	**Coronado Island**	**CA**	**2 to 1**	**5025**	**10,000**	**4975**	**ALB 6747**
23	**Diamond Bar**	**CA**	**3 to 2**	**4466**	**5231**	**765**	**SFY 2062**
24	**El Cajon**	**CA**	**4 to 3**	**2983**	**3597**	**614**	**ALB 6771**
25	**Hermosa Beach**	**CA**	**5 to 4**	**2752**	**4371**	**1619**	**ALB 6127, 6138, 6153 & 6189**
26	**Imperial Beach**	**CA**	**2 to 1**	**5869**	**10,000**	**4131**	**ALB 6228**
27	**La Jolla**	**CA**	**3 to 2**	**5505**	**7083**	**1578**	**ALB 6788**
28	**La Mesa**	**CA**	**3 to 2**	**3382**	**5997**	**2615**	**SFY 2064 & 2137**
29	**Ladera Ranch**	**CA**	**2 to 1**	**5081**	**10,000**	**4919**	**SFY 2703**

30	**Laguna Beach**	**CA**	**3 to 2**	**3335**	**5799**	**2464**	**ALB 6575**
31	**Laguna Niguel**	**CA**	**4 to 3**	**3190**	**3883**	**693**	**SFY 1676**
32	**Lakewood**	**CA**	**6 to 5**	**2073**	**2581**	**508**	**ALB 6154**
33	**Lemon Grove**	**CA**	**3 to 2**	**3581**	**6059**	**2478**	**SFY 2365**
34	**Lomita**	**CA**	**3 to 2**	**3695**	**5040**	**1345**	**ALB 6107**
35	**Lompoc**	**CA**	**4 to 3**	**2566**	**3713**	**1147**	**ALB 6339**
36	**Mira Mesa (North)**	**CA**	**5 to 4**	**2412**	**3808**	**1396**	**ALB 6742 & 6772**
37	**Mira Mesa (South)**	**CA**	**2 to 1**	**6904**	**10,000**	**3096**	**ALB 6770**
38	**Mission Viejo/ Laguna Hills**	**CA**	**4 to 3**	**3157**	**3784**	**627**	**ALB 6517**
39	**Mission Viejo (North)**	**CA**	**3 to 2**	**3933**	**5012**	**1079**	**SFY 1670**
40	**Morro Bay**	**CA**	**5 to 4**	**2965**	**4056**	**1091**	**SFY 2312**
41	**National City**	**CA**	**3 to 2**	**3748**	**5013**	**1265**	**SFY 2006, 2336 & 3063**

42	**Newbury Park**	**CA**	**3 to 2**	**3629**	**5833**	**2204**	**SFY 1793**
43	**Newport Beach**	**CA**	**5 to 4**	**3160**	**3811**	**651**	**ALB 6504**
44	**Oxnard**	**CA**	**4 to 3**	**2939**	**3375**	**436**	**ALB 6217**
45	**Palm Desert/ Rancho Mirage**	**CA**	**6 to 5**	**2196**	**3094**	**898**	**SFY 2383 & 3218**
46	**Palmdale**	**CA**	**4 to 3**	**3056**	**4039**	**983**	**ALB 6329**
47	**Paso Robles**	**CA**	**4 to 3**	**2851**	**5427**	**2576**	**SFY 2317**
48	**Poway**	**CA**	**4 to 3**	**2540**	**3526**	**986**	**ALB 6741 & 6763**
49	**Rancho Cucamonga/ Upland**	**CA**	**4 to 3**	**3266**	**4118**	**852**	**ALB 6523 & 6589**
50	**Rancho Santa Margarita**	**CA**	**4 to 3**	**2628**	**4300**	**1672**	**ALB 6521**
51	**San Diego (Clairemont)**	**CA**	**3 to 2**	**4066**	**6374**	**2308**	**ALB 6781**
52	**San Diego (Hillcrest/ University Heights)**	**CA**	**3 to 2**	**4436**	**6571**	**2135**	**ALB 6714 & 6715**

53	**San Diego, CA (Tierrasanta)**	**CA**	**2 to 1**	**5586**	**10,000**	**4414**	**ALB 6760**
54	**San Luis Obispo**	**CA**	**4 to 3**	**2896**	**5306**	**2410**	**ALB 6372 & 6409**
55	**San Marcos**	**CA**	**3 to 2**	**5991**	**6282**	**291**	**SFY 2174**
56	**San Pedro**	**CA**	**3 to 2**	**3518**	**6442**	**2924**	**ALB 6160 & 6164**
57	**Santa Barbara**	**CA**	**4 to 3**	**2741**	**3462**	**721**	**ALB 6351 & 6352**
58	**Santa Barbara/ Goleta**	**CA**	**3 to 2**	**3909**	**7469**	**3560**	**SFY 2048 & 2691**
59	**Santa Clarita**	**CA**	**4 to 3**	**2646**	**3732**	**1086**	**SFY 1669 & 1961**
60	**Santa Monica**	**CA**	**4 to 3**	**3293**	**4879**	**1586**	**ALB 6162**
61	**Santee**	**CA**	**3 to 2**	**3477**	**6133**	**2656**	**ALB 6727**
62	**Simi Valley**	**CA**	**5 to 4**	**3633**	**7101**	**3468**	**ALB 6317 & 6363; SFY 2163**
63	**Solana Beach**	**CA**	**3 to 2**	**3830**	**6188**	**2358**	**ALB 6702**

64	**Thousand Oaks**	**CA**	**3 to 2**	**4057**	**6047**	**1990**	**ALB 6369**
65	**Tujunga**	**CA**	**3 to 2**	**3688**	**3969**	**281**	**ALB 6397**
66	**Tustin (central)**	**CA**	**4 to 3**	**3474**	**4348**	**874**	**SFY 2146 & 2324**
67	**Tustin/Irvine**	**CA**	**4 to 3**	**3939**	**4485**	**546**	**SFY 2822**
68	**Ventura**	**CA**	**4 to 3**	**2732**	**3550**	**818**	**ALB 6318**
69	**Westlake Village**	**CA**	**5 to 4**	**1955**	**3563**	**1608**	**ALB 6388**
70	**Yorba Linda**	**CA**	**4 to 3**	**2803**	**4588**	**1785**	**ALB 6510**
71	**Butte**	**MT**	**3 to 2**	**4701**	**5189**	**488**	**ALB 2007**
72	**Deer Lodge**	**MT**	**2 to 1**	**5000**	**10,000**	**5000**	**SFY 3256**
73	**Missoula**	**MT**	**4 to 3**	**3107**	**4063**	**956**	**SFY 1573 & 2619**
74	**Boulder City**	**NV**	**2 to 1**	**5051**	**10,000**	**4949**	**SFY 2391**
75	**Henderson (East)**	**NV**	**4 to 3**	**2705**	**3356**	**651**	**ALB 6014 & 6019**
76	**Henderson (Southwest)**	**NV**	**3 to 2**	**3653**	**5042**	**1389**	**ALB 6028**

77	**Summerlin**	**NV**	**4 to 3**	**3107**	**4367**	**1260**	**SFY 1688, 2392 & 2395**
78	**Ashland**	**OR**	**2 to 1**	**5013**	**10,000**	**4987**	**SFY 4292**
79	**Baker County**	**OR**	**2 to 1**	**5102**	**10,000**	**4898**	**ALB 261**
80	**Bend**	**OR**	**6 to 5**	**2632**	**3824**	**1192**	**ALB 587 & 588**
81	**Eugene**	**OR**	**5 to 4**	**2392**	**3414**	**1022**	**ALB 507 & 568**
82	**Grants Pass**	**OR**	**4 to 3**	**2769**	**3537**	**768**	**ALB 501 & 537**
83	**Happy Valley/ Clackamas**	**OR**	**2 to 1**	**5006**	**10,000**	**4994**	**ALB 503**
84	**Keizer**	**OR**	**5 to 4**	**2852**	**3367**	**515**	**ALB 562**
85	**Klamath Falls**	**OR**	**5 to 4**	**2511**	**2917**	**406**	**SFY 1766 & 4395**
86	**Lake Oswego**	**OR**	**4 to 3**	**3176**	**5604**	**2428**	**ALB 521**
87	**Milwaukie**	**OR**	**3 to 2**	**5729**	**6082**	**353**	**ALB 566**

88	**Sherwood**	**OR**	**3 to 2**	**3989**	**5028**	**1039**	**ALB 579**
89	**Springfield**	**OR**	**3 to 2**	**4400**	**5197**	**797**	**SFY 311**
90	**Tigard**	**OR**	**5 to 4**	**2261**	**2984**	**723**	**ALB 559, 565 & 576**
91	**West Linn**	**OR**	**3 to 2**	**3611**	**6268**	**2657**	**ALB 506**
92	**Colleyville**	**TX**	**5 to 4**	**2686**	**3465**	**779**	**SFY 3555 & 3576**
93	**Dallas (Far North)**	**TX**	**5 to 4**	**2413**	**2891**	**478**	**ALB 4140**
94	**Dallas (Farmers Branch/ North Dallas)**	**TX**	**4 to 3**	**3746**	**5175**	**1429**	**ALB 4182**
95	**Dallas (University Park/ Highland Park)**	**TX**	**4 to 3**	**2755**	**4261**	**1506**	**ALB 4134 & 4168**
96	**Dallas (University Park/ Northeast Dallas)**	**TX**	**5 to 4**	**2345**	**3065**	**720**	**ALB 4132 & 4297**
97	**McKinney**	**TX**	**5 to 4**	**2692**	**3613**	**921**	**SFY 3573**

98	**Plano**	**TX**	**4 to 3**	**3105**	**3541**	**436**	**SFY 2568**
99	**Roanoke**	**TX**	**3 to 2**	**4680**	**5351**	**671**	**ALB 4149**
100	**Rowlett**	**TX**	**3 to 2**	**3386**	**5450**	**2064**	**ALB 4197**
101	**Bremerton**	**WA**	**4 to 3**	**2721**	**3399**	**678**	**ALB 443**
102	**Burien**	**WA**	**5 to 4**	**1979**	**4489**	**2510**	**ALB 411 & 473**
103	**Everett**	**WA**	**5 to 4**	**2301**	**2586**	**285**	**SFY 517**
104	**Federal Way**	**WA**	**5 to 4**	**2312**	**2709**	**397**	**ALB 496**
105	**Gig Harbor**	**WA**	**3 to 2**	**3396**	**5235**	**1839**	**SFY 2949**
106	**Lake Forest Park**	**WA**	**5 to 4**	**3889**	**4352**	**463**	**ALB 425**
107	**Lake Stevens**	**WA**	**5 to 4**	**2646**	**3455**	**809**	**ALB 477**
108	**Lakewood**	**WA**	**5 to 4**	**2333**	**3170**	**837**	**ALB 465**
109	**Liberty Lake**	**WA**	**3 to 2**	**3483**	**5090**	**1607**	**SFY 1741**
110	**Milton**	**WA**	**3 to 2**	**3960**	**5010**	**1050**	**ALB 472**
111	**Monroe**	**WA**	**4 to 3**	**2911**	**3352**	**441**	**ALB 476**

112	**Oak Harbor**	**WA**	**3 to 2**	**4296**	**6446**	**2150**	**SFY 3518**
113	**Olympia (East)**	**WA**	**6 to 5**	**2205**	**2566**	**361**	**ALB 415**
114	**Port Angeles**	**WA**	**3 to 2**	**3773**	**5588**	**1815**	**ALB 404**
115	**Port Orchard**	**WA**	**4 to 3**	**2747**	**3362**	**615**	**SFY 1082**
116	**Puyallup**	**WA**	**3 to 2**	**4160**	**5072**	**912**	**ALB 468**
117	**Renton (East Hill-Meridian)**	**WA**	**4 to 3**	**3304**	**3719**	**415**	**ALB 470**
118	**Renton (New Castle)**	**WA**	**4 to 3**	**4417**	**5274**	**857**	**SFY 1468**
119	**Sammamish**	**WA**	**2 to 1**	**5761**	**10,000**	**4239**	**ALB 403**
120	**Shoreline**	**WA**	**4 to 3**	**3792**	**4017**	**225**	**SFY 442**
121	**Silverdale**	**WA**	**4 to 3**	**2845**	**3516**	**671**	**ALB 492**
122	**Snohomish**	**WA**	**2 to 1**	**5595**	**10,000**	**4405**	**ALB 401**
123	**Tacoma (Eastside)**	**WA**	**4 to 3**	**3260**	**3727**	**467**	**ALB 498**
124	**Tacoma (Spanaway)**	**WA**	**5 to 4**	**2707**	**3360**	**653**	**SFY 551**
125	**Walla Walla**	**WA**	**5 to 4**	**2624**	**3417**	**793**	**ALB 225**

126	**Wenatchee**	**WA**	**3 to 2**	**3744**	**5047**	**1303**	**ALB 244**
127	**Woodinville**	**WA**	**3 to 2**	**3568**	**5192**	**1624**	**ALB 459**
128	**Casper**	**WY**	**4 to 3**	**3816**	**4353**	**537**	**SFY 433 & 2468**
129	**Laramie**	**WY**	**3 to 2**	**3793**	**5000**	**1207**	**ALB 2063**
130	**Sheridan**	**WY**	**3 to 2**	**4802**	**5421**	**619**	**SFY 2664**

Complaint

IN THE MATTER OF

TT OF LONGWOOD, INC.
D/B/A
CORY FAIRBANKS MAZDA

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE CONSUMER LEASING ACT, AND REGULATION M

Docket No. C-4531; File No. 152 3047
Complaint, July 2, 2015 – Decision, July 2, 2015

This consent order addresses respondent Cory Fairbanks Mazda's dissemination of advertisements to the public. Cory Fairbanks Mazda is a Florida corporation that offers automobiles for sale or lease to consumers. The respondent violated the Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising vehicles for lease. Throughout their advertisements, the respondent leads the consumer to believe that they can purchase on of their many vehicles either with zero down payments or at a very low price. However, hidden within the fine print is information stating that their advertised prices and payment options all come after a $3,000 cash payment or trade in equity. The order is designed to prevent the respondent from engaging in similar deceptive practices in the future. The order prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle. The order 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: that the transaction advertised is a lease; the total amount due at lease signing or delivery; whether or not a security deposit is required; the number, amounts, and timing of scheduled payments; and that an extra charge may be imposed at the end of the lease term The respondent must also make all advertisements for the five years after the last date of dissemination available to the Federal Trade Commission upon request.

Participants

For the *Commission: Sana Chriss.*

For the *Respondent: Melanie Debis* and *Jami Farris, Parker Poe LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that TT of Longwood, Inc., also doing business as Cory Fairbanks Mazda ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Florida corporation with its principal office or place of business at 400 N Hwy 17-92, Longwood, FL 32750. 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 September 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 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.

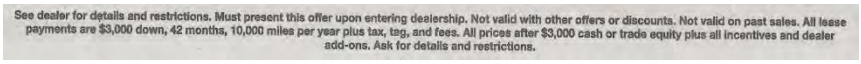
5. Respondent has placed numerous such advertisements for auto sales and leases in the *Orlando Sentinel* newspaper. A copy of one such full-page advertisement is attached as Exhibit A. This advertisement contains the statements and depictions described in Paragraphs 6 through 12 below. Respondent's advertisements in other editions of the *Orlando Sentinel* contain substantially similar statements and depictions.

6. Respondent's advertisements deceptively promote various offers for vehicles with certain features at specific sales prices.

a. For example, the bottom of the attached advertisement in Exhibit A deceptively advertises various vehicles

for purchase, including but not limited to the following advertisement for a Nissan Sentra, which is advertised as having a sunroof and spoiler, for a purchase price of $5,991.

b. Further down in the advertisement, away from the sales price and below prominent contact information and in much less prominent print, the following information states that all prices are after $3,000 cash or trade equity plus all incentives and dealer add-ons. An illustration of the disclaimer appears as follows:



7. Thus, the actual price of each of respondent's advertised vehicles is $3,000 more than the dollar amount that is prominently displayed immediately below the vehicle.

8. Additionally, in numerous instances, the advertised discount and price are subject to various qualifications or restrictions. Such qualifications or restrictions have included, for example, loyalty incentives, which in many instances amount to a $500 credit only available to prior Mazda owners. As a result, the typical consumer will not be able to obtain the vehicles at the advertised prices.

9. Further, the advertised prices do not reflect additional costs required to obtain the depicted dealer-added features such as

sunroofs and spoilers. As a result, consumers, in numerous instances, cannot purchase vehicles with specific add-ons at the advertised prices.

10. Respondent's advertisements deceptively advertise that cars may be obtained with zero down, zero payments, and zero interest as illustrated below and in Exhibit A.

a. In truth, however, these terms are not available because consumers are not able to obtain cars without making any payments. As illustrated in the disclaimer set forth in Paragraph 6(b) and Exhibit A, to purchase a vehicle, consumers must make a $3,000 down payment or provide the equivalent value in trade. To lease a vehicle, consumers also must provide a $3,000 down payment.

11. Respondent's advertisements deceptively promote "sign and drive" lease offers indicating that no down payment is required at lease signing. However, language appearing in fine print at the bottom of the advertisements states that a $3,000 down payment is required for all leases.

a. For example, the following vehicles are prominently advertised as "sign and drive" offers with monthly payments of $139 and $169, as depicted in Exhibit A and illustrated below.

b. Further down the page, the same disclaimer referenced in Paragraph 6(b) states that "All lease payments are $3,000 down, 42 months, 10,000 miles per year plus tax, tag, and fees." Thus, despite the prominent claim that consumers could "sign and drive" for no money down, all lease arrangements in fact require a significant down payment amount of $3,000.

c. Additionally, these advertisements list certain terms, such as monthly payment amounts for various lease offers, but do not provide required information, such as the total amount due prior to or at consummation of the lease.

12. Respondent's advertisements deceptively advertise "used cars for as low as $99," as depicted in Exhibit A and illustrated below.

a. In truth, however, the used cars are not available from as low as $99 because this amount is a minimum bid amount for used cars offered at a liquidation sale. In addition to this minimum bid, the liquidated cars require the payment of additional fees, including, in numerous instances, $299 in dealer fees. As a result, consumers are not able to obtain used cars for as low as $99.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

COUNT I

Misrepresentation of Vehicle Purchase Prices

13. Through the means described in Paragraphs 6 through 7, respondent has represented, expressly or by implication, that vehicles are available for purchase at the prices prominently advertised.

14. 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 Paragraph 13 were, and are, false and misleading.

15. 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 Prices and Rebates

16. Through the means described in Paragraphs 6 through 8, respondent has represented, expressly or by implication, that specific discounts, rebates, bonuses, incentives or prices are generally available to consumers.

17. In truth and in fact, the specific dealer discounts, rebates, bonuses, incentives or prices are not generally available to consumers. Therefore, respondent's representations as alleged in Paragraph 16 of this Complaint were, and are, are false or misleading.

18. 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 Prices for Added Features

19. Through the means described in Paragraphs 6 through 9, respondent has represented, expressly or by implication, that vehicles with certain features such as spoilers and sunroofs are available at specific, prominently advertised prices.

20. In truth and in fact, vehicles depicted with additional features are not available at the prominently advertised purchase prices because the extra costs of the additional features are not included in the advertised price. Therefore, respondent's representations as alleged in paragraph 19 of this Complaint were, and are, false and misleading.

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 IV

Misrepresentation that Vehicles are Available for $0 Down, $0 Payments, and $0 Interest

22. Through the means described in Paragraph 10, respondent has represented, expressly or by implication, that vehicles are available for sale or lease for zero down, zero payments, and zero interest.

23. In truth and in fact, vehicles sold and leased by respondent require a substantial down payment or the equivalent in trade equity. Additionally, vehicles sold or leased by respondent routinely require monthly payments and fees. Therefore, respondent's representations as alleged in Paragraph 22 of this Complaint were, and are, false and misleading.

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).

COUNT V

Misrepresentation of Amount Due at Lease Inception

25. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that consumers can "sign and drive" and pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount.

26. In truth and in fact, consumers cannot "sign and drive" and pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount. Consumers also must pay a $3,000 down payment amount. Therefore, respondent's representations as alleged in paragraph 25 of this Complaint were, and are, false and misleading.

27. 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 VI

Misrepresentation that Vehicles are Available for $99

28. Through the means described in Paragraph 12, respondent has represented, expressly or by implication, that consumers may purchase or lease used vehicles for very low dollar amounts, such as $99.

29. In truth and in fact, consumers cannot purchase or lease vehicles for $99 because this dollar amount is a minimum bid for vehicles offered at a liquidation event. Additionally, vehicles sold at these liquidation events often include significant fees, including dealer fees. Therefore, respondent's representations as alleged in paragraph 28 of this Complaint were, and are, false and misleading.

30. 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 CONSUMER LEASING ACT AND REGULATION M

31. 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.

32. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 11, are subject to the requirements of the CLA and Regulation M.

COUNT VII

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

33. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 11, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously additional terms required by 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.

34. Therefore, the practices set forth in Paragraph 33 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.

THEREFORE, the Federal Trade Commission, this second day of July, 2015, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

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 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 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, 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, TT of Longwood, Inc., also doing business as Cory Fairbanks Mazda, is a Florida corporation with its principal office or place of business at 400 N Hwy 17-92, Longwood, FL 32750. 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:

A. Unless otherwise specified, "respondent" shall mean TT of Longwood, Inc., also doing business as Cory Fairbanks Mazda, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. 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;

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

3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and

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

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

5. In all 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. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or Services.

E. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with 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 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 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: TT OF LONGWOOD, INC., also d/b/a CORY FAIRBANKS MAZDA.

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 July 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 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 TT of Longwood, Inc., also doing business as Cory Fairbanks Mazda. 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's complaint, the respondent has misrepresented: (1) vehicle purchase prices; (2) that advertised prices, discounts, rebates, bonuses, and incentives are available to all consumers; (3) the prices for added features such as spoilers and sunroofs; (4) that vehicles are available for sale or lease for zero down, zero payments, or zero interest; (5) that vehicles are available for $99; and (6) that consumers can pay $0 at the inception of a lease to lease the advertised vehicle for the advertised monthly payment amount. The complaint alleges therefore that the representations are false and misleading in violation of Section 5 of the FTC Act.

In addition, the complaint alleges the respondent violated the Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising vehicles for lease.

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 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. Part II.B prohibits respondent from misrepresenting 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.

Part III of the proposed order addresses the CLA allegations. Part III.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. Part III.B prohibits the respondent from violating any provision of the CLA or Regulation M.

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 term.

Complaint

IN THE MATTER OF

REYNOLDS AMERICAN INC.
AND
LORILLARD, INC.

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

Docket C-4533; File No. 141 0168
Complaint, July 13, 2015 – Decision, July 30, 2015

The consent order addresses the $27.4 billion acquisition by Reynold of certain assets of Lorillard. The proposed Reynolds American is the second largest cigarette producer in the United States with Lorillard being the third. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, by substantially lessening competition in the market for traditional combustible cigarettes. The Consent Agreement allows Reynolds to complete its acquisition of Lorillard, but requires Reynolds to divest several of its post-acquisition assets to Imperial. Among other terms, the Consent Agreement requires Reynolds to sell Imperial four of its post-acquisition cigarette brands: Winton, Kool, Salem, and Maverick. The Commission's order requires not only that the brands be divested, but also that Reynolds divest to Imperial the Lorillard manufacturing facilities in Greensboro, North Carolina, and provide Imperial with the opportunity to hire most of the existing Lorillard management, staff, and salesforce. Details about the divestiture are included in the analysis to aid public comment for this matter.

Participants

For the *Commission: James Abell, Joonsuk Lee, Meredith Levert, Victoria Lippincott. Michael Lovinger, Sean Sullivan,* and *Robert Tovsky,*

For the *Respondents: Joe Sims* and *Craig Waldman, Jones Day; Sara Razi* and *Matthew Reilly, Simpson Thacher.*

COMPLAINT

As authorized by the Clayton Act and the Federal Trade Commission Act, the Federal Trade Commission ("Commission"), having reason to believe that Reynolds American Inc. ("Reynolds"), a corporation subject to the

jurisdiction of the Commission, has agreed to acquire Lorillard, Inc. ("Lorillard"), 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 on this matter would be in the public interest, issues this Complaint, stating the following charges.

I.RESPONDENTS

1. Respondent Reynolds is a corporation existing and doing business under and by virtue of the laws of North Carolina, with its office and principal place of business at 401 North Main Street, Winston-Salem, North Carolina 27101. Directly or by a subsidiary, Reynolds sold approximately 70 billion cigarettes throughout the United States in 2014.

2. Respondent Lorillard is a corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business at 714 Green Valley Road, Greensboro, North Carolina, 27408-7018. Directly or by a subsidiary, Lorillard sold approximately 39 billion cigarettes throughout the United States in 2014.

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

II.THE PROPOSED ACQUISITION

4. Pursuant to an agreement executed on July 15, 2014 (the "Agreement"), Reynolds proposes to acquire all of the voting securities of Lorillard for approximately $27.4 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

5. The relevant line of commerce for analyzing the Acquisition is the design, manufacture, and sale of traditional combustible cigarettes ("cigarettes").

6. The relevant geographic area for analyzing the Acquisition is the United States.

IV.THE STRUCTURE OF THE MARKET

7. The U.S. cigarette market is already concentrated. After the acquisition, Altria Group, Inc. and Reynolds would have approximately 90% of all U.S. cigarette sales. As measured by the Herfindahl-Hirschman Index, the Acquisition would increase the concentration index of the market by roughly 775 points, to a post-merger level of roughly 4,250. This increase in concentration far exceeds the thresholds set out in the *Horizontal Merger Guidelines* for raising a presumption that the Acquisition would create or enhance market power.

V.BARRIERS TO ENTRY AND EXPANSION

8. Entry and expansion by other cigarette producers would not deter or counteract the anticompetitive harm of the Acquisition. Entry is unlikely in light of the statutory and regulatory barriers to product development and advertising, and the contractual barriers to securing visible shelf space at retail.

VI.EFFECTS OF THE ACQUISITION

9. The Acquisition, if consummated, is likely to substantially lessen competition for the retail sale of cigarettes in the United States in the following ways, among others:

a. by eliminating current and emerging competition between Respondents Reynolds and Lorillard;

b. by increasing the likelihood that Respondent Reynolds will unilaterally exercise market power; and

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

VII. VIOLATIONS CHARGED

10. 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.

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 thirtieth day of July, 2015, issues this Complaint against the Respondents.

By the Commission, Commissioner Brill and Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Respondent Lorillard, Inc. ("Lorillard"), by Respondent Reynolds American Inc. ("Reynolds"), 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 Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Reynolds American Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of North Carolina with its office and principal place of business at 401 North Main Street, Winston-Salem, NC 27101.

2. Respondent Lorillard, Inc., is a corporation 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 714 Green Valley Road, Greensboro, NC 27401.

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 Order, the following definitions shall apply:

A. "Reynolds" means Reynolds American Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Reynolds American Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "Imperial" means Imperial Tobacco Group PLC, a public limited company incorporated under the laws of England and Wales with its headquarters and principal place of business located at 121 Winterstoke Road Bristol BS3 2LL, United Kingdom. Imperial Tobacco Group PLC's U.S. subsidiaries are ITG Brands, LLC, a Texas limited liability company (f/k/a Lignum-2, L.L.C.), and Commonwealth Altadis, Inc., with its principal place of business located in Fort Lauderdale, Florida.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means Imperial or any Person that receives the prior approval of the Commission to acquire the Combined Cigarette Business pursuant to this Decision and Order.

F. "Acquisition" means the proposed acquisition by Reynolds of Lorillard as described in the Agreement and Plan of Merger, dated as of July 15, 2014, between Respondents Reynolds and Lorillard.

G. "Acquisition Date" means the date the Acquisition is consummated.

H. "Assets" means the tangible and intangible assets related to the manufacture, distribution, and sale of the Reynolds Cigarette Brands and Lorillard Cigarette Brand. Such assets include, among other things:

1. All Business Records relating to the research, development, manufacture, distribution, marketing or sale of the Brands including, but not limited to:

   a. Brand profit and loss statements, contribution statements, advertising, promotional and marketing spend records for each Brand since January 1, 2010;

   b. A list of all direct customers who have bought the Brands from Reynolds and Lorillard at any time from January 1, 2010, including names and addresses, telephone numbers of the individual customer contracts, and unit and dollar amount of sales, by Brand, for each customer;

   c. All names of manufacturers and suppliers under contract, and the contract, with Respondent Reynolds or Respondent Lorillard who produce for, or supply to, Respondent Reynolds or Respondent Lorillard, as applicable, in connection with the manufacture or sale of each of the Brands; and

   d. All current and projected advertising, promotional, and marketing information, materials, and programs specifically dedicated to the sale and distribution of each of the

Brands including, but not limited to, sales training materials, consumer research (quantitative and qualitative), pricing and marketing research and documents, advertising and promotions.

2. A bill of materials for each of the Brands, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including a list of authorized sources for materials and components;

3. Machinery used for the manufacture of the Brands;

4. Finished goods inventories uniquely related to each of the Brands and Lorillard Cigarette Brand packaging;

5. All fixtures, shelving, and point of sale materials, owned by Respondent Lorillard at any retail or wholesale location relating to the Lorillard Cigarette Brand;

6. Trademarks, trade dress, trade secrets, technical information, Intellectual Property, Patents, manufacturing technology, know-how, tobacco content formulae, designs, specifications, drawings, processes, quality control data, and any other intellectual property exclusively related to any of the Brands;

7. A copy of all testing and results required by any regulatory authority specific to the Brands from January 1, 2010, including but not limited to tar and nicotine content testing, and all regulatory registrations and correspondence;

8. A copy and license to all internal toxicology testing and historical test data of the Lorillard and Reynolds research and development staff including, but not limited to, animal testing and

ingredient databases relating to the Lorillard Cigarette Brand and the Reynolds Cigarette Brands, respectively;

9. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body, including, but not limited to the Food and Drug Administration, or pursuant to any legal requirement relating to the research, development, manufacture, distribution, marketing or sale of the Brands, and all pending applications therefor or renewals thereof;

10. All price lists for each of the Brands from January 1, 2010.

Provided, however,, that "Assets" does not include any asset, described above, that is not included in the Remedial Agreement that receives the Commission's approval.

I. "Brands" means, collectively, the Reynolds Cigarette Brands and the Lorillard Cigarette Brand.

J. "Business Records" means all originals and all copies of any operating, financial or other information, documents, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: distributor files and records; customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, customer approvals, and other information; credit records and information; correspondence; referral sources; supplier and vendor files and lists; advertising, promotional, and marketing

materials, including website content; sales materials; research and development data, files, and reports; technical information; data bases; studies; designs, drawings, specifications and creative materials; production records and reports; service and warranty records; equipment logs; operating guides and manuals; employee and personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind.

K. "Cigarette" means any roll of tobacco wrapped in paper not containing tobacco.

L. "Combined Cigarette Business" means the Reynolds Cigarette Business and the Lorillard Cigarette Business.

M. "Confidential Business Information" means Business Records and Intellectual Property (together "Information") owned by, or in the possession or control of, Respondent Reynolds that is not in the public domain and that is directly related to the Combined Cigarette Business. *provided, however*, that the term "Confidential Business Information" *EXCLUDES* the following Information:

1. Information relating to any of Respondent Reynolds' general business strategies or practices:

   a. that are not divested pursuant to this Order; and

   b. do not discuss exclusively the Reynolds Cigarette Brands or Lorillard Cigarette Brand, or

   c. are aggregated Information that includes Information about Reynolds Cigarette Brands or Lorillard Cigarette Brand

2. Information not divested to the Acquirer pursuant to a Remedial Agreement including, but not limited to, Information permitted to be retained by

Respondent Reynolds under the Remedial Agreement;

3. Information that is:

   a. provided to an Acquirer; and

   b. is unrelated to the Combined Cigarette Business acquired by that Acquirer; or

   c. is exclusively related to businesses or products retained by Respondent Reynolds;

4. Information provided to Respondent Reynolds, by third parties, including, but not limited to, wholesalers, retailers, or third party data providers such as Management Sciences Associates, Inc., Burke Inc., Information Resources, Inc., Capstone Research, Inc., Nielsen, Bellomy Research, Inc., MARC Research, Lieberman Research Inc., BuzzBack, and TNS Custom Research, Inc.;

5. Information obtained by Respondent Reynolds, after the Divestiture Date, concerning the competitive or other activities of the Acquirer;

6. 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 law;

7. Information that Respondent Reynolds demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:

   a. Was or becomes generally available to the public other than as a result of disclosure by Respondent Reynolds;

   b. Is necessary to be included in Respondent Reynolds' mandatory regulatory filings;

c. Was available, or becomes available, to Respondent Reynolds on a non-confidential basis, but only if, to the knowledge of Respondent Reynolds, the source of such Information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the Information;

d. Is Information the disclosure of which is consented to by the Acquirer;

e. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement;

f. Is disclosed in complying with the Order;

g. Is Information the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or

h. Is disclosed in obtaining legal advice.

N. "Cost-Plus Price" means a cost not to exceed a ten percent premium on the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the product or service or are reasonably allocated to the provision of such product or service.

O. "Designated Employee" means employees of Respondent Lorillard who are or have worked for Respondent Lorillard since July 15, 2014, including, but not limited to, employees at the Lorillard Manufacturing Facility, Respondent Lorillard sales personnel, and executives, *EXCEPT* for those Persons listed on Non-Public Appendix C.

P. "Divestiture Date" means the date on which Respondent Reynolds (or a Divestiture Trustee) close

on the divestiture of the Combined Cigarette Business as required by Paragraph II (or Paragraph IV) of this Order.

Q. "Imperial Divestiture Agreement" means the Asset Purchase Agreement, dated as of July 15, 2014, as amended, between Respondent Reynolds and Imperial for the divestiture of the Combined Cigarette Business attached, partially as Non-public Appendix A, and partially as Appendix B (public portions), including all amendments, exhibits, attachments, agreements (including an agreement between Respondent Lorillard and Imperial), and schedules, negotiated by the parties up to the date approved by the Commission, thereto, including, but not limited to:

1. the following documents, including all amendments, exhibits, attachments, agreements, and schedules thereto, between Respondent Reynolds and Imperial:

   a. Route to Market Agreement, Exhibit C to the Asset Purchase Agreement, dated as of July 15, 2014;

   b. Transition Services Agreement;

   c. the Reciprocal Manufacturing Agreement, ("Reynolds-Imperial Reciprocal-Manufacturing Agreement");

   d. the Patent License Agreement;

   e. the Substantial Equivalence License Agreement;

   f. the Supply Agreement For Reconstituted Tobacco;

   g. the Retained Trademark and Retained UPC Codes Agreement;

h. the Document Access, Return, and Preservation Agreement;

i. the RAI Information Protection Agreement;

j. the Imperial Information Protection Agreement; and

2. The Transfer Agreement, between Respondent Lorillard and Imperial as Exhibit I to the Asset Purchase Agreement, dated as of July 15, 2014, including all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Intellectual Property" means:

1. Patents, and the 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;

2. product manufacturing technology, including process technology, technology for equipment, inspection technology, and research and development of product or process technology;

3. product and manufacturing copyrights;

4. all plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the non-exclusive right to use Patents, know-how, and other intellectual property relating to such plans);

5. product trademarks, trade dress, trade secrets, technology, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information,

formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the products, including, but not limited to, 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 any Government Entity approvals and compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

6. licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Respondents;

7. formulations and a description of all ingredients, materials, or components used in the manufacture of products; and

8. any other intellectual property used in the past by Respondents in the design, manufacture, and sale of the Brands.

S. "Lorillard Cigarette Brand" means the following brand of Cigarettes in the U.S.: Maverick.

T. "Lorillard Cigarette Business" means:

1. The Lorillard Cigarette Brand Assets;

2. The Lorillard Manufacturing Facility.

U. "Lorillard Manufacturing Facility" means the infrastructure and factory located at East Market St., Greensboro, N.C. 27401, including, but not limited to, all real property interests (including fee simple

interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondent Lorillard, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the research, development, manufacture, distribution, marketing or sale of the Lorillard Cigarette Business. *provided, however*, that parts, inventory, designs, or other assets held for use exclusively by or for the Lorillard Retained Business, may be excluded.

Provided, further, however, that "Lorillard Manufacturing Facility" does not include any real property interests or Tangible Personal Property, described above, that is not included in the Remedial Agreement that receives the Commission's approval.

V. "Lorillard Migration Manufacturing Machinery" means the machinery located at the Lorillard Manufacturing Facility that will be moved to a manufacturing facility owned by, or operated by or on behalf of, Respondent Reynolds as a part of the Imperial Divestiture Agreement.

W. "Lorillard Retained Business" means the assets and businesses of Respondent Lorillard, other than the Lorillard Cigarette Business, and the Lorillard Migration Manufacturing Machinery.

X. "Order Date" means the date on which this Decision and Order is issued by the Commission.

Y. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents.

Z. "Patents" means pending patent applications, including provisional patent applications, invention

disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, 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.

AA. "Remedial Agreement" means:

1. the Imperial Divestiture Agreement if such agreement has not been rejected by the Commission; or

2. any agreement between Respondent Reynolds 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 Respondent Reynolds to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order.

BB. "Reynolds Cigarette Brands" means the following brands of Cigarettes in the U.S.: Winston, Salem, and KOOL.

CC. "Reynolds Cigarette Business" means:

1. The Reynolds Cigarette Brands Assets; and

2. The Reynolds Migration Manufacturing Machinery.

DD. "Reynolds Migration Manufacturing Machinery" means the machinery located at Respondent Reynolds' Tobaccoville cigarette manufacturing facility, located at 7855 King Tobaccoville Road, Tobaccoville, NC 27050, that will be moved to a manufacturing facility owned by, or operated by or on behalf of, Imperial as a part of the Imperial Divestiture Agreement.

Provided, however, that "Reynolds Migration Manufacturing Machinery" does not include any machinery, described above, that is not included in the Remedial Agreement that receives the Commission's approval.

EE. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased by Respondents, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

FF. "Transitional Assistance" means transitional services that may be required by the Acquirer for the operation of the divested business including, but not limited to administrative assistance (including, but not limited to, order processing, shipping, accounting, and information transitioning services), technical assistance, and supply agreements.

II.

IT IS FURTHER ORDERED that:

A. On the Acquisition Date, Respondent Reynolds shall divest the Combined Cigarette Business, absolutely and in good faith, to Imperial, pursuant to, and in accordance with, the Imperial Divestiture Agreement. The Imperial Divestiture Agreement (which includes,

among other things, the divestiture agreement, supply agreements, and transition services agreements) between Respondent Reynolds and Imperial shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Imperial, or to reduce any obligations of Respondent Reynolds under such Imperial Divestiture Agreement, and such Imperial Divestiture Agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, that if Respondent Reynolds has divested the Combined Cigarette Business to Imperial prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Reynolds that Imperial is not an acceptable purchaser of the Combined Cigarette Business, then Respondent Reynolds shall immediately rescind the transaction with Imperial, in whole or in part, as directed by the Commission, and shall divest the Combined Cigarette Business, including, as directed by the Commission, adding assets related to the Brands that are not included in the Combined Cigarette Business, 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 Reynolds has divested the Combined Cigarette Business to Imperial prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Reynolds that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Reynolds, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the

Combined Cigarette Business (including, but not limited to, entering into additional agreements or arrangements, or adding assets related to the Brands that are not included in the Combined Cigarette Business) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent Reynolds shall provide:

1. at the Acquirer's option and approved by the Commission as part of the Remedial Agreement, Transitional Assistance:

   a. sufficient to enable the Acquirer to operate the divested business in substantially the same manner that Respondents conducted the divested assets and business prior to the divestiture; and

   b. at substantially the same level and quality as such services are provided by Respondents in connection with their operation of the divested assets and businesses prior to the divestiture.

2. Transitional Assistance included in the Imperial Divestiture Agreement includes, but is not limited to:

   a. An agreement that, among other things, provides for the supply to Imperial Cigarettes from the Reynolds Cigarette Brands for a period, at Imperial's option, of up two (2) years from the Divestiture Date, with an option for Imperial for successive one-year extensions;

   b. An agreement relating to the Reynolds Migration Manufacturing Machinery which involves the removal, transfer, and reinstallation of Respondent Reynolds' machines that manufacture the Reynolds Cigarette Brands (including machines for

manufacturing filters) as directed by Imperial; and

c. An agreement that allows for, among other things, Imperial access for a period of time to certain signage and shelf space at retail locations previously occupied or used by the Lorillard Cigarette Brand.

3. Transitional Assistance not included in the Remedial Agreement, if requested by the Acquirer within one (1) year after the Divestiture Date, and if the Monitor, after consultation with Respondent Reynolds, and approved by Commission staff, believes such additional assistance is necessary for the Acquirer to operate the Combined Cigarette Business. *provided, however*,, that Respondent Reynolds shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the Cost-Plus Price of providing such goods and services, or (ii) limit the damages (such as indirect, special, and consequential damages) which an Acquirer would be entitled to receive in the event of Respondent Reynolds' breach of any agreement to provide Transitional Assistance.

C. Respondents shall not terminate or modify any agreement that is part of the Remedial Agreement before the end of the agreement, as approved by the Commission, without prior approval of the Commission.

D. Until the Divestiture Date, Respondents shall take such actions as are necessary to:

1. maintain the full economic viability and marketability of the Combined Cigarette Business;

2. minimize any risk of loss of competitive potential for the Combined Cigarette Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Combined Cigarette Business; and

4. not sell, transfer, encumber, or otherwise impair the Combined Cigarette Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Combined Cigarette Business.

E. No later than from the date Respondents execute the Consent Agreement, Respondents shall provide a proposed Acquirer with the opportunity to recruit and employ any Designated Employee in conformance with the following:

1. No later than ten (10) days after a request from a proposed Acquirer, or staff of the Commission, Respondents shall provide a proposed Acquirer with the following information for each Designated Employee, to the extent permitted by law:

   a. name, job title or position, date of hire and effective service date;

   b. a specific description of the employee's responsibilities;

   c. the base salary or current wages;

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

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

   f. any other material terms and conditions of employment in regard to such employee that

are not otherwise generally available to similarly-situated employees; and

g. at a proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Designated Employee(s).

2. No later than ten (10) days after a request from a proposed Acquirer, Respondents shall provide the proposed Acquirer with an opportunity:

   a. to meet, personally and outside the presence or hearing of any employee or agent of Respondent, with any Designated Employee;

   b. to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws; and

   c. to make offers of employment to any Designated Employee.

3. Respondents shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Designated Employee, (ii) not offer any incentive to any Designated Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Designated Employee who receives a written offer of employment from a proposed Acquirer; *provided, however*,, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; and (iv) remove any impediments within the control of Respondents that may deter any Designated Employee from accepting employment with a proposed Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other

contracts with Respondents that would affect the ability of such employee to be employed by a proposed Acquirer.

F. For a period of two (2) years after the Divestiture Date, Respondent Reynolds shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by the Acquirer, to terminate his or her employment relationship with an Acquirer; *provided, however*,, Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so long as these actions are not targeted specifically at any Acquirer employee; and

2. Hire employees of the Acquirer who apply for employment with Respondent Reynolds, so long as such individuals were not solicited by Respondents in violation of this paragraph; *provided, further, however*, that this sub-Paragraph shall not prohibit Respondent Reynolds from making offers of employment to or employing any employee of the Acquirer if the Acquirer has notified Respondent Reynolds in writing that an Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by an Acquirer.

G. The purpose of this Paragraph II is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents, minimize the loss of competitive potential for the Combined Cigarette Business, to prevent the destruction, removal, wasting, deterioration, or impairment of the Combined Cigarette Business, except for ordinary wear and tear, 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. Except in the course of (i) performing its obligations under the Remedial Agreement, (ii) complying with tax and financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Combined Cigarette Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Combined Cigarette Business, or (iii) as required by law or expressly allowed under this Order,

1. Respondent Reynolds shall not:

   a. provide, disclose or otherwise make available any Confidential Business Information to any Person;

   b. use any Confidential Business Information to interfere with any suppliers, distributors, resellers, or customers of the Acquirer.

2. Respondent Reynolds shall make all reasonable efforts to maintain the confidentiality of the Confidential Business Information in the regulatory reportings or filings, as described, above.

B. The purpose of this Paragraph III is to minimize the risk of disclosure of unauthorized use of Confidential Business Information.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested the Combined Cigarette Business and otherwise fully complied with the obligations as required by Paragraph II.A of this Order, the Commission may appoint a Divestiture Trustee to divest the Combined Cigarette Business, including the addition of assets related to the Brands that are not included in the Combined Cigarette Business, in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

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

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.

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

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

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court; *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 IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Reynolds' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided, further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of

Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of 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. For purposes of this Paragraph IV.E.6., the term "Divestiture Trustee" shall include all persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.5. of this Order.

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

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) 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.

10. The Commission may require, among other things, 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 IV.

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:

A. The Remedial Agreement 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 an Acquirer or to reduce any obligations of the Respondents under such Remedial Agreement.

B. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all provisions of the Remedial Agreement, and any breach by Respondents of any term of such Remedial Agreement shall constitute a violation of this Order. If any term of the Remedial Agreement varies from the terms of this Order, then to the extent that Respondents cannot fully comply with both terms, the terms of this Order shall determine Respondents' obligations under this Order.

VI.

IT IS FURTHER ORDERED that:

A. Dennis Hatchell shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Reynolds and attached as Appendix D ("Monitor Agreement") and Non-Public Appendix E ("Monitor Compensation"). The Monitor is appointed to assure that Respondent Reynolds expeditiously comply with all of its obligations and perform all of its responsibilities as required by this Order.

B. No later than one (1) day after the Acquisition Date, the Monitor Agreement shall require that Respondent Reynolds transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order,

and Respondent Reynolds shall effectuate such transfer.

C. Respondent Reynolds shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent Reynolds' compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:

   a. Assuring that Respondent Reynolds expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Order in this matter;

   b. Monitoring any Transitional Assistance;

   c. Assuring that Confidential Business Information is not received or used by Respondent Reynolds or the Acquirer, except as allowed in the Order in this matter.

2. The Monitor shall have the power and authority to monitor Respondent Reynolds' compliance with the divestiture and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission

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

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Reynolds' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Reynolds' compliance with its obligations under the Order, including, but not limited to, its obligations related to the Combined Cigarette Business.

E. Respondent Reynolds shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Reynolds' compliance with the Order.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent Reynolds, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondent Reynolds, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondent Reynolds 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. For purposes of this Paragraph VI.G., the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VI.F. of this Order.

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

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

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

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

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

Reynolds shall be deemed to have consented to the selection of the proposed Monitor.

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

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

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

VII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraph II.A., II.B.2.b. (completion of the manufacturing migration of Respondent Reynolds' machines to Imperial and production of cigarettes on the migrated machines pursuant to Exhibit F to the Reynolds-Imperial Reciprocal-Manufacturing Agreement), and II.E. of this Order, Respondent Reynolds 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 Order. Respondent Reynolds shall include in its compliance reports, among other things that are required from time to time, a full

description of the efforts being made to comply with the Order; and

B. One (1) year after the date this Order becomes final and annually thereafter until this Order terminates, and at such other times as the Commission may request, Respondent Reynolds shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with the Order and any Remedial Agreement.

VIII.

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

A. to any proposed dissolution of Respondent Reynolds;

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

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

IX.

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

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

Agreement and/or the Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents;

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on July 30, 2025.

By the Commission, Commissioner Brill and Commissioner Wright dissenting.

NON-PUBLIC APPENDIX A

IMPERIAL DIVESTITURE AGREEMENT (CONFIDENTIAL PORTIONS)

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

APPENDIX B

Imperial Divestiture Agreement
(Public Portions)

EX-2.2 3 d757470dex22.htm EX-2.2

Exhibit 2.2

EXECUTION COPY

ASSET PURCHASE AGREEMENT

dated as of July 15, 2014

among

REYNOLDS AMERICAN INC.,

LIGNUM-2, L.L.C.,

and for purposes of certain provisions and as guarantor of certain obligations of Lignum-2, L.L.C.,

IMPERIAL TOBACCO GROUP PLC

Decision and Order

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EXHIBITS

Decision and Order

This ASSET PURCHASE AGREEMENT, dated July 15, 2014, is made among REYNOLDS AMERICAN INC., a North Carolina corporation ("RAI"), LIGNUM-2, L.L.C., a Texas limited liability company and wholly owned subsidiary of Imperial (the "Acquiror"), and, for purposes of Section 6.05 and ARTICLE XII, and as guarantor (pursuant to Section 6.24) of certain obligations of the Acquiror, IMPERIAL TOBACCO GROUP PLC, a public limited company incorporated under the laws of England and Wales ("Imperial"). (RAI, the Acquiror, and solely for purposes of Sections 6.05 and 6.24 and ARTICLE XII, Imperial are each referred to herein as a "Party" and, collectively, as the "Parties".)

PRELIMINARY STATEMENTS

A. RAI holds, directly or indirectly, all of the outstanding shares of, or ownership interests in, the entities identified as asset sellers or transferors of Liabilities set forth in Section 1.01 of the Disclosure Schedule (such entities, the "RAI Asset Owners", and together with RAI, the "RAI Parties").

B. Lorillard, Inc., a Delaware corporation ("Lorillard"), holds, directly or indirectly, all of the outstanding shares of, or ownership interests in, the entities identified as Lorillard asset owners set forth in Section 1.01 of the Disclosure Schedule (such entities collectively, with Lorillard, the "Lorillard Asset Owners"). Each of the RAI Parties and the Lorillard Asset Owners are each referred to herein as a "Seller" and, collectively, as the "Sellers".

C. Pursuant to the Agreement and Plan of Merger, dated as of July 15, 2014, among RAI, Lorillard and Lantern Acquisition Co. (the "Merger Agreement"), Lantern Acquisition Co. has agreed, upon the terms and subject to the conditions set forth in the Merger Agreement, to merge with and into Lorillard, with Lorillard as the surviving corporation, such that RAI would, following the Effective Time of the Merger, own 100% of the outstanding capital stock of Lorillard and, through Lorillard, the other Lorillard Asset Owners (such transaction, the "Merger").

D. The RAI Asset Owners are, as of the date of this Agreement, collectively engaged in, among other things, the business of the development, design, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing and promotion of certain tobacco cigarette brands known as Winston, KOOL and Salem (collectively, the "RAI Brands"). The Lorillard Asset Owners are, as of the date of this Agreement, collectively engaged in, among other things, the business of the development, design, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing and promotion of a tobacco cigarette brand known as Maverick, an "e-vapor" brand known as blu (including SkyCig) (collectively, the "Lorillard Brands") and other tobacco cigarette brands (the business of the Lorillard Brands and such other tobacco cigarette brands, the "Lorillard Business").

E. Subject to the consummation of the Merger, RAI wishes to sell, and to cause the RAI Asset Owners (and, after consummation of the Merger, cause the Lorillard Asset Owners) to sell, to the Acquiror, and the Acquiror wishes to purchase from the RAI Asset Owners and Lorillard Asset Owners, (a) certain of the assets of the RAI Asset Owners and the

Lorillard Asset Owners relating to the Acquired Tobacco Cigarette Brands, (b) all of the assets of the Lorillard Asset Owners used or held for use primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the Lorillard Business (it being understood that certain of such assets will be transferred to the Acquiror by the Lorillard Asset Owners prior to the Effective Time of the Merger pursuant to the Lorillard Transfer Agreement), other than the Excluded Assets, including those Excluded Assets related to the Retained Lorillard Brands, (c) certain of the assets of the RAI Asset Owners used or held for use primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the PR Business, and (d) certain other specified assets of the RAI Asset Owners and Lorillard Asset Owners, in each case, upon the terms and subject to the conditions set forth in this Agreement. In addition, the Acquiror wishes to assume, and RAI wishes to have the Acquiror assume, certain liabilities of the RAI Asset Owners and Lorillard Asset Owners relating to the Acquired Tobacco Cigarette Brands, the Lorillard Business, the PR Business and the other Transferred Assets (defined in Section 2.01(a)), in each case, upon the terms and subject to the conditions set forth in this Agreement (and, in the case of certain of the Transferred Assets transferred by the relevant Lorillard Asset Owners, the Lorillard Transfer Agreement). Except as set forth in Recital H below, the sale and purchase referred to above shall take place at the Closing (as defined in Section 2.03), which is expected to occur immediately after the Effective Time of the Merger.

F. The board of directors of Imperial (the "Imperial Board") has unanimously (a) determined that the transactions contemplated by this Agreement will promote the success of Imperial, (b) adopted resolutions approving this Agreement and the transactions contemplated by this Agreement and (c) resolved to recommend, subject to Section 6.05, that the shareholders of Imperial approve the transactions contemplated by this Agreement.

G. (a) Prior to the Closing, one or more Affiliates of RAI and the Acquiror, or one or more Affiliates of the Acquiror, will execute and deliver the transitional services agreement (the "TSA") on terms mutually agreeable to RAI and the Acquiror, which terms will be consistent with the terms set out in Exhibit B, and (b) on the date of this Agreement, RAI and the Acquiror executed and delivered the route to market agreement in the form attached hereto as Exhibit C (the "Route to Market Agreement").

H. In connection with the execution of this Agreement and the Merger Agreement, and in furtherance of the transactions contemplated hereby and thereby, the Acquiror and Lorillard have entered into an asset transfer agreement in the form attached hereto as Exhibit I (the "Lorillard Transfer Agreement") pursuant to which the relevant Lorillard Asset Owners will transfer and assign to the Acquiror or one or more of its designated Affiliates, and the Acquiror or one or more of its designated Affiliates will acquire and assume from the relevant Lorillard Asset Owners, certain of the assets and liabilities of such Lorillard Asset Owners relating to the Lorillard Business, in each case, as specified in and upon the terms and subject to the conditions set forth in the Lorillard Transfer Agreement. The consideration for the assets transferred and liabilities assumed under the Lorillard Transfer Agreement shall be paid hereunder to RAI or its designee as a specifically allocated part of the Purchase Price (the "Lorillard Transfer Payment"). The transfer of the assets, payment of the Lorillard Transfer Payment and the assumption of liabilities under the Lorillard Transfer Agreement shall take place at a closing (the "Lorillard Transfer Closing") that shall be held immediately prior to the Effective Time of the Merger in accordance with, and subject to, the terms and conditions of the Lorillard Transfer Agreement.

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I. Each member of the Imperial Board has advised the Acquiror that he or she intends to vote all of his or her ordinary shares of Imperial held by him or her in favor of the Imperial Shareholder Resolution.

NOW, THEREFORE, in consideration for the premises and mutual covenants, representations, warranties and agreements hereinafter set forth, the Parties agree as follows:

ARTICLE I

DEFINITIONS

Section 1.01. Certain Defined Terms. Capitalized terms used in this Agreement shall have the meanings specified in Exhibit A to, or elsewhere in, this Agreement.

ARTICLE II

PURCHASE AND SALE

Section 2.01. Purchase and Sale of the Assets.

(a) Transferred Assets. Upon the terms and subject to the conditions set forth in this Agreement, (1) RAI shall, and shall cause the other Sellers to, and (2) pursuant to the Lorillard Transfer Agreement with respect to certain assets of the Lorillard Asset Owners, Lorillard shall, and shall cause the Lorillard Asset Owners to, sell, convey, assign, transfer and deliver to the Acquiror (or one or more of its designated Affiliates, including, in the case of the blu Brand Intellectual Property, Dutch IPCo), at the Closing or the Lorillard Transfer Closing, as the case may be, free and clear of all Liens, except for Permitted Liens, and the Acquiror (or one or more of its designated Affiliates, including, in the case of the blu Brand Intellectual Property, Dutch IPCo) shall purchase, acquire and accept from RAI or the other Sellers at the Closing or the Lorillard Transfer Closing, as the case may be, all of the Sellers' right, title and interest in and to (x) other than Excluded Assets and the Retained Lorillard Brands, all of the assets, properties and rights used or held for use primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of the PR Business or the Lorillard Business, and (y) all of the following assets, properties and rights ((x) and (y) collectively, the "Transferred Assets"):

(i) (A) the owned real property listed in Section 2.01(a)(i)(A) of the Disclosure Schedule (the "Transferred Owned Property"), together with all improvements and fixtures and all appurtenances thereto and rights in respect thereof, and (B) all interests, rights and benefits under the leases and other agreements relating to the leased real property listed in Section 2.01(a)(i)(B) of the Disclosure Schedule (collectively, the "Transferred Leased Property");

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(ii)

(A) all raw materials, work-in-process, finished goods and products, supplies, packaging, packaging materials, parts and other inventories used or held for use primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the business of the blu Brand, wherever located, including any such being held on consignment, bailment, or other arrangement (collectively, the "blu Brand Inventory");

(B) all finished goods inventories related to the RAI Brands, wherever located, including any such being held on consignment, bailment or other arrangement (collectively, the "RAI Brands Finished Goods");

(C) all finished goods inventories related to the Maverick Brand, wherever located, including any such being held on consignment, bailment or other arrangement (collectively, the "Maverick Brand Finished Goods");

(D) (1) a portion of the tobacco leaf inventory and reconstituted tobacco sheets of the Lorillard Asset Owners equal to the Maverick Brand MSAI Percentage and (2) all other raw materials, work-in-process, supplies, packaging and packaging materials (including all branded packaging and packaging materials), and other inventories of the Lorillard Asset Owners, wherever located ((1) and (2) collectively, the "Lorillard Raw Materials Inventory"); and

(E) title to a portion of the RJRT Tobacco Inventory equal to the RAI Brands MSAI Percentage (collectively, the "RAI Leaf"); provided that possession of all such RAI Leaf will remain with RAI or one of its Affiliates and the risk of loss with respect to such RAI Leaf will remain with RAI or one of its Affiliates, as applicable, until such time as it is delivered to the Acquiror or one of its Affiliates under the Reciprocal Manufacturing Agreement (blu Brand Inventory, RAI Brands Finished Goods, Maverick Brand Finished Goods, Lorillard Raw Materials Inventory and RAI Leaf collectively, "Inventory"); (and the Parties shall work together in good faith to correctly identify the RJRT Tobacco Inventory and to differentiate it from inventory held at the same sites which is not referable to RJRT US domestic and Puerto Rico cigarette production (other than any such inventory related to sales to Santa Fe Natural Tobacco Company, Inc.), including for example tobacco leaf inventory, reconstituted tobacco sheets, work-in-progress and tobacco by-products (excluding tobacco virgin stems and virgin tobacco scrap) for use for contract manufacture for third parties or for use by other RAI Affiliates);

(iii) all rights under:

(A) all Contracts used primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the blu Brand Business, including those listed in Section 2.01(a)(iii)(A) of the Disclosure Schedule,

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(B) all Contracts used primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the PR Business, including those listed in Section 2.01(a)(iii)(B) of the Disclosure Schedule,

(C) all raw materials Contracts and Contracts (other than distribution, sales or agency Contracts), in each case, related to the operation of the Transferred Real Property owned or leased as of the date of this Agreement by a Lorillard Asset Owner, including those listed in Section 2.01(a)(iii)(C) of the Disclosure Schedule,

(D) all Intellectual Property licenses from or to third parties used exclusively in, or arising, directly or indirectly, exclusively out of the operation or conduct of, the PR Business or the blu Brand Business, or otherwise exclusively related to an Acquired Tobacco Cigarette Brand and all material Intellectual Property licenses from or to third parties used primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the PR Business or the blu Brand Business, or otherwise primarily related to an Acquired Tobacco Cigarette Brand, including those listed in Section 2.01(a)(iii)(D) of the Disclosure Schedule, and

(E) the Contracts listed in Section 2.01(a)(iii)(E) of the Disclosure Schedule (all such Contracts referred to in clauses (A), (B), (C), (D) and (E) collectively, the "Assumed Contracts");

(iv) all credits, prepaid expenses, deferred charges, advanced payments, security deposits and prepaid items to the extent used primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of, the blu Brand Business or the PR Business or otherwise related primarily to the Transferred Owned Property or the Transferred Leased Property;

(v) all claims, causes of action, defenses and rights of offset or counterclaim against third parties relating to any Transferred Asset or any Assumed Liability, including unliquidated rights under manufacturers' or vendors' warranties, except for claims for refunds of any Taxes paid prior to the Closing Date;

(vi) all benefits and credits under the State Settlements in respect of the Acquired Brands that relate to the period after the Closing Date;

(vii) all Lorillard Brands Intellectual Property and RAI Brands Intellectual Property;

(viii) to the extent transferable under applicable Law (with or without consent of a third party), all qualifications, registrations, filings (including Substantial Equivalence Reports), privileges, franchises, licenses, permits, Environmental Permits, variances, approvals, certifications, listings or authorizations from, with or to any Governmental Authority ("Permits") that (A) are used primarily in, or obtained primarily for, directly or indirectly, the operation or conduct of, the Lorillard Business (other than those related primarily to the Retained Lorillard Brands) or the PR Business, or for the

distribution, sale or marketing of the Acquired Brands or (B) are otherwise required in order for the Acquiror to comply with its obligations under the Reciprocal Manufacturing Agreement;

(ix) all books, records, files, papers and other works of authorship in any media, including hard copy or computer format, including books of account, ledgers, financial and accounting records, files, invoices, design, manufacture and materials information, scientific studies, other tangible embodiments of Intellectual Property, sales and promotional literature, manuals and data, sales and purchase correspondence, customer lists, lists of suppliers, personnel and employment records and records of State Settlement calculations, payments, disputes and communications, recordings, graphs, drawings, reports, analyses, writings and materials (the "Books and Records"), and in each case that are (A) used primarily in, or prepared, directly or indirectly, primarily for the operation or conduct of, the blu Brand Business or the PR Business or (B) primarily related to any Transferred Assets, in the case of (A) and (B) other than (x) any Books and Records that primarily relate to the Retained Lorillard Brands or other tobacco cigarette brands or e-vapor brands other than the Acquired Brands, (y) any Books and Records that the Sellers are required by Law to retain (in the case of (x) and (y), copies of which, to the extent permitted by Law, will be given or made available to the Acquiror) and (z) personnel and employment records for employees and former employees of the Sellers who are not Transferred Employees;

(x) (A) except for the Lorillard Equipment, all furniture, furnishings, fixtures, equipment, machinery, vehicles, tools, apparatus, office equipment, IT Systems, models, molds/tooling equipment replacement, spare parts and supplies and other tangible personal property ("Equipment") located at the Transferred Real Property, and (B) the Equipment set forth on Section 2.01(a)(x) of the Disclosure Schedule;

(xi) all tangible personal property used primarily in the operation of the Lorillard Business or used solely by Proposed Transferred Employees;

(xii) all goodwill in respect of, or arising, directly or indirectly, primarily (A) out of the sale and marketing of the Acquired Brands, or (B) out of the operation or conduct of, the blu Brand Business or the PR Business;

(xiii) all rights and claims under any and all warranties, indemnities and similar rights extended by suppliers, vendors, contractors, manufacturers and licensors, and all claims, defenses, causes of action, rights of recovery, rights of set off, and rights of recoupment in respect of, or arising, directly or indirectly, primarily out of the operation or conduct of, the Lorillard Business (other than any such rights or claims related to Excluded Assets) or the PR Business (other than in each case any claims against RAI or any of its Affiliates); provided, however, that nothing in this Section 2.01(a)(xiii) shall limit any claims, defenses, causes of action, rights of recovery, rights of set off or rights of recoupment of the Acquiror or any Acquiror Indemnified Party under any Transaction Agreement or relating to the purchase and sale of goods and services in the ordinary course of business;

(xiv) all insurance benefits, including rights and proceeds received or receivable under any insurance policy written prior to the Closing Date (A) in connection with the Transferred Assets or in connection with, directly or indirectly, the operation or conduct of, the Lorillard Business (other than any such rights or claims related to Excluded Assets) or the PR Business, including in connection with the damage or complete destruction of any of the Transferred Assets (other than Inventory) prior to the Closing that would have been included in the Transferred Assets (other than Inventory) but for such damage or complete destruction following the date of this Agreement, and (B) subject to Section 6.06, in connection with any Assumed Liability;

(xv) all the employee benefit plans, programs, arrangements and agreements and policies, and any trusts and other assets related thereto, as expressly provided in Exhibit D;

(xvi) other than with respect to sales of finished goods and inventory in the ordinary course of business consistent with past practice, all proceeds (net of expenses incurred in connection with the sale, transfer or settlement) resulting from (A) any sales or transfers from and after the date of this Agreement through the Closing Date of any asset that would have been included in the Transferred Assets but for such sale or transfer or (B) any settlement from and after the date of this Agreement through the Closing Date of any claims or other causes of action that would have been included in the Transferred Assets but for such settlement;

(xvii) all Software used primarily in or arising, directly or indirectly, primarily out of the operation or conduct of, the Lorillard Business or the PR Business and all rights under licenses thereto; and

(xviii) the right to receive any funds released from escrow in relation to the blu Brand.

(b) Excluded Assets. Notwithstanding any other provision of this Agreement, except for the Transferred Assets, all other assets, properties or rights, wherever located, whether real, personal or mixed, tangible or intangible, Contracts and claims of the Sellers and their Affiliates (such assets, properties, rights, Contracts and claims, the "Excluded Assets") shall be retained by the Sellers and their Affiliates, and shall be excluded from the Transferred Assets, including, without limitation:

(i) the Retained Lorillard Brands and any other tobacco cigarette brands or e-vapor brands other than the Acquired Brands and any Contracts used primarily in, or arising, directly or indirectly, primarily out of the operation or conduct of the Retained Lorillard Brands or such other brands;

(ii) (A) any cash and cash equivalents, bank accounts and securities of the Sellers, other than any cash or cash equivalents held in escrow by a Lorillard Asset Owner in respect of the acquisition of the blu Brand or any rights to any such cash or cash equivalents held by another Person in respect of the acquisition of the blu Brand and (B) any accounts receivable and other current assets of the Sellers, other than accounts receivable related exclusively to the blu Brand Business or the Maverick Brand;

(iii) subject to Section 2.01(a)(xiv) and Section 6.06, all policies of insurance and interests in insurance pools and programs;

(iv) all claims, causes of action, defenses and rights of offset or counterclaim against third parties relating to any Excluded Asset or any Excluded Liability, as well as any books, records and privileged information related thereto, and all refunds of Taxes paid prior to the Closing or with respect to any Pre-Closing Tax Period;

(v) all benefits and credits under the State Settlements in respect of the Acquired Brands that relate to the period ending on the Closing Date;

(vi) all Seller Intellectual Property;

(vii) all goodwill in respect of, or arising, directly or indirectly, primarily out of the sale and marketing of the Retained Lorillard Brands;

(viii) the Equipment set forth on Section 2.01(b)(viii) of the Disclosure Schedule (such equipment, the "Lorillard Equipment");

(ix) subject to Section 2.01(a)(iii)(A), (A) all distribution, wholesale, sales and agency Contracts to which a Lorillard Asset Owner is a party and (B) all Contracts related exclusively to the operation of the Retained Lorillard Brands;

(x) all rights and claims under any and all warranties, indemnities and similar rights extended by suppliers, vendors, contractors, manufacturers and licensors, and all claims, defenses, causes of action, rights of recovery, rights of set off, and rights of recoupment in respect of, or arising, directly or indirectly, primarily out of the operation or conduct of, the business of the Retained Lorillard Brands;

(xi) all employee benefit plans, programs, arrangements and agreements and policies, and any trusts and other assets related thereto, except as expressly provided in Exhibit D;

(xii)

(A) except for blu Brand Inventory and Maverick Brand Finished Goods, all finished goods inventories of the Lorillard Asset Owners, wherever located, including any such being held on consignment, bailment or other arrangement; and

(B) except for tobacco leaf and reconstituted tobacco sheets included in the Lorillard Raw Materials Inventory, title to all tobacco leaf and reconstituted tobacco sheets of the Lorillard Asset Owners, wherever located (collectively, the "Lorillard Leaf"); provided that possession of all such Lorillard Leaf will transfer to the Acquiror or one of its Affiliates at the Closing and the

risk of loss with respect to such Lorillard Leaf will remain with the Acquiror or one of its Affiliates, as applicable, until such time as it is delivered to RAI or one of its Affiliates under the Reciprocal Manufacturing Agreement;

(xiii) copies of all Substantial Equivalence Reports related to the Acquired Brands;

(xiv) all Permits that are (A) used primarily in, or obtained primarily for, directly or indirectly, the operation or conduct of the Retained Lorillard Brands or (B) are otherwise required in order for RAI to comply with its obligations under the Reciprocal Manufacturing Agreement;

(xv) the corporate records, including governing documents, minute books and membership interest books, of the Sellers, and, subject to Section 2.01(a)(ix), all Books and Records of RAI and its Affiliates, including all sales and promotional literature, manuals and data, sales and purchase correspondence, customer lists and lists of suppliers related to the Retained Lorillard Brands; and

(xvi) all Software used primarily in or arising, directly or indirectly, primarily out of the operation or conduct of, the business relating to the Retained Lorillard Brands and all rights under licenses thereto.

(c) Assumed Liabilities. Upon the terms and subject to the conditions set forth in this Agreement (including Section 2.01(d)), the Acquiror hereby agrees, effective as of the Closing or the Lorillard Transfer Closing, as the case may be, to assume and thereafter to pay, discharge and perform in accordance with their terms only the following Liabilities of the Sellers, and no other Liabilities of the Sellers or any other Person or any other Liabilities whatsoever (the "Assumed Liabilities"):

(i) all Liabilities arising (A) under any of the Assumed Contracts (other than the Assumed CBAs and the Assumed Contracts related to the blu Brand Business), to the extent such liabilities relate to the operation or conduct of the Business after the Closing Date;

(ii) all Liabilities arising under the Assumed CBAs and the Assumed Contracts related to the blu Brand Business, including all Liabilities (including "earn-out" and other future payment obligations) related to the blu Brand or the blu Brand Business;

(iii) all Liabilities to the extent arising, directly or indirectly, out of the operation or the conduct of the blu Brand Business prior to, on or after the Closing;

(iv) all Liabilities (other than Excluded Liabilities) to the extent arising, directly or indirectly, out of the operation or conduct of the PR Business or the use of the Transferred Assets, in each case from and after the Closing;

(v) other than Straddle Tobacco Action Liabilities, all Liabilities arising out of or in connection with any Action to the extent relating to the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution,

marketing, promotion, use or consumption of, or exposure to, tobacco products, including smoking and health-related claims, in each case, to the extent relating to the period commencing after the Closing Date and related to one or more of the Acquired Tobacco Cigarette Brands (such Liabilities, collectively, the "Acquiror Tobacco Liabilities" and each an "Acquiror Tobacco Liability");

(vi) any Liability arising out of, or related to, the Transferred Employees (including Liabilities arising prior to the Closing) and any Liability relating to the employee benefit plans, programs, arrangements and agreements and policies and any trusts or assets related thereto, in each case that is expressly assumed by the Acquiror pursuant to Exhibit D hereof; and

(vii) subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date, including (A) any recalculation or redetermination of amounts due in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date, and (B) all plaintiffs' attorneys' fees attributable to any post-Closing increases in volume of sales (determined in accordance with Section 11.08) of any of the Acquired Tobacco Cigarette Brands, but excluding, for the avoidance of doubt, Seller Plaintiff Fees (collectively, the "Assumed Plaintiff Fees").

(d) Excluded Liabilities. Notwithstanding any other provision of this Agreement, the Acquiror is not assuming (directly or indirectly by merger, entity acquisition or acquisition of shares) or agreeing to pay or discharge any of the following Liabilities, each of which shall be retained and shall be paid, performed and discharged when due by RAI or one of the other Sellers (the "Excluded Liabilities"):

(i) all Liabilities arising out of or in connection with any Action (whether commenced before, on or after the Closing Date) to the extent relating to the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing, promotion, use or consumption of, or exposure to, tobacco products, including smoking and health-related claims, in each case, to the extent relating to the period ending on the Closing Date and related to one or more of the Acquired Tobacco Cigarette Brands (such Liabilities, collectively the "Seller Tobacco Liabilities" and each a "Seller Tobacco Liability");

(ii) any Indebtedness of RAI, Lorillard or any Affiliates of RAI or Lorillard;

(iii) (A) all Liabilities of RAI, Lorillard or any Affiliate of RAI or Lorillard in respect of any Tax for any Tax period, and (B) all Liabilities for any Tax otherwise arising out of or relating to the Transferred Assets, the Assumed Liabilities or the operation or conduct of RAI and Lorillard's respective businesses for any Pre-Closing Tax Period, in each case including any obligation to indemnify or otherwise assume or succeed to the Tax Liability of any other Person;

(iv) any Liability associated with any Excluded Asset;

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(v) all Straddle Tobacco Action Liabilities;

(vi) all Liabilities (whether accruing before, on or after the Closing Date) to the extent arising from or relating in any way to Environmental Laws or environmental, health or safety matters and to the conduct of the Business during the period ending on the Closing Date, including any Liabilities arising from or relating in any way to: (A) any actual or alleged non-compliance with Environmental Laws or Environmental Permits in connection with the Business; (B) any actual or alleged presence or Release of or exposure to Hazardous Materials, or any other actual or alleged environmental conditions in, on, at, under or migrating to or from (1) the Transferred Real Property on or prior to the Closing Date or (2) any real property formerly owned, leased or occupied in connection with the Transferred Assets or any closed, divested or discontinued businesses or operations; (C) any off-site shipment, treatment, recycling, storage, or disposal of Hazardous Materials or other waste or materials from the Transferred Real Property or otherwise in connection with the Business or its closed, divested or discontinued business or operations; (D) any personal injury, property damage, natural resources or other Actions relating to any of the foregoing, but excluding any Acquiror Tobacco Liabilities; and (E) any asbestos or asbestos-containing materials present in, on, at, under or about any of the Transferred Real Property;

(vii) all Liabilities arising under any of the Assumed Contracts (other than the Assumed CBAs or Assumed Contracts related to the blu Brand Business), to the extent such Liabilities relate to the operation or conduct of the Business during the period ending on the Closing Date;

(viii) subject to the Agreed Assumption Terms, all Liabilities (whether accruing before, on or after the Closing Date) under the State Settlements to the extent relating to the period ending on the Closing Date, including any recalculation or redetermination after the Closing of amounts due for the period ending on the Closing Date, and all Liabilities (whether accruing before, on or after the Closing Date) under the State Settlements for brands other than the Acquired Tobacco Cigarette Brands;

(ix) all Seller Plaintiff Fees;

(x) any Liability arising out of, or related to, the RAI PR Employees and the Lorillard Employees, in each case, who are not Transferred Employees, and any Liability relating to the employee benefit plans, programs, arrangements and agreements and policies, and any trusts or other assets related thereto, that is not expressly assumed by the Acquiror pursuant to Exhibit D hereof;

(xi) all obligations of the Sellers under this Agreement and any other Transaction Agreement; and

(xii) all other Liabilities, whether accruing before, on or after the Closing Date, to the extent not constituting an Assumed Liability or not arising out of the operation or conduct of the Lorillard Business, the PR Business or the Transferred Assets following the Closing.

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Section 2.02. Assignment of Certain Transferred Assets; Update of Disclosure Schedule.

(a) Notwithstanding any other provision of this Agreement to the contrary, this Agreement shall not constitute an agreement to assign, directly or indirectly, any Transferred Asset or any claim or right or any benefit arising thereunder or resulting therefrom if an attempted direct or indirect assignment or transfer thereof, without the consent of a third party, would constitute a breach, default, violation or other contravention thereof, would be ineffective with respect to any party to an agreement concerning such Transferred Asset, claim or right or would in any way adversely affect the rights of the Acquiror or the Sellers (as applicable) thereto or thereunder, and such consent has not been obtained on or prior to the Closing Date. If any direct or indirect transfer or assignment by any Seller to the Acquiror or any direct or indirect acquisition or assumption by the Acquiror of, any interest in, or liability, obligation or commitment under, any Transferred Asset, claim or right requires the consent of a third party, then such transfer or assignment or assumption shall be made subject to such consent being obtained. RAI will provide, within 60 days following the date of this Agreement, a list of all Transferred Assets for which the transfer, assignment or assumption is subject to obtaining such third party consent. RAI will, and will cause each of the other Sellers (and to the extent practicable, each of their respective Affiliates) to, use its and their reasonable best efforts to obtain any consent necessary for the transfer or assignment of any such Transferred Asset, claim, right or benefit to the Acquiror at no cost to the Acquiror; provided, however, that nothing in this Section 2.02 will be deemed to require RAI or any of the other Sellers or any of their Affiliates to make any payments or agree to amend or modify any existing material commercial terms relating to seeking or obtaining any such consents. If on or prior to the Closing Date any such consent is not obtained, or if an attempted transfer or assignment thereof would be ineffective or would adversely affect the rights of the Acquiror so that the Acquiror would not in fact receive all such rights, (i) at the Closing, the Sellers and the Acquiror will enter into one or more mutually agreeable Contracts under which the Acquiror would obtain the benefits and assume the obligations and bear the economic burdens associated with such Transferred Asset, claim, right or benefit in accordance with this Agreement, including subcontracting, sublicensing or subleasing to the Acquiror, or under which the Sellers would enforce for the benefit of the Acquiror any and all of their rights against a third party associated with such Transferred Asset, claim, right or benefit (collectively, "Third Party Rights"), and the Sellers would promptly pay to the Acquiror when received all monies received by them under any such Transferred Asset, claim, right or benefit, and (ii) after the Closing Date, RAI will, and will cause each of the other Sellers to, continue to use its and their reasonable best efforts to obtain any consent necessary for the transfer or assignment of any such Transferred Asset claim, right or benefit to the Acquiror, and, upon the receipt of such consent, will immediately transfer such Transferred Asset to the Acquiror at no cost to the Acquiror.

(b) To the extent a Party believes that the Schedules specifying certain Transferred Assets, Excluded Assets, Assumed Liabilities or Excluded Liabilities as of the date of this Agreement do not accurately reflect such Party's good faith understanding of the assets that should be acquired by the Acquiror or retained by the Sellers or the Liabilities that should be assumed by the Acquiror or retained by the Sellers, the Parties will work in good faith to resolve the matter and amend or supplement, as appropriate, the Disclosure Schedule.

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(c) As soon as possible (and, in any event, within 180 days) after the date of this Agreement, the Parties agree to work together and cooperate in good faith to agree upon the Imperial Migration Plan and RAI Migration Plan (each as contemplated by the Reciprocal Manufacturing Agreement), including the identification of the Migration Machinery, including associated spare parts (as contemplated by the Reciprocal Manufacturing Agreement) to be transferred in accordance with the Imperial Migration Plan and RAI Migration Plan, as the case may be, (i) from RAI to Acquiror with respect to the Acquired Tobacco Cigarette Brands, and (ii) from Acquiror to RAI with respect to businesses and brands other than the Acquired Tobacco Cigarette Brands. In identifying the Migration Machinery, unless otherwise agreed, the Parties agree to allocate it between the Parties (or their Affiliates) using the following principles: (A) any secondary production equipment or machinery that is used (or calibrated for use) exclusively for the manufacture of any of the Acquired Tobacco Cigarette Brands will be allocated to Acquiror; (B) any secondary production equipment or machinery that is used (or calibrated for use) exclusively for the manufacture of any business or brand owned or retained by RAI will be allocated to RAI; and (C) any other secondary production equipment and machinery that could be used or useful (but not exclusively used or calibrated for use) in connection with the Acquired Tobacco Cigarette Brands will be allocated between Acquiror and RAI (1) on a pro rata basis by reference to the respective aggregate production volumes as of the date of this Agreement of each Party for the relevant brands taking into account equipment and machinery already allocated pursuant to (A) and (B) above, and (2) using an alternating selection process for each piece of equipment. For example, with respect to the foregoing clause (C), if RAI would have 8/9 of the production volume at the Greensboro Facility, then Acquiror would be entitled to select one production complex; then, RAI would select eight production complexes; Acquiror would select one production complex; then RAI would select eight production complexes; and so on.

Section 2.03. Closing. Unless the Parties shall otherwise mutually agree in writing, subject to the satisfaction or waiver of the conditions precedent set forth in Article IX and provided RAI shall have given the Acquiror written notice of the date on which the Effective Time of the Merger shall occur at least four Business Days prior to such date, the sale and purchase of the Transferred Assets and the assumption of the Assumed Liabilities contemplated by this Agreement shall take place at a closing (the "Closing") that will be held at the offices of Jones Day, 222 East 41st Street, New York, NY 10017 on the same day as the date on which the Effective Time of the Merger occurs (so long as the date on which the Effective Time of the Merger occurs is not earlier than the date specified in such notice) (the date on which the Closing takes place being the "Closing Date"). Subject to the satisfaction or waiver of the applicable conditions precedent set forth in Article IX (and the satisfaction of the notice requirement set forth in the preceding sentence), the Lorillard Transfer Closing shall be held on the Closing Date and immediately prior to the Effective Time of the Merger.

Section 2.04. Purchase Price.

(a) The aggregate "Purchase Price" for the Transferred Assets to be delivered at the Closing shall be (i) an amount in cash equal to $7,056,202,000 and (ii) the assumption of the Assumed Liabilities by the Acquiror.

(b) The Purchase Price shall include the consideration payable in respect of the assets transferred and liabilities assumed at the Lorillard Transfer Closing and no separate purchase price shall be payable at the Lorillard Transfer Closing.

(c) The Acquiror shall have the right to have the portion of the Purchase Price allocable to the blu Brand Intellectual Property paid to RAI directly by Dutch IPCo.

Section 2.05. Market Share. In the event that, based on the relevant Management Science Associates, Inc. monthly reporting of shipments from wholesale to retail, the aggregate market share of Winston, KOOL and Salem for the three months ended prior to the month in which the Closing Date occurs is less than 4.9%, determined by a fraction, the numerator of which is the shipments of Winston, KOOL and Salem for such three month period, and the denominator of which is total shipments for such three month period, then the RAI tobacco brand known as Doral (the "Doral Brand") will, for all purposes of the Transaction Agreements, be deemed to be a RAI Brand; provided that, in the event that during such three month period, unusual or irregular market forces or disruptions (including, without limitation, any disruptions resulting from any natural disasters, changes in the economy, war, disruptions in supply or disruptions in manufacturing), such that the monthly shipments for any of Winston, KOOL or Salem are significantly inconsistent with historical shipments, then the Parties will work in good faith to determine a more appropriate measurement period to be used for purposes of this Section 2.05. In the event the Doral Brand is included as a RAI Brand, then RAI will, as soon as reasonably practicable, supplement or amend the Disclosure Schedule to include any matter to the extent related to the Doral Brand that, had the Doral Brand been deemed to be a RAI Brand as of the date of this Agreement, would have been required or otherwise included in the Disclosure Schedule as of the date of this Agreement. Any such disclosed matter will be deemed to be disclosed solely and exclusively with respect to the Doral Brand and any Transferred Assets exclusively related to the Doral Brand. Subject to the foregoing sentence, any such supplement will amend the Disclosure Schedule for all purposes under the Transaction Agreements, and the information included in such supplement shall be deemed to be a part of the Disclosure Schedule as if included therein as of the date of this Agreement.

Section 2.06. Closing Deliveries by RAI. At the Closing, RAI shall deliver or cause to be delivered to the Acquiror:

(a) a receipt for the cash portion of the Purchase Price;

(b) the certificates required to be delivered pursuant to Section 9.03(a) and Section 9.03(e);

(c) special warranty deeds, or their equivalent in the relevant jurisdiction, with respect to the Transferred Owned Property, conveying to the Acquiror fee simple title to such Transferred Owned Property, together with any applicable transfer Tax Returns and other required forms and filings (and such customary affidavits as to matters relating to title as a title insurer shall require to insure title to, and issue customary endorsements with respect to, the Transferred Owned Property);

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(d) a duly executed counterpart to each Ancillary Agreement (other than the Route to Market Agreement);

(e) a copy of Exhibit A to the Separation Agreement, dated as of May 7, 2008, by and among Loews Corporation, Lorillard, Inc., Lorillard Tobacco Company, Lorillard Licensing Company, LLC, One Park Media Services, Inc. and Plisa S.A., duly executed by the Surviving Corporation (as defined in the Merger Agreement) as delivered to Loews Corporation; and

(f) such other deeds, bills of sale, endorsements, consents, assignments and other good and sufficient instruments of conveyance and assignment as the Parties and their respective counsel shall deem reasonably necessary for the assumption of the Assumed Liabilities or to vest in the Acquiror (or its designated Affiliates) all of the Sellers' respective rights, titles and interests in, to and under the Transferred Assets.

Section 2.07. Closing Deliveries by the Acquiror. At the Closing, the Acquiror shall deliver or cause to be delivered to RAI:

(a) the cash portion of the Purchase Price, by wire transfer in immediately available funds, to accounts as directed by RAI in writing at least four Business Days prior to the Closing, which will receive any portion of the Purchase Price attributable to Transferred Assets owned by Lorillard Asset Owners by and on behalf of such Lorillard Asset Owners as agent for such Lorillard Asset Owners;

(b) a receipt for the Transferred Assets;

(c) the certificate required to be delivered pursuant to Section 9.02(a);

(d) a duly executed counterpart to each Ancillary Agreement (other than the Route to Market Agreement); and

(e) a duly executed copy of the MSA Assumption Agreement.

Section 2.08. Prorations. Each of the following shall be apportioned between RAI and Acquiror as of the close of business on the day immediately preceding the Closing Date (the "Cut-Off Time"), on the basis of the actual number of days of the month that shall have elapsed as of the Cut-Off Time and based upon the actual number of days in the month and a 365 day year: (a) water, sewer, gas, electric, vault and fuel charges, if any (unless separately billed to a Seller (or its Affiliate) for the usage prior to the Cut-Off Time and to Acquiror from and after the Cut-Off Time); (b) real estate Taxes, and general or special assessments on the Transferred Owned Property, or any other governmental Tax or charge levied or assessed against the Transferred Owned Property, but, in each case, only for the annual installment for the fiscal year in which the Closing Date occurs; (c) any other charge, amount, cost or expense customarily prorated in the jurisdiction in which the Transferred Owned Property is located, including rent, security deposits, prepaid rents and other credits, free rent credits, and credits in respect of tenant improvements, leasing commissions and capital expenditures; and (d) payroll and compensation expense for employees who become Transferred Employees. The Parties acknowledge and agree that the purpose and intent of the provisions set forth in this Section 2.08 as to prorations

and adjustments is that RAI shall bear the expenses of the ownership and operation of the Transferred Owned Property for which buyers and sellers would customarily prorate or apportion and shall receive the income therefrom accruing through the Cut-Off Time and Acquiror shall bear such expenses and receive such income accruing thereafter. To the extent the adjustments described in this Section 2.08 cannot be made at the Closing because applicable amounts cannot be finally ascertained, the Parties shall make such adjustments at the Closing based on the best available information, subject to reasonably prompt adjustment upon receipt of the final report, distribution or other evidence of the applicable amounts as herein provided. The foregoing allocations and adjustments shall be shown on a closing statement (with such supporting documentation as the Parties may reasonably require being attached as exhibits to such statement) and shall increase or decrease (as the case may be) the Purchase Price payable by Acquiror. Any discrepancy resulting from such recomputation and any errors or omissions in computing apportionments at or after the Closing shall be promptly corrected.

Section 2.09. Title Fee and Costs. In connection with the Closing, (a) the fee for an ALTA title policy for the Transferred Owned Property, and (b) all typical recording costs, including the recordation costs of recording the deeds to the Transferred Owned Property, will be borne solely by the Acquiror.

Section 2.10. Payments and Computations. Except for the payment of the cash portion of the Purchase Price (which shall be paid at the Closing), each Party shall make each payment due to another Party not later than 2:00 p.m., New York City time, on the day when due. All payments shall be paid by wire transfer in immediately available funds to the account or accounts designated in writing in advance by the Party receiving such payment. All computations of interest shall be made on the basis of a year of 365 days, in each case for the actual number of days (including the first day but excluding the last day) occurring in the period for which such interest is payable. Whenever any payment under this Agreement shall be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall be included in the computation of, and payment of, interest.

Section 2.11. Purchase Price Allocation. The Purchase Price pursuant to Section 2.04 shall be payable as follows: (i) a portion of the Purchase Price shall be paid with respect to Transferred Assets relating to the PR Business, (ii) a portion of the Purchase Price shall be paid with respect to blu Brand Business, and (iii) the remainder of the Purchase Price shall be paid with respect to the remaining Transferred Assets, which, for clarity, relates to the Acquired Tobacco Cigarette Brands and related operating assets. Consistent with the foregoing allocation of Purchase Price, the respective portions of the Purchase Price will be allocated among the Transferred Assets for all U.S. Tax purposes in accordance with Section 1060(a) of the Code. The Acquiror will deliver a draft Purchase Price allocation schedule (the "Allocation") and draft IRS Forms 8594 consistent with the Allocation to RAI within 180 days after the Closing Date for RAI's review, which Allocation shall be binding on the Acquiror, any applicable Affiliate of the Acquiror and the Sellers if RAI does not object to the Allocation within 30 days after receiving the Allocation. If RAI notifies the Acquiror in writing within 30 days after receiving the Allocation that RAI objects to one or more items reflected in the Allocation (the "Objections Notice"), the Acquiror and RAI will negotiate in good faith to resolve such dispute. If the Acquiror and RAI fail to agree within 15 days after the delivery of the Objections Notice, then

they shall mutually agree upon a firm of independent nationally recognized accountants, and, if the Acquiror and RAI cannot mutually agree on a firm, then each of the Acquiror and RAI shall nominate a firm of independent nationally recognized accountants, and such two firms shall in turn choose a firm of independent nationally recognized accountants (as finally determined, the "Accounting Referee"), and the disputed items shall be resolved by the Accounting Referee, whose determination shall be final and binding on all Parties. The Accounting Referee shall resolve the dispute within 30 days after the item has been referred to it. The costs, fees and expenses of the Accounting Referee shall be borne 50% by RAI and 50% by the Acquiror. The Acquiror, any applicable Affiliate of the Acquiror and the Sellers shall file all U.S. Tax Returns (if required, including Form 8594) in accordance with the agreed Allocation, and unless otherwise required by law shall not take any position inconsistent therewith for any U.S. Tax purpose.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF RAI

RAI represents and warrants to the Acquiror that, except (a) as set forth in the Disclosure Schedule or (b) as set forth in the RAI SEC Documents filed since January 1, 2014, but prior to the date of this Agreement (excluding all disclosures in any "Risk Factors" section and any disclosures included in any such RAI SEC Documents that are cautionary, predictive or forward looking in nature):

Section 3.01. Incorporation and Qualification of the RAI Parties. Each RAI Party (a) is a corporation or other organization duly incorporated, formed or organized, validly existing and, to the extent legally applicable, in good standing under the Laws of its jurisdiction of incorporation or organization and (b) has all necessary corporate or equivalent power and authority and possesses all Permits necessary to enable it to own, lease or otherwise hold the Transferred Assets owned, leased or otherwise held by it (the "RAI Assets"), except where the failure to have such power or authority or to possess such Permits, individually or in the aggregate, has not had and would not reasonably be expected to have a Material Adverse Effect.

Section 3.02. Authority; Execution and Delivery; Enforceability.

(a) RAI has full power and authority to execute and deliver this Agreement and each Ancillary Agreement to which it is, or is specified to be, a party and to consummate the transactions contemplated to be consummated by it by, and to carry out its obligations under, this Agreement and each such Ancillary Agreement. Each of the RAI Asset Owners has full power and authority to execute and deliver each Ancillary Agreement to which it is, or is specified to be, a party, and to consummate the transactions contemplated to be consummated by it by, and to carry out its obligations under, this Agreement and each such Ancillary Agreement.

(b) The execution and delivery by each RAI Party of the Transaction Agreements to which such RAI Party is, or is specified to be, a party, and the consummation by such RAI Party of the transactions contemplated by, and the performance by such RAI Party of its obligations under, the Transaction Agreements have been duly authorized by all requisite corporate or equivalent action on the part of such RAI Party.

(c) This Agreement has been, and upon execution and delivery each Ancillary Agreement will be, duly executed and delivered by the RAI Party party thereto, and (assuming due authorization, execution and delivery by the other party or parties thereto) this Agreement constitutes, and upon execution and delivery each Ancillary Agreement will constitute, legal, valid and binding obligations of each such RAI Party party thereto, enforceable against each such RAI Party party thereto in accordance with their respective terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

Section 3.03. No Conflict. The execution, delivery and performance by each RAI Party of the Transaction Agreements to which it is, or is specified to be, a party, and the consummation by such RAI Party of the transactions contemplated by the Transaction Agreements to which it is, or is specified to be, a party, do not and will not (a) violate or conflict with the certificate of incorporation or bylaws or any similar organizational documents of such RAI Party, (b) conflict with or violate any Law or Governmental Order applicable to such RAI Party or the RAI Assets of such RAI Party or (c) result in any breach of, or constitute a default (or event that, with the giving of notice or lapse of time, or both, would become a default) under, or give to any Person any rights of termination, cancellation or acceleration of any obligation of, or result in the creation of any Lien (other than a Permitted Lien) on any of the RAI Assets pursuant to any note, bond, mortgage, indenture, Contract or Permit to which such RAI Party is a party or by which any Transferred Asset owned by such RAI Party is bound, except, in the case of clauses (b) and (c), any such conflicts, violations, breaches, defaults, rights or Liens as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

Section 3.04. Governmental Notices, Consents and Approvals. The execution and delivery by each RAI Party of the Transaction Agreements to which it is, or is specified to be, a party, do not, and the performance by each RAI Party of, and the consummation by each RAI Party of the transactions contemplated by, the Transaction Agreements to which it is, or is specified to be, a party, will not, require any consent, approval, authorization or other action by, or any filing with or notification to, any Governmental Authority, except (a) in compliance with the notification and waiting period requirements of the HSR Act, (b) compliance with and any filings required under Section 13(a) of the Exchange Act, (c) any filings or notifications that may be required under applicable state property transfer laws or other Environmental Laws, (d) the required prior approval of the DC District Court to transfer the Acquired Tobacco Cigarette Brands to the Acquiror, as contemplated by Section 9.01(d), (e) the change to the MSA brands listing of the Acquired Tobacco Cigarette Brands by NAAG as contemplated by Section 6.19, (f) the certification or re-certification (if applicable) of the Acquired Tobacco Cigarette Brands by the States as contemplated by Section 6.19, (g) compliance with Section XVIII(c) of the MSA, (h) the notice of transfer of the Acquired Tobacco Cigarette Brands and related assets to the MSA Settling States as contemplated by Section 6.19 and Section 6.20 and Section XVIII(x) of the MSA, (i) to the extent necessary, approval or authorization by the PSS, or (j) where the failure to obtain such consent, approval, authorization or action, or to make such filing or notification, would not, individually or in the aggregate, reasonably be expected to be materially adverse to the RAI Brands and the PR Business.

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Section 3.05. Financial Information.

(a) Section 3.05(a) of the Disclosure Schedule sets forth: (i) unaudited summary combined brand contribution for the RAI Brands for the 12 month periods ended December 31 of 2012 and 2013, respectively; (ii) unaudited pro forma condensed combined balance sheets for the RAI Brands as at December 31 of 2012 and 2013, respectively; and (iii) unaudited pro forma condensed consolidated income statements for the PR Business and all other RAI operations in Puerto Rico for the 12 month periods ended December 31 of 2012 and 2013 (the information referred to in clauses (i), (ii) and (iii) being collectively referred to as the "RAI Financial Information").

(b) The RAI Financial Information (i) has been prepared from the Books and Records of RAI, regularly maintained to prepare the financial statements of RAI, (ii) was prepared in good faith in accordance with the historical accounting methods and policies of RAI, applied on a consistent basis during the periods involved, (iii) fairly presents, in all material respects, as applicable, the brand contribution of the RAI Brands, in the case of the unaudited summary combined brand contribution included in the RAI Financial Information, and the PR Business at their respective dates and for the periods covered by such statements and (iv) is not materially inaccurate or misleading taken as a whole.

Section 3.06. Information Supplied. None of the information provided or to be provided by RAI specifically for inclusion or incorporation by reference in the Class 1 Circular, at the time the Class 1 Circular is first mailed to shareholders of Imperial and at the time such shareholders vote on the resolutions set forth in the Class 1 Circular, will contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

Section 3.07. Books and Records. The Books and Records relating exclusively to the RAI Brands and primarily to the PR Business are true and correct in all material respects and have been maintained in accordance with sound business practices, including the maintenance of an adequate system of internal controls.

Section 3.08. Absence of Certain Changes or Events. Except as contemplated by this Agreement or the Merger Agreement and other than in connection with the negotiation, execution and delivery of this Agreement, the Merger Agreement, the Route to Market Agreement and all other agreements and actions taken in connection with the transactions contemplated hereby and thereby, from January 1, 2014 to the date of this Agreement, the RAI Asset Owners have (a) operated the business related to the RAI Brands and operated and conducted the PR Business in the ordinary course in all material respects and (b) not taken any action that, if such action were taken after the date of this Agreement, would require the Acquiror's consent pursuant to Section 6.01.

Section 3.09. Absence of Litigation. There are no (and since January 1, 2014, there have been no) Actions pending or, to the Knowledge of RAI, threatened against the RAI

Parties that relate to the RAI Assets that either (a) have had, or would reasonably be expected to have, individually or in the aggregate, a RAI Brands Material Adverse Effect or (b) that would be materially adverse to the PR Business. No RAI Party is a party or subject to or in default under any outstanding judgment, order or decree applicable to the RAI Assets.

Section 3.10. Compliance with Laws.

(a) None of the RAI Asset Owners is, or since January 1, 2013, has been, in non-compliance with any Laws or Governmental Orders applicable to the use of the RAI Brands or the operation of the PR Business, except for such non-compliance that, individually or in the aggregate, either (i) has not had and would not reasonably be expected to have a RAI Brands Material Adverse Effect or (ii) has not been and would not reasonably be expected to be materially adverse to the PR Business. None of the RAI Parties has received, since January 1, 2013, any written notice or other communication from any Governmental Authority that alleges that the PR Business, or, in connection with the RAI Assets, any RAI Party, has any Liability under, or is not in compliance with, any applicable Laws, except for any notice or other communication relating to matters that, individually or in the aggregate, either (i) have not had and would not reasonably be expected to have a RAI Brands Material Adverse Effect or (ii) have not been and would not reasonably be expected to be materially adverse to the PR Business.

(b) None of the RAI Parties nor, to the Knowledge of RAI, any director or senior officer of RAI:

(i) is, or is controlled by, a Restricted Party;

(ii) directly or indirectly, has conducted, conducts or is otherwise involved with any business with or involving any Governmental Authority (or any sub-division thereof), or any Person targeted by, or located in any country that is the subject of, any of the sanctions administered by OFAC or any other equivalent sanctions or measures imposed by the United States Government (collectively, "Sanctions"); or

(iii) is, or within the past two years has been, in violation of or subject to an investigation relating to Sanctions.

(c) With respect to the RAI Assets, none of the RAI Parties nor any of their respective Subsidiaries, nor, to the Knowledge of RAI, any director or senior officer of RAI, directly or indirectly, has, within the past two years, violated or is in violation of any applicable anti-corruption Law;

(d) With respect to the RAI Assets, the operations of the RAI Parties are and, since January 1, 2013 have been, conducted in material compliance with all applicable anti-money laundering Laws and financial record keeping and reporting requirements, rules, regulations and guidelines (collectively, "Money Laundering Laws"), and no Actions involving the RAI Assets are pending or, to the Knowledge of RAI, threatened with respect to Money Laundering Laws that, individually or in the aggregate, either (i) have had or would reasonably be expected to have a RAI Brands Material Adverse Effect or (ii) have been or would reasonably be expected to be materially adverse to the PR Business.

Section 3.11. Governmental Licenses and Permits. (a) All material Permits relating to the business related to the RAI Brands (the "Material RAI Brands Permits") are validly held by RAI or a Subsidiary of RAI, and RAI or a Subsidiary of RAI has complied with the terms and conditions thereof, (b) since January 1, 2013, RAI has not received written notice of any Action relating to, and, to the Knowledge of RAI, there are no facts, circumstances or conditions that would reasonably be expected to result in, the termination, suspension, material modification, revocation or nonrenewal of any such Material RAI Brands Permits and (c) none of such Material RAI Brands Permits would reasonably be expected to be subject to termination, suspension, material modification, revocation or nonrenewal as a result of the execution and delivery of this Agreement or the consummation of the Transactions contemplated hereby.

Section 3.12. Sufficiency of, and Title to, the Assets.

(a) As of the date of this Agreement, the tangible RAI Assets are structurally sound, in operating condition, and adequate for the uses to which they are currently being put, in each case, subject to ordinary wear and tear.

(b) The RAI Assets will, together with the Ancillary Agreements and Third Party Rights and taking into account the benefits and burdens passed to the Acquiror pursuant to Section 2.02, constitute all of the assets, properties, rights and interests (including real property and tangible and intangible property) necessary for the Acquiror to conduct the PR Business immediately following the Closing in all material respects as the same is conducted on the date of this Agreement and as of immediately prior to the Closing.

(c) (i) Except for Permitted Liens, the RAI Asset Owners have good and marketable title to the RAI Assets, free and clear of all Liens; and (ii) on the Closing Date, assuming the Lorillard Asset Owners have free and clear title to the Lorillard Assets owned, held or used by them, the Sellers shall have good and marketable title to, or valid leasehold interests in, all of the Transferred Assets, free and clear of all Liens, except for Permitted Liens.

Section 3.13. Intellectual Property.

(a) Section 3.13 of the Disclosure Schedule sets forth a complete and accurate list of all RAI Brands Intellectual Property that is registered or issued, or for which applications to register or obtain issuance have been filed and are pending anywhere in the world, and an indication of the jurisdictions in which such filings have been made and the status thereof and all Trademarks included in the RAI Brands Intellectual Property that are not registered but are material to the business related to the RAI Brands or the PR Business. All RAI Brands Intellectual Property so shown as registered or issued is duly registered in or filed in or issued by the United States Copyright Office, the United States Patent and Trademark Office or any similar national or local foreign intellectual property authority.

(b) The RAI Asset Owners own and have the right to use, free and clear of all Liens (other than Permitted Liens), all material RAI Brands Intellectual Property. All Trademarks and copyrights included in the RAI Brands Intellectual Property are, to the Knowledge of RAI, valid, and such Trademarks and copyrights are subsisting and in full force and effect, and have not been canceled, expired or abandoned.

(c) To the Knowledge of RAI, all employees, agents, consultants or contractors who have contributed to the creation or development of any material RAI Brands Intellectual Property either: (i) created such Intellectual Property in the scope of his or her employment with the relevant RAI Asset Owner at the time of creation of such materials; (ii) is a party to a "work-for-hire" agreement under which the relevant RAI Asset Owner is deemed to be the original owner/author of all rights, title and interest therein; or (iii) has executed an assignment in favor of the relevant RAI Asset Owner of all right, title and interest in such Intellectual Property.

(d) (i) To the Knowledge of RAI, the business related to the RAI Brands and the PR Business, in each case, as operated on the date of this Agreement do not infringe upon any Intellectual Property rights of third parties; (ii) there is no pending or, to the Knowledge of RAI, threatened infringement claim, opposition, interference or cancellation proceeding before any court, patent office or registration authority in any jurisdiction against any RAI Brands Intellectual Property; and (iii) since January 1, 2011, neither RAI nor any other RAI Asset Owner has received any written notice from any other Person challenging its use or ownership of any RAI Brands Intellectual Property material to the use of the RAI Brands or the subsistence, validity or enforceability thereof.

(e) To the Knowledge of RAI, no Person is, as of the date of this Agreement, engaging in any activity that infringes in any material respect upon the RAI Brands Intellectual Property.

(f) Except with respect to registered and issued RAI Brands Intellectual Property that was allowed to lapse in the ordinary course of business, the RAI Asset Owners have taken commercially reasonable action to maintain and preserve the RAI Brands Intellectual Property, including entering into appropriate confidentiality/non-disclosure agreements with third parties to whom they disclose confidential information or trade secrets that are RAI Brands Intellectual Property and that are material to the use of the RAI Brands or the PR Business, and making payments of all maintenance and similar fees for any such RAI Brands Intellectual Property.

(g) The consummation of the transactions contemplated by this Agreement will not materially impair or materially alter any of the RAI Asset Owners' rights (or the Acquiror's rights following the Closing) in any RAI Brands Intellectual Property.

(h) There are no settlements, forbearances to sue, consents, judgments or orders to which any RAI Party is a party or with respect to which any such party is bound that (A) restrict the rights of the RAI Asset Owners to use any material RAI Brands Intellectual Property or (B) permit third parties to use any material RAI Brands Intellectual Property other than on behalf of RAI and its Affiliates.

Section 3.14. Environmental Matters. The representations and warranties set forth in this Section 3.14 represent the sole and exclusive representations and warranties regarding Environmental Laws and Environmental Permits related to the PR Business. Except for matters which, individually or in the aggregate, have not had and would not reasonably be expected to have a Material Adverse Effect:

(a) the RAI Assets, and the facilities where the RAI Brands will be manufactured pursuant to the Reciprocal Manufacturing Agreement, are and, since January 1, 2011, have been, in compliance with Environmental Laws; and

(b) there are no pending or threatened Environmental Actions against or affecting the RAI Assets or the facilities where the RAI Brands will be manufactured pursuant to the Reciprocal Manufacturing Agreement and, to the Knowledge of RAI, there are no facts, circumstances or conditions that would reasonably be expected to form the basis of any such Environmental Action; and

(c) To the Knowledge of RAI, there are no Hazardous Materials present in, on, at, under or migrating to or from any of the Transferred Real Property or any third-party property to which any Hazardous Materials were sent in connection with the RAI Assets or any prior operations of the RAI Assets for treatment, recycling, storage or disposal that would reasonably be expected to require any investigation, cleanup, remediation or similar activities or form the basis of any Environmental Action.

Section 3.15. Major Customers and Suppliers; Assumed Contracts.

(a) Section 3.15(a) of the Disclosure Schedule lists each of the Material RAI Brands Customers and the Material RAI Brands Suppliers. Since January 1, 2013, no Material RAI Brands Customer or Material RAI Brands Supplier has either terminated its relationship with the RAI Asset Owners with respect to the business related to the RAI Brands or the PR Business or materially reduced the aggregate value of its annual transactions with the RAI Asset Owners with respect to the business related to the RAI Brands or the PR Business, nor has any RAI Asset Owner received written notice from any Material RAI Brands Customer or Material RAI Brands Supplier that it intends to do so.

(b) Except for matters that, individually or in the aggregate, would not reasonably be expected to be materially adverse to the PR Business, (i) each Assumed Contract to which a RAI Asset Owner is a party is a legal, valid and binding obligation of the applicable RAI Asset Owner, and, to the Knowledge of RAI, each other party to such Assumed Contract, and (ii) is enforceable against the applicable RAI Asset Owner and, to the Knowledge of RAI, each such other party, in accordance with its terms, subject, in each case, to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally, and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). Except for matters that, individually or in the aggregate, would not reasonably be expected to be materially adverse to the PR Business, none of the RAI Asset Owners nor, to the Knowledge of RAI, any other party to an Assumed Contract is in material default or material breach of or has failed to perform any material obligation under an Assumed Contract.

(c) Complete and correct copies of each Assumed Contract (including all modifications, amendments and supplements thereto in effect as of the date of this Agreement) have been made available to the Acquiror.

Section 3.16. Taxes.

(a) Each RAI Party has timely filed all material Tax Returns required to be filed by it with respect to the PR Business, each such Tax Return is true, correct and complete in all material respects, and all material Taxes (whether or not shown on any Tax Return) owed by any RAI Party with respect to or attributable to the PR Business or the RAI Assets and the Assumed Liabilities have been or will be paid in full at the time such Taxes were or will be due and payable.

(b) With respect to the PR Business, (i) no RAI Party is the subject of an audit or other examination of Taxes by any Governmental Authority or other proceeding, and to the Knowledge of RAI, no such audit or other examination or proceeding is contemplated or pending; (ii) no extension or waiver of the statute of limitations has been granted for any Tax Return with respect to any material Taxes, which statute (after giving effect to such extension or waiver) has not yet expired; (iii) no issues with respect to material Taxes were raised by the relevant Governmental Authority during any currently pending or completed audit or examination that would reasonably be expected to recur in a later taxable period; and (iv) no RAI Party has received any written notice from any Governmental Authority relating to any material Taxes which are currently in dispute or are unpaid.

(c) With respect to the businesses related to the RAI Brands and the PR Business, no written claim has been made by a Governmental Authority in a jurisdiction where any RAI Party does not file a Tax Return that any RAI Party is or may be subject to taxation by that jurisdiction for Taxes that would be covered by or the subject of such Tax Return, which claim is pending.

(d) There is no Lien for a material amount of Taxes on any Transferred Asset that arose in connection with any failure (or alleged failure) to pay any Tax.

Section 3.17. Employment and Employee Benefits Matters.

(a) Section 3.17 of the Disclosure Schedule sets forth a true and accurate list of (i) all material employee benefit plans (within the meaning of Section 3(3) of ERISA (whether or not subject to ERISA)) and all bonus, stock option, stock purchase, restricted stock and other equity or equity-based awards, incentive, deferred compensation, retiree health or life insurance, supplemental retirement, severance, superannuation, profit-sharing or other benefit plans, programs, agreements or arrangements, that are maintained, contributed to, or sponsored by the RAI Parties or their respective Affiliates and ERISA Affiliates for the benefit of any employee who is actively and primarily employed by RAI or any of its Affiliates in the PR Business (each such individual (including any employees of RAI or its Subsidiaries who are not actively employed at such time and who have a right of re-instatement), a "RAI PR Employee") or any dependents thereof and (ii) all individual employment, retention, termination, change in control, severance or other similar contracts or agreements pursuant to which any RAI Party or its Affiliates currently has any obligation or Liability with respect to any RAI PR Employee or any dependents thereof (the plans, programs, arrangements, contracts and agreements described in clauses (i) and (ii) above are hereinafter referred to as the "RAI PR Employee Plans"). Each RAI PR Employee Plan is in writing and, with respect to each RAI PR Employee Plan, RAI has

previously made available to the Acquiror, true and correct copies of each of the following documents: (i) a copy of the RAI PR Employee Plan (or to the extent no such copy exists, an accurate written description thereof); (ii) a copy of the most recent summary plan description and summary of material modifications with respect thereto, if any; (iii) a copy of each trust or other funding arrangement, if any; (iv) the two most recent annual financial reports, if any; (v) the two most recent actuarial reports, if any; and (vi) if applicable, the most recent determination letter. Except as specifically provided in the foregoing documents made available to Acquiror and except as provided by applicable Law, there are no material amendments to any RAI PR Employee Plan, nor has any party with the authority to do so undertaken to make any such material amendments or to adopt or approve any new RAI PR Employee Plan.

(b) None of the RAI PR Employee Plans is a multiemployer plan (within the meaning of Section 3(37) or 4001(a)(3) of ERISA) (a "Multiemployer Plan") or a single employer plan (within the meaning of Section 4001(a)(15) of ERISA) for which any RAI Party would reasonably be expected to incur material Liability under Section 4063 or 4064 of ERISA.

(c) Each RAI PR Employee Plan that is intended to qualify for tax-preferential treatment under applicable Law has received, where required, approval from the applicable Governmental Authority that it is so qualified, and no fact or event has occurred since the date of such approval that would reasonably be expected to adversely affect such qualification.

(d) With respect to each RAI PR Employee Plan, all material employer and employee payments, expenses, contributions or accruals (including premiums) required by Law or by the terms of such plan have been made when due pursuant to the terms of such plan and applicable Laws, or if applicable, accrued, in accordance with US GAAP.

(e) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (either alone or in conjunction with any other event) result in, cause the accelerated vesting, funding or delivery of, or increase in any material respect the amount or value of, any payment or benefit to any RAI PR Employee that is payable by Acquiror pursuant to the terms of any RAI PR Employee Plan or pursuant to the terms of any contractual obligation expressly assumed by Acquiror under this Agreement or result in any material limitation on the right of the Acquiror to amend, merge, terminate or receive a reversion of assets from any RAI PR Employee Plan that is to be transferred to the Acquiror pursuant to this Agreement or its related trusts.

(f) Each RAI PR Employee Plan is now and has been operated in all material respects in accordance with the requirements of all applicable Laws, including ERISA and the Code.

(g) There are no material controversies, audits or investigations pending or, to the Knowledge of RAI, threatened in connection with any RAI PR Employee Plan.

(h) No union, employee association, works council or similar organization represents any RAI PR Employees, no such organization has made a written demand against any RAI Party or any of its Affiliates for recognition with respect to representation of any RAI PR Employee or a group of such employees and no such organization is attempting to organize such employees.

(i) RAI has previously provided the Acquiror with a true and correct listing, as of May 15, 2014, of each RAI PR Employee (with his or her name redacted), his or her current rate of annual base salary or current wages, 2014 annual bonus target, job title, employment status, work location and date of hire. Such listing shall be updated by the RAI Parties 90 days prior to the Closing Date and 14 days prior to the Closing Date to reflect new hires and departures consistent with this Agreement.

(j) With respect to the RAI PR Employees, the RAI Parties are in material compliance with all applicable Laws governing the employment of labor, including all applicable Laws relating to wages, hours, discrimination, termination, reductions in force, classification of employees for purposes of overtime, immigration, civil rights, safety and health, workers' compensation and the collection and payment of withholding and/or social security Taxes and similar Taxes. No RAI Party has any Liability by reason of an individual who performs or performed services for the Business for the RAI Parties with respect to the RAI Brands or the PR Business in the United States in any capacity being improperly excluded from participating in a RAI PR Employee Plan.

(k) There is no labor strike, dispute, lock-out or stoppage pending or, to the Knowledge of RAI, threatened, against or affecting the PR Business, and the PR Business has not experienced any such strike, dispute, lock-out or stoppage since January 1, 2011. No RAI Party has materially breached or otherwise materially failed to comply with the provisions of any collective bargaining agreement or contract with a union or employee representative and there are no material written grievances or unfair labor practice complaints outstanding against any RAI Asset Owner under any such agreement or contract with respect to the PR Business.

Section 3.18. Real Property.

(a) All leases and subleases for the Transferred Leased Property under which any of the RAI Asset Owners is a lessee or sublessee are in full force and effect and are enforceable in accordance with their respective terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). None of the RAI Asset Owners nor, to the Knowledge of RAI, any other party to a lease or sublease related to Transferred Leased Property and to which a RAI Asset Owner is a party is in a material default or material breach of or has failed to perform any material obligation under any such lease or sublease.

(b) The RAI Asset Owners have good and valid leasehold or subleasehold (as applicable) title to all Transferred Leased Property leased by them, free and clear of all Liens, except for Permitted Liens.

(c) All buildings, fixtures and other improvements located on the Transferred Real Property leased by a RAI Asset Owner are structurally sound and in operating condition, subject to ordinary wear and tear, except, in each case, as would not materially adversely affect the use and operation of any such buildings, fixtures and other improvements.

Section 3.19. Disclosure of State Settlement Arrangements. RAI has made available to the Acquiror all Contracts and Governmental Orders to which any RAI Party is a party or bound, in each case with respect to the RAI Brands or the PR Business, and that relate wholly or partially to any of the State Settlements including any agreement or arrangement relating to the allocation of any amount with respect to any State Settlement payment among the OPMs or between any RAI Party and any other signatory or litigant. There are no agreements existing as at the date hereof and as of the Closing Date among the OPMs with respect to the MSA, or among the Settling Defendants with respect to any of the PSS Agreements, that affect the RAI Brands other than those set out in Section 4.9 of Exhibit F to this Agreement. Except for matters that, individually or in the aggregate, would not reasonably be expected to be material to an owner of the RAI Brands and the PR Business, there are no claims or disputes or outstanding obligations under the Growers Trust.

Section 3.20. Disclosure of DoJ Tobacco Case Documentation. Within 90 days following the date of this Agreement, RAI will have made available to the Acquiror all Contracts and Governmental Orders to which any RAI Party is a party or bound, in each case with respect to the RAI Brands or the PR Business, and that relates to the DoJ Tobacco Case.

Section 3.21. Compliance with Final Judgment and Remedial Order. Except for matters that, individually or in the aggregate, either (a) have not had and would not reasonably be expected to have a RAI Brands Material Adverse Effect or (b) have not been and would not reasonably be expected to be materially adverse to the PR Business, each RAI Party has complied with all obligations under the Final Judgment and Remedial Order applicable to the RAI Brands or PR Business, and, as of the date of this Agreement, no such Person has received any written notice or other written communication of any material breach of any of its obligations under any such Final Judgment and Remedial Order.

Section 3.22. Compliance with State Settlements. Except for matters that, individually or in the aggregate, either (a) have not had and would not reasonably be expected to have a RAI Brands Material Adverse Effect or (b) have not been and would not reasonably be expected to be materially adverse to the PR Business, each RAI Party has complied with all obligations under the State Settlements applicable to it, and, as of the date of this Agreement, no such Person has received any written notice or other written communication of any material breach of any of its obligations under any State Settlement.

Section 3.23. Compliance with Certification/Listing. Except for matters that, individually or in the aggregate, either (a) have not had and would not reasonably be expected to have a RAI Brands Material Adverse Effect or (b) have not been and would not reasonably be expected to be materially adverse to the PR Business, each Certification/Listing in respect of the RAI Brands is valid, and, as of the date of this Agreement, no RAI Party has received any written notice or other written communication of any expiration, invalidity or material adverse change in such Certification/Listing or any material non-compliance or alleged material non-compliance with any Law applicable to such Certification/Listing.

Section 3.24. Merger Agreement. A complete and correct copy of the Merger Agreement as in effect as of the date of this Agreement has been provided to the Acquiror. As of the date of this Agreement, the Merger Agreement has been duly authorized, executed and delivered and is binding on each party thereto and is in full force and effect.

Section 3.25. Brokers. Except for fees and expenses of Lazard Frères & Co. (the "RAI Banker") in connection with their rendering of investment banking advice to RAI, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission from any RAI Party in connection with the sale of the RAI Brands or the PR Business based upon arrangements made by or on behalf of RAI. RAI is solely responsible for the investment advisory fees and expenses of the RAI Banker.

Section 3.26. No Indebtedness as of Closing. As of the Closing, no Transferred Asset owned by a RAI Party will be encumbered with any indebtedness.

Section 3.27. Substantial Equivalence Reports. Section 3.27 of the Disclosure Schedule lists, with respect to the RAI Brands, each provisional Substantial Equivalence Report tracking number, and with respect to each such provisional Substantial Equivalence Report tracking number, each RAI Brand style associated with it. The provisional Substantial Equivalence Reports included in the RAI Assets constitute all of the Substantial Equivalence Reports and other substantial equivalence filings necessary for the Acquiror to market the RAI Brands following the Closing in accordance with applicable Law.

ARTICLE IV

CERTAIN REPRESENTATIONS AND WARRANTIES OF RAI IN RESPECT OF LORILLARD

RAI represents and warrants to the Acquiror that, to the Knowledge of RAI, except (a) as set forth in the Disclosure Schedule or (b) as set forth in the Lorillard SEC Documents filed since January 1, 2014, but prior to the date of this Agreement (excluding all disclosures in any "*Risk Factors*" section and any disclosures included in any such Lorillard SEC Documents that are cautionary, predictive or forward looking in nature):

Section 4.01. Incorporation and Qualification of the Lorillard Asset Owners. Each Lorillard Asset Owner (a) is a corporation or other organization duly incorporated, formed or organized, validly existing and, to the extent legally applicable, in good standing under the Laws of its jurisdiction of incorporation or organization and (b) has all necessary corporate or equivalent power and authority and possesses all Permits necessary to enable it to own, lease or otherwise hold the Transferred Assets owned, leased or otherwise held by it (the "Lorillard Assets") and to conduct the Maverick Brand Business and the blu Brand Business as currently conducted, except where the failure to have such power or authority or to possess such Permits, individually or in the aggregate, have not had and would not reasonably be expected to have a Material Adverse Effect.

Section 4.02. Financial Information.

(a) Section 4.02(a) of the Disclosure Schedule sets forth (i) unaudited summary brand contribution information for the Maverick Brand for the 12-month periods ended December 31 of 2012 and 2013, respectively, and (ii) the unaudited consolidated balance sheets for the blu Brand Business as at December 31 of 2012 and 2013, respectively (the information referred to in clauses (i) and (ii) being collectively referred to as the "Lorillard Financial Information").

(b) The Lorillard Financial Information (i) has been prepared from the Books and Records of Lorillard, regularly maintained to prepare the financial statements of Lorillard, (ii) was prepared in good faith in accordance with the historical accounting methods and policies of Lorillard, applied on a consistent basis during the periods involved, (iii) fairly presents in all material respects, as applicable, the brand contribution of the Lorillard Brands, in the case of the unaudited summary brand contribution of the Maverick Brand and the unaudited consolidated balance sheets of the blu Brand Business at their respective dates and for the periods covered by such statements and (iv) is not materially inaccurate or misleading taken as a whole.

Section 4.03. Information Supplied. None of the information provided or to be provided by Lorillard specifically for inclusion or incorporation by reference in the Class 1 Circular, at the time the Class 1 Circular is first mailed to shareholders of Imperial and at the time such shareholders vote on the resolutions set forth in the Class 1 Circular, will contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

Section 4.04. Books and Records. The Books and Records relating exclusively to the Maverick Brand and primarily to the blu Brand Business are true and correct in all material respects and have been maintained in accordance with sound business practices, including the maintenance of an adequate system of internal controls.

Section 4.05. Absence of Certain Changes or Events. Except as contemplated by this Agreement or the Merger Agreement and other than in connection with the negotiation, execution and delivery of the Merger Agreement, the Lorillard Transfer Agreement and all other agreements and actions taken in connection with the transactions contemplated thereby, from January 1, 2014 to the date of this Agreement, the Lorillard Asset Owners have (a) operated the Lorillard Assets and operated and conducted the Maverick Brand Business and the blu Brand Business in the ordinary course in all material respects and (b) not taken any action that, if such action were taken after the date of this Agreement, would require the Acquiror's consent pursuant to Section 6.01.

Section 4.06. Absence of Litigation. There are no (and since January 1, 2014, there have been no) Actions pending or threatened against the Lorillard Asset Owners that relate to the Lorillard Assets that have had, or would reasonably be expected to have, individually or in the aggregate, a Lorillard Material Adverse Effect. No Lorillard Asset Owner is a party or subject to or in default under any outstanding judgment, order or decree applicable to the Lorillard Assets.

Section 4.07. Compliance with Laws.

(a) None of the Lorillard Asset Owners is, or since January 1, 2013, has been, in non-compliance with any Laws or Governmental Orders applicable to the operation of the Lorillard Assets or the use of the Lorillard Brands or operation of the blu Brand Business, except for such non-compliance that, individually or in the aggregate, has not had and would not reasonably be expected to have a Lorillard Material Adverse Effect. None of the Lorillard Asset Owners has received, since January 1, 2013, any written notice or other communication from any Governmental Authority that alleges that the blu Brand Business or the Maverick Brand Business or, in connection with the Lorillard Assets, any Lorillard Asset Owner, has any Liability under, or is not in compliance with, any applicable Laws, except for any notice or other communication relating to matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Lorillard Material Adverse Effect.

(b) None of the Lorillard Asset Owners or any of their respective Subsidiaries, nor any director or senior officer of Lorillard:

(i) is, or is controlled by, a Restricted Party;

(ii) directly or indirectly, has conducted, conducts or is otherwise involved with any business with or involving any Governmental Authority (or any sub-division thereof), or any Person targeted by, or located in any country that is the subject of, any Sanctions; or

(iii) is or, within the past two years has been, in violation of or subject to an investigation relating to Sanctions.

(c) With respect to the Lorillard Assets, none of the Lorillard Asset Owners nor any of their respective Subsidiaries, nor any director or senior officer of RAI, directly or indirectly, has within the past two years, violated or is in violation of any applicable anti-corruption Law;

(d) With respect to the Lorillard Assets, the operations of the Lorillard Asset Owners are and, since January 1, 2013 have been, conducted in material compliance with all applicable Money Laundering Laws, and no Actions involving the Lorillard Assets are pending or threatened with respect to Money Laundering Laws that, individually or in the aggregate, have had or would reasonably be expected to have a Lorillard Material Adverse Effect.

Section 4.08. Governmental Licenses and Permits. (a) All material Permits relating to the Lorillard Assets (the "Material Lorillard Asset Permits") are validly held by Lorillard or a Subsidiary of Lorillard, and Lorillard or a Subsidiary of Lorillard has complied with the terms and conditions thereof, (b) since January 1, 2013, Lorillard has not received written notice of any Action relating to, and there are no facts, circumstances or conditions that would reasonably be expected to result in, the termination, suspension, material modification, revocation or nonrenewal of any such Material Lorillard Asset Permits and (c) none of such Material Lorillard Asset Permits would reasonably be expected to be subject to termination, suspension, material modification, revocation or nonrenewal as a result of the execution and delivery of this Agreement or the consummation of the Transactions contemplated hereby.

Decision and Order

Section 4.09 Sufficiency of and Title to the Assets.

(a) As of the date of this Agreement, the tangible Lorillard Assets are structurally sound, in operating condition, and adequate for the uses to which they are currently being put, in each case, subject to ordinary wear and tear.

(b) The Lorillard Assets will, together with the Ancillary Agreements and Third Party Rights and taking into account the benefits and burdens passed to the Acquiror pursuant to Section 2.02, constitute all of the assets, properties, rights and interests (including real property and tangible and intangible property) necessary for the Acquiror to conduct the blu Brand Business and the Maverick Brand Business and to operate the Greensboro Facility and the Danville Facility immediately following the Closing in all material respects as the same is conducted on the date of this Agreement and as of immediately prior to the Closing.

(c) Except for Permitted Liens, the Lorillard Asset Owners have good and marketable title to the Lorillard Assets free and clear of all Liens.

Section 4.10. Intellectual Property.

(a) Section 4.10 of the Disclosure Schedule sets forth a complete and accurate list of all Lorillard Brands Intellectual Property that is registered or issued, or for which applications to register or obtain issuance have been filed and are pending anywhere in the world, and an indication of the jurisdictions in which such filings have been made and the status thereof and any Trademarks included in the Lorillard Brands Intellectual Property that are not registered but are material to the business related to the Lorillard Brands or the blu Brand Business. All Lorillard Brands Intellectual Property so shown as registered or issued is duly registered in or filed in or issued by the United States Copyright Office, the United States Patent and Trademark Office or any similar national or local foreign intellectual property authority.

(b) The Lorillard Asset Owners own and have the right to use, free and clear of all Liens (other than Permitted Liens), all material Lorillard Brands Intellectual Property. All registered patents, Trademarks and copyrights included in the Lorillard Brands Intellectual Property are valid, and such registered patents, Trademarks and copyrights are subsisting and in full force and effect, and have not been canceled, expired or abandoned.

(c) All employees, agents, consultants or contractors who have contributed to the creation or development of any material Lorillard Brands Intellectual Property either: (i) created such Intellectual Property in the scope of his or her employment with the relevant Lorillard Asset Owner at the time of creation of such materials; (ii) is a party to a "work-for-hire" agreement under which the relevant Lorillard Asset Owner is deemed to be the original owner/author of all rights, title and interest therein; or (iii) has executed an assignment in favor of the relevant Lorillard Asset Owner of all right, title and interest in such Intellectual Property.

(d) (i) The business related to the Lorillard Brands and the blu Brand Business, in each case, as operated on the date of this Agreement do not infringe upon any Intellectual Property rights of third parties; (ii) there is no pending or threatened infringement claim, opposition, interference or cancellation proceeding before any court, patent office or registration authority in any jurisdiction against any Lorillard Brands Intellectual Property; and

(iii) since January 1, 2011, neither Lorillard nor any other Lorillard Asset Owner has received any written notice from any other Person challenging its use or ownership of any Lorillard Brands Intellectual Property material to the use of the Lorillard Brands or the subsistence, validity or enforceability thereof.

(e) No Person is, as of the date of this Agreement, engaging in any activity that infringes in any material respect upon the Lorillard Brands Intellectual Property.

(f) Except with respect to registered and issued Lorillard Brands Intellectual Property that was allowed to lapse in the ordinary course of business, the Lorillard Asset Owners have taken commercially reasonable action to maintain and preserve the Lorillard Brands Intellectual Property, including entering into appropriate confidentiality/non-disclosure agreements with third parties to whom they disclose confidential information or trade secrets that are Lorillard Brands Intellectual Property and that are material to the use of the Lorillard Brands or the operation of the blu Brand Business, and making payments of all maintenance and similar fees for any such Lorillard Brands Intellectual Property.

(g) The consummation of the transactions contemplated by this Agreement will not materially impair or materially alter any of the Lorillard Asset Owners' rights (or the Acquiror's rights following the Closing) in any Lorillard Brands Intellectual Property.

(h) There are no settlements, forbearances to sue, consents, judgments or orders to which Lorillard Asset Owners are a party or with respect to which such parties are bound that restrict the rights of the Lorillard Asset Owners to use any material Lorillard Brands Intellectual Property other than on behalf of Lorillard and its Affiliates.

Section 4.11. Information Technology.

(a) The Lorillard Asset Owners are the exclusive owners and have direct control of and/or are validly licensed or otherwise authorized to use the Transferring IT Systems.

(b) The Transferring IT Systems comprise all material IT Systems required for the operation of the Lorillard Business after the Closing in substantially the same manner as the Lorillard Business was operated during the six month period immediately prior to the date of this Agreement.

(c) There are no material defects in any Software transferred pursuant to Section 2.01(a)(xvii) that would prevent the same from performing in accordance with its specifications.

(d) There have been no security breaches, breakdowns, malfunctions, data loss, failures or other defects in the Transferring IT Systems in the two year period ended on the date of this Agreement which have had a material adverse effect on the operations of the Lorillard Business.

Section 4.12. Environmental Matters. The representations and warranties set forth in this Section 4.12 represent the sole and exclusive representations and warranties regarding Environmental Laws and Environmental Permits related to the Lorillard Brands and the blu Brand Business. Except for matters that, individually or in the aggregate, would not reasonably be expected to have a Lorillard Material Adverse Effect:

(a) the Lorillard Assets and the Transferred Real Property owned or leased by Lorillard Asset Owners are and, since January 1, 2011, have been in compliance with Environmental Laws;

(b) the Lorillard Asset Owners possess, maintain and are and, since January 1, 2011 have been, in compliance with all required Environmental Permits. The transactions contemplated by this Agreement will not result in or trigger the termination, modification, revocation, or right of termination or cancellation of or under any such Environmental Permits;

(c) there are no pending or threatened Environmental Actions against or affecting the Lorillard Assets or the Transferred Real Property and there are no facts, circumstances or conditions that would reasonably be expect to form the basis of any such Environmental Action; and

(d) there are no Hazardous Materials present in, on, at, under or migrating to or from any of the Transferred Real Property or any third-party property to which any Hazardous Materials were sent in connection with the Lorillard Assets or any prior operations of the Lorillard Assets for treatment, recycling, storage or disposal that would reasonably be expected to require any investigation, cleanup, remediation or similar activities or form the basis of any Environmental Action.

Section 4.13. Major Customers and Suppliers; Assumed Contracts.

(a) Section 4.13(a) of the Disclosure Schedule lists each of the Material Lorillard Brands Customers and the Material Lorillard Brands Suppliers. Since January 1, 2013, no Material Lorillard Brands Customer or Material Lorillard Brands Supplier has either terminated its relationship with the Lorillard Asset Owners with respect to the business related to the Lorillard Brands or the blu Brand Business or materially reduced the aggregate value of its annual transactions with the Lorillard Asset Owners with respect to the business related to Lorillard Brands or the blu Brand Business, nor has any Lorillard Asset Owner received written notice from any Material Lorillard Brands Customer or Material Lorillard Brands Supplier that it intends to do so.

(b) Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Lorillard Material Adverse Effect, (i) each Assumed Contract to which a Lorillard Asset Owner is a party is a legal, valid and binding obligation of the applicable Lorillard Asset Owner, and each other party to such Assumed Contract, and (ii) is enforceable against the applicable Lorillard Asset Owner and each such other party, in accordance with its terms, subject, in each case, to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally, and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a

Lorillard Material Adverse Effect, (i) none of the Lorillard Asset Owners, nor any other party to an Assumed Contract is in material default or material breach of or has failed to perform any material obligation under an Assumed Contract.

Section 4.14. Taxes.

(a) Each Lorillard Asset Owner has timely filed all material Tax Returns required to be filed by it with respect to the blu Brand Business, each such Tax Return is true, correct and complete in all material respects, and all material Taxes (whether or not shown on any Tax Return) owed by any Lorillard Asset Owner with respect to or attributable to the blu Brand Business or the Lorillard Assets and the Assumed Liabilities have been or will be paid in full at the time such Taxes were or will be due and payable.

(b) With respect to the blu Brand Business, (i) no Lorillard Asset Owner is the subject of an audit or other examination of Taxes by any Governmental Authority or other proceeding, and no such audit or other examination or proceeding is contemplated or pending; (ii) no extension or waiver of the statute of limitations has been granted for any Tax Return with respect to any material Taxes, which statute (after giving effect to such extension or waiver) has not yet expired; (iii) no issues with respect to material Taxes were raised by the relevant Governmental Authority during any currently pending or completed audit or examination that would reasonably be expected to recur in a later taxable period; and (iv) no Lorillard Asset Owner has received any written notice from any Governmental Authority relating to any material Taxes with respect to the blu Brand Business which are currently in dispute or are unpaid.

(c) With respect to the businesses related to the Lorillard Brands and the blu Brand Business, no written claim has been made by a Governmental Authority in a jurisdiction where any Lorillard Asset Owner does not file a Tax Return that any Lorillard Asset Owner is or may be subject to taxation by that jurisdiction for Taxes that would be covered by or the subject of such Tax Return, which claim is pending.

(d) There is no Lien for a material amount of Taxes on any Lorillard Asset that arose in connection with any failure (or alleged failure) to pay any Tax.

Section 4.15. Employment and Employee Benefits Matters.

(a) Section 4.15(a) of the Disclosure Schedule sets forth a true and accurate list of all material Lorillard Employee Plans. The term "Lorillard Employee Plans" means (i) all employee benefit plans (within the meaning of Section 3(3) of ERISA (whether or not subject to ERISA)) and all bonus, stock option, stock purchase, restricted stock and other equity or equity-based awards, incentive, deferred compensation, retiree health or life insurance, supplemental retirement, severance, superannuation, profit-sharing or other benefit plans, programs, agreements or arrangements, that are maintained, contributed to, or sponsored by the Lorillard Asset Owners or their respective Affiliates and ERISA Affiliates for the benefit of any employee of Lorillard or its Affiliates (including any employee of Lorillard or its Affiliates who is not actively employed at such time and who has a right of re-instatement) (each a "Lorillard Employee") or any dependents thereof and (ii) all individual employment, retention, termination, change in control, severance or other similar contracts or agreements pursuant to which any

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Lorillard Asset Owner or its Affiliates currently has any obligation or Liability with respect to any Lorillard Employee or any dependents thereof. Each Lorillard Employee Plan is in writing and, with respect to each Lorillard Employee Plan, RAI has previously made available to the Acquiror, true and correct copies of each of the following documents: (i) a copy of the Lorillard Employee Plan (or to the extent no such copy exists, an accurate written description thereof); (ii) a copy of the most recent summary plan description and summary of material modifications with respect thereto, if any; (iii) a copy of each trust or other funding arrangement, if any; (iv) the two most recent annual financial reports, if any; (v) the two most recent actuarial reports, if any; and (vi) if applicable, the most recent IRS determination letter. Except as specifically provided in the foregoing documents made available to Acquiror and except as provided by applicable Law, there are no material amendments to any Lorillard Employee Plan, nor has any party with the authority to do so undertaken to make any such material amendments or to adopt or approve any new Lorillard Employee Plan.

(b) None of the Lorillard Employee Plans is a Multiemployer Plan or a single employer plan (within the meaning of Section 4001(a)(15) of ERISA) for which any Lorillard Asset Owner would reasonably be expected to incur material Liability under Section 4063 or 4064 of ERISA for which the Acquiror or any of its Affiliates would reasonably be expected to be liable on or after the Closing.

(c) Each Lorillard Employee Plan that is intended to be qualified under Section 401(a) of the Code has received a favorable determination letter from the IRS that it is so qualified, and each related trust that is intended to be exempt from federal income Tax pursuant to Section 501(a) of the Code has received a determination letter from the IRS that it is so exempt, and no fact or event has occurred since the date of such determination letter that would reasonably be expected to adversely affect such qualification or exemption, as the case may be.

(d) None of the Lorillard Asset Owners has incurred any material Liability, for which the Acquiror or any of its Affiliates would reasonably be expected to be liable on and after the Closing, under or arising out of Title IV of ERISA that has not been satisfied in full and no fact or event exists that would reasonably be expected to result in such a Liability. None of the Lorillard Assets owned by a Lorillard Asset Owner is the subject of any material Lien arising under Section 303(k) of ERISA or Section 430(k) of the Code and none of the Lorillard Asset Owners has been required to post any material security under ERISA or the Code with respect to any Lorillard Employee Plan, in each case, for which the Acquiror or any of its Affiliates would reasonably be expected to be liable on and after the Closing, and no fact or event exists that would reasonably be expected to give rise to any such Lien or requirement to post any such security.

(e) With respect to each Lorillard Employee Plan, all material employer and employee payments, expenses, contributions or accruals (including premiums) required by Law or by the terms of such plan have been made when due pursuant to the terms of such plan and applicable Laws, or if applicable, accrued, in accordance with US GAAP.

(f) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (either alone or in conjunction with any other event) result in, cause the accelerated vesting, funding or delivery of, or increase in any

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material respect the amount or value of, any payment or benefit to any Lorillard Employee that is payable by Acquiror pursuant to the terms of any Lorillard Employee Plan or pursuant to the terms of any contractual obligation expressly assumed by Acquiror under this Agreement or result in any material limitation on the right of the Acquiror to amend, merge, terminate or receive a reversion of assets from any Lorillard Employee Plan that is to be transferred to the Acquiror pursuant to this Agreement or its related trusts. Except as disclosed in Section 4.15(f) of the Disclosure Schedule, in connection with the consummation of the transactions contemplated by this Agreement, there will be no disallowance of a deduction under Section 280G of the Code for any amount paid or payable by Lorillard or its Affiliates as employee compensation, whether under any contract, plan, program or arrangement, understanding or otherwise.

(g) Each Lorillard Employee Plan is now and has been operated in all material respects in accordance with the requirements of all applicable Laws, including ERISA and the Code.

(h) There are no material controversies, audits or investigations pending or threatened in connection with any Lorillard Employee Plan.

(i) The Acquiror has previously been provided a true and correct listing, as of June 16, 2014, of each Lorillard Employee, his or her current rate of annual base salary or current wages, 2014 annual bonus target, job title, employment status, work location and date of hire.

(j) The Lorillard Asset Owners are in compliance in all material respects with all applicable Laws governing the employment of labor, including all Laws relating to wages, hours, discrimination, termination, reductions in force, layoff, classification of employees for purposes of overtime, immigration, civil rights, safety and health, workers' compensation and the collection and payment of withholding and/or social security Taxes and similar Taxes. No Lorillard Asset Owner has any material Liability, for which the Acquiror or any of its Affiliates would reasonably be expected to be liable on and after the Closing, by reason of an individual who performs or performed services for the Business for the Lorillard Asset Owners in the United States in any capacity being improperly excluded from participating in a Lorillard Employee Plan; and each Lorillard Employee in the United States has been properly classified in all material respects as "exempt" or "non-exempt" under applicable Law.

(k) The Lorillard Asset Owners have taken prior to the date of this Agreement all actions required by Law to be taken prior to the date of this Agreement and all actions otherwise necessary to enable the Parties to carry out the transactions contemplated by this Agreement with respect to trade unions, work councils, employee representatives and employees in connection with the transactions contemplated by this Agreement, and, where such actions are required to be taken after the date of this Agreement, whether by Law or otherwise, the Lorillard Asset Owners will take, such actions as soon as reasonably practicable following the date of this Agreement (and in any event prior to the Closing Date or as otherwise required under this Agreement or any exhibit hereto).

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Section 4.16. Real Property.

(a) All leases and subleases for the Transferred Leased Property under which any of the Lorillard Asset Owners is a lessee or sublessee are in full force and effect and are enforceable in accordance with their respective terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). None of the Lorillard Asset Owners nor any other party to a lease or sublease related to Transferred Leased Property and to which a Lorillard Asset Owner is a party is in a material default or material breach of or has failed to perform any material obligation under any such lease or sublease.

(b) The Lorillard Asset Owners have (i) good and marketable fee simple title to all the Transferred Owned Property, and (ii) good and valid leasehold or subleasehold (as applicable) title to all Transferred Leased Property leased by them, in each of cases (i) and (ii), free and clear of all Liens, except for Permitted Liens.

(c) All buildings, fixtures and other improvements located on the Transferred Real Property owned or leased by a Lorillard Asset Owner are structurally sound and in operating condition, subject to ordinary wear and tear, except, in each case, as would not materially adversely affect the use and operation of any such buildings, fixtures and other improvements.

Section 4.17. Insurance. Section 4.17 of the Disclosure Schedule contains a list of (a) all material insurance policies maintained by a Lorillard Asset Owner and in effect as of the date of this Agreement that relates primarily to the blu Brand Business or any Transferred Asset owned, leased or held by a Lorillard Asset Owner, including policy type, policy numbers, policy periods, limits of coverage, and information regarding any settlement or commutation of the same and (b) with respect to the blu Brand Business, the Lorillard Assets owned, leased or held by a Lorillard Asset Owner or the Assumed Liabilities that are Liabilities of a Lorillard Asset Owner, a list of all pending claims as of the date of this Agreement against any such insurance policy. Subject to any settlements and commutations and except as would not reasonably be expected to be material to an owner of the Lorillard Assets, all such insurance policies are in full force and effect, and all premiums due thereunder have been paid. Since January 1, 2013, no Lorillard Asset Owner has received written notice of cancellation or termination, other than in connection with normal renewals, of any such insurance policies. There is no claim with respect to the blu Brand Business, Lorillard Assets or Assumed Liabilities by any Lorillard Asset Owner pending under any such insurance policies that (a) has been denied or disputed by the insurer other than denials and disputes in the ordinary course of business consistent with past practice or (b) if not paid would reasonably be expected to be material to an owner of the Lorillard Assets.

Section 4.18. Disclosure of State Settlement Arrangements. Lorillard has made available to the Acquiror all Contracts and Governmental Orders to which any Lorillard Asset Owner is a party or bound, in each case with respect to the Lorillard Brands or the blu Brand Business, and that relate wholly or partially to any of the State Settlements including any agreement or arrangement relating to the allocation of any amount with respect to any State Settlement payment among the OPMs or between any Lorillard Asset Owner and any other

signatory or litigant. There are no agreements existing as at the date hereof and as of the Closing Date among the OPMs with respect to the MSA, or among the Settling Defendants with respect to any of the PSS Agreements, that affect the Maverick Brand other than those set out in Section 4.9 of Exhibit F to this Agreement. Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Material Adverse Effect, there are no claims or disputes or outstanding obligations under the Growers Trust.

Section 4.19. Disclosure of DoJ Tobacco Case Documentation. Within 90 days following the date of this Agreement, Lorillard will have made available to the Acquiror all Contracts and Governmental Orders to which any Lorillard Asset Owner is a party or bound, in each case with respect to the Lorillard Brands or the blu Brand Business, and that relates to the DoJ Tobacco Case.

Section 4.20. Compliance with Final Judgment and Remedial Order. Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Lorillard Material Adverse Effect, each Lorillard Asset Owner has complied with all obligations under the Final Judgment and Remedial Order applicable to the Lorillard Brands or blu Brand Business, and as of the date of this Agreement, no such Person has received any written notice or other written communication of any material breach of any of its obligations under any such Final Judgment and Remedial Order.

Section 4.21. Compliance with State Settlements. Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Lorillard Material Adverse Effect, each Lorillard Asset Owner has complied with all obligations under the State Settlements applicable to it, and as of the date of this Agreement, no such Person has received any written notice or other written communication of any material breach of any of its obligations under any State Settlement.

Section 4.22. Compliance with Certification/Listing. Except for matters that, individually or in the aggregate, have not had and would not reasonably be expected to have a Lorillard Material Adverse Effect, each Certification/Listing in respect of the Lorillard Brands is valid, and as of the date of this Agreement, no Lorillard Asset Owner has received any written notice or other written communication of any expiration, invalidity or material adverse change in such Certification/Listing or any material non-compliance or alleged material non-compliance with any Law applicable to such Certification/Listing.

Section 4.23. Brokers. Except for fees and expenses of Barclays Capital Inc. and Centerview Partners LLC (the "Lorillard Bankers") in connection with their rendering of investment banking advice to Lorillard, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission from any Lorillard Asset Owner in connection with the sale of the Lorillard Brands or the blu Brand Business based upon arrangements made by or on behalf of Lorillard. Lorillard is solely responsible for the investment advisory fees and expenses of the Lorillard Bankers.

Section 4.24. No Indebtedness as of Closing. As of the Closing, no Transferred Asset owned by a Lorillard Asset Owner will be encumbered with any Indebtedness.

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Section 4.25. Authority; Performance.

(a) Each of the Lorillard Asset Owners has full power and authority to consummate the transactions contemplated to be consummated by it by this Agreement.

(b) The consummation by each Lorillard Asset Owner of the transactions contemplated by this Agreement has been duly authorized by all requisite corporate or equivalent action on the part of such Lorillard Asset Owner.

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF THE ACQUIROR

The Acquiror represents and warrants to RAI that, except as set forth in the Acquiror Disclosure Schedule:

Section 5.01. Incorporation and Qualification of the Acquiror. The Acquiror is a limited liability company duly organized, validly existing and in good standing under the Laws of Texas and has all necessary limited liability company power and authority and possesses all Permits necessary to enable it to own, lease, or otherwise hold its properties and assets and to conduct its business as currently conducted. Imperial is, indirectly, the holder of all of the equity interests in the Acquiror.

Section 5.02. Authority; Execution and Delivery; Enforceability.

(a) The Acquiror has full power and authority to execute and deliver this Agreement and each Ancillary Agreement to which it is, or is specified to be, a party and, subject to receiving the Imperial Shareholder Approval, to consummate the transactions contemplated to be consummated by it by, and carry out its obligations under, this Agreement and each such Ancillary Agreement.

(b) The execution and delivery by the Acquiror of this Agreement and the other Transaction Agreements to which the Acquiror is, or is specified to be, a party, and the consummation by the Acquiror of the transactions contemplated by, and the performance by the Acquiror of its obligations under, the Transaction Agreements have been duly authorized by all requisite corporate action on the part of the Acquiror.

(c) This Agreement has been, and upon execution and delivery each Ancillary Agreement to which the Acquiror is, or is specified to be, a party will be, duly executed and delivered by the Acquiror, and (assuming due authorization, execution and delivery by the other party or parties thereto) this Agreement constitutes, and upon execution and delivery each Ancillary Agreement will constitute, legal, valid and binding obligations of the Acquiror, enforceable against the Acquiror in accordance with their respective terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

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Section 5.03. No Conflict. The execution, delivery and performance by the Acquiror of, and the consummation by the Acquiror of the transactions contemplated by, the Transaction Agreements do not and will not (a) violate or conflict with the limited liability company agreement of the Acquiror, (b) conflict with or violate any Law or Governmental Order applicable to the Acquiror or (c) result in any breach of, or constitute a default (or event that with the giving of notice or lapse of time, or both, would become a default) under, or give to any Person any rights of termination, amendment, recapture, acceleration or cancellation of, or result in the creation of any Lien on any of the assets or properties of the Acquiror pursuant to, or require the consent of or notice to any Person under, any note, bond, mortgage, indenture, Contract or Permit to which the Acquiror is a party or by which any of such assets or properties is bound, except, in the case of clauses (b) and (c), any such conflicts, violations, breaches, defaults, rights or Liens as would not, individually or in the aggregate, reasonably be expected to prevent, materially impair or delay the ability of the Acquiror to consummate the transactions contemplated by, or perform its obligations under, the Transaction Agreements.

Section 5.04. Governmental Notices, Consents and Approvals. The execution and delivery by the Acquiror of this Agreement and the other Transaction Agreements to which it is, or is specified to be, a party do not, and the performance by the Acquiror of, and the consummation by the Acquiror of the transactions contemplated by, the Transaction Agreements will not, require any consent, approval, authorization or other action by, or any filing with or notification to, any Governmental Authority, except (a) as contemplated by Section 9.01(a); (b) the required prior approval of the DC District Court to transfer the Acquired Tobacco Cigarette Brands to the Acquiror as contemplated by Section 9.01(d); (c) the change to the brands listing of the Acquired Tobacco Cigarette Brands by NAAG as contemplated by Section 6.19; (d) the certification or re-certification (if applicable) of the Acquired Tobacco Cigarette Brands by the States as contemplated by Section 6.19; (e) compliance with Section XVIII(c) of the MSA; (f) the notice of transfer of the Acquired Tobacco Cigarette Brands and related assets to the MSA Settling States as contemplated by Section 6.19 and Section 6.20 and Section XVIII(x) of the MSA; (g) to the extent necessary, approval or authorization by the PSS; and (h) where the failure to obtain such consent, approval, authorization or action, or to make such filing or notification, would not prevent, materially impair or delay the ability of the Acquiror to consummate the transactions contemplated by, or perform its obligations under, the Transaction Agreements.

Section 5.05. Information Supplied. None of the information provided or to be provided by the Acquiror specifically for inclusion or incorporation by reference in materials filed by RAI or Lorillard with the SEC or mailed to RAI shareholders or Lorillard stockholders, at the time such materials are filed with the SEC or first mailed to RAI shareholders or Lorillard stockholders, as the case may be, will contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

Section 5.06. Financial Ability.

(a) Subject to Section 5.06(f), the Acquiror has sufficient funds available to it, and (subject only to Closing) will have sufficient funds available to it under the financing agreements (the "Financing Agreements") entered into to finance the Purchase Price, to pay when required by the Transaction Agreements, all amounts payable by it or any of its Affiliates

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under or as contemplated by the Transaction Agreements, including payment of the Purchase Price together with any fees and expenses to be borne by the Acquiror in accordance with the Transaction Agreements (collectively, the "Required Amount"). The financing under the Financing Agreements to finance the Required Amount is collectively referred to in this Agreement as the "Debt Financing".

(b) The Acquiror has, prior to the execution of this Agreement, delivered to RAI true and complete copies of the Financing Agreements (redacted as necessary to address reasonable confidentiality concerns but only to the extent that any such redaction is not directly or indirectly in respect of any provision which relates to the commitment to provide the Debt Financing), pursuant to which the Acquiror will have sufficient funds to pay when required by the Transaction Agreements the Required Amount.

(c) The Financing Agreements are in full force and effect and constitute legal, valid and binding obligations of each of the parties thereto (in the case of parties other than Affiliates of the Acquiror, so far as the Acquiror is aware).

(d) The Financing Agreements in the form delivered to RAI have not been amended or modified: (i) in a manner which would reduce the aggregate amount of the Debt Financing set forth in the Financing Agreements below the Required Amount; or (ii) in a manner otherwise likely to prevent or impair or delay the Closing or the date on which the Debt Financing would otherwise be obtained, and the Acquiror will promptly deliver true and correct copies of any amendment, replacement, supplement or modification to the Financing Agreements to RAI and Lorillard, if they are amended, modified, replaced or supplemented in any respect that would have an effect specified in (i) or (ii) above.

(e) Except to the extent refinanced on a dollar-for-dollar basis through issues of debt for cash by Affiliates of the Acquiror, the commitments available to finance the Required Amount contained in the Financing Agreements have not as of the date of this Agreement been and as of Closing will not have been withdrawn, terminated or rescinded in any respect.

(f) There are no conditions to the Acquiror's or any of its Affiliates' ability to borrow under the Financing Agreements and to pay when required the Required Amount, other than: (i) any conditions precedent to Closing under this Agreement; (ii) the conditions expressly set forth in the Financing Agreements; and (iii) any other conditions that have been satisfied on the date of this Agreement and will remain satisfied at Closing.

(g) Each warranty, representation, covenant and obligation of the Acquiror or any of its Affiliates made, given or undertaken in or pursuant to the Financing Agreements, the breach of or non-compliance with which would limit or prevent the borrowing of funds to finance the payment of the Required Amount under the Financing Agreements and the use of such portion thereof as may be required by the Acquiror to enable it to consummate the Closing and to perform its other obligations under the Transaction Agreements, has not been breached and will not at Closing be breached in any respect which would limit or prevent the borrowing of funds under the Financing Agreements as at Closing and the use of such portion thereof as may be required by the Acquiror to enable it to consummate the transactions contemplated by, and to perform its other obligations under, the Transaction Agreements.

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(h) The Acquiror has no reason to believe that it or any of its Affiliates will be unable to satisfy on a timely basis any warranty, covenant or obligation prior to or on Closing to be satisfied by the Acquiror or the Affiliates of the Acquiror contained in the Financing Agreements, the non-satisfaction of which would limit, delay or prevent the borrowing of funds under the Financing Agreements to finance the Required Amount, and the Acquiror undertakes that if it becomes aware of any such reason prior to the Closing, it will promptly notify the Sellers of the same.

(i) As of the date of this Agreement there are no outstanding borrowings under or pursuant to the Existing Facilities Agreement (as such term is defined in the original form of the Financing Agreements) and at or prior to the Closing, there will not be any such outstanding borrowings by the Acquiror or any of its Affiliates thereunder.

Section 5.07. Brokers. Except for the fees and expenses of Credit Suisse and Goldman Sachs (collectively, the "Imperial Bankers") in connection with their rendering of investment banking advice to the Acquiror and its Affiliates, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission from the Acquiror or any of its Affiliates in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Acquiror or any of its Affiliates. The Acquiror is solely responsible for the investment advisory fees and expenses of the Imperial Bankers.

ARTICLE VI

ADDITIONAL AGREEMENTS

Section 6.01. Conduct Prior to the Closing. Except as required by applicable Law or as otherwise contemplated by or necessary to effectuate the Merger or to perform the Transaction Agreements and except for matters identified in Section 6.01 of the Disclosure Schedule, from the date of this Agreement through the Closing, unless the Acquiror otherwise consents in writing in advance (such consent not be unreasonably withheld, conditioned or delayed), from the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI will, and will cause the RAI Asset Owners to, and will use its reasonable best efforts to cause the Lorillard Asset Owners to: (A) operate the business related to the RAI Brands and the PR Business and the blu Brand Business in the ordinary course in all material respects; (B) use reasonable best efforts to preserve intact the material business relationships and goodwill associated with the Acquired Brands, the blu Brand Business and the PR Business with the material customers, material suppliers, material distributors, material agents, material retailers and others with whom the RAI Asset Owners or Lorillard Asset Owners have business relationships with respect to the business related to the Acquired Brands and the blu Brand Business or the PR Business, as applicable; (C) use reasonable best efforts to continue distribution practices substantially in accordance with past practice; and (D) use reasonable best efforts to keep available the services of executive officers and the Key Lorillard Employees who are Proposed Transferred Employees in the ordinary course consistent with past practice. In addition, and without limiting the generality of the foregoing, except for matters identified in Section 6.01 of the Disclosure Schedule, unless the Acquiror otherwise consents in writing in advance (such consent not be unreasonably withheld,

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conditioned or delayed), from the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI will not and will cause the other Sellers not to:

(a) grant any Lien (other than granting or suffering to exist a Permitted Lien) on any material Transferred Assets (whether tangible or intangible) that will not be extinguished, as to the Transferred Assets, at the Closing;

(b) acquire (by merger, consolidation, acquisition of stock or assets or otherwise) any corporation, partnership or other business organization or division that would constitute Transferred Assets in excess of $35,000,000 in the aggregate;

(c) incur or suffer to exist any Indebtedness (including intercompany Indebtedness) that would encumber any Transferred Asset, or otherwise issue any debt securities or assume, grant, guarantee or endorse, or otherwise as an accommodation become responsible for, the obligations of any Person, except for any Indebtedness, debt securities or obligations for which RAI or its Affiliates shall be solely obligated and that shall be Excluded Liabilities or that will be extinguished on or prior to the Closing;

(d) other than in the ordinary course of business consistent with past practice, waive any claims or rights of material value to the Acquired Brands, the PR Business or the blu Brand Business (to the extent such claims or rights would constitute Transferred Assets);

(e) sell, pledge, assign, transfer, lease, sublease, license or otherwise dispose of any Transferred Assets, other than (i) Intellectual Property, Inventory and obsolete or excess Equipment in the ordinary course of business consistent with past practice or (ii) pursuant to existing Assumed Contracts or commitments or pursuant to Assumed Contracts entered into after the date of this Agreement without violating the terms of this Agreement;

(f) with respect to (i) the blu Brand Business, (A) undertake or commit to undertake any capital expenditure in any 12-month period (to the extent such capital expenditure would constitute an Assumed Liability) in excess of $10,000,000 in the aggregate for all such capital expenditures that are not contemplated by the capital plans set forth in Section 6.01(f)(1) of the Disclosure Schedule or (B) fail to make any capital expenditure contemplated by the capital plans set forth in Section 6.01(f)(1) of the Disclosure Schedule, except to the extent such failure would not materially affect the capital plan or cause a timing delay of more than a quarter or (ii) the PR Business, (A) undertake or commit to undertake any capital expenditure in any 12-month period (to the extent such capital expenditure would constitute an Assumed Liability) in excess of $20,000 in the aggregate for all such capital expenditures that are not contemplated by the capital plans set forth in Section 6.01(f)(2) of the Disclosure Schedule or (B) fail to make any material capital expenditure contemplated by the capital plans set forth in Section 6.01(f)(2) of the Disclosure Schedule;

(g) solely with respect to Proposed Transferred Employees, other than to the extent required by any existing Employee Plan or expressly contemplated or permitted by the terms of this Agreement or the Merger Agreement, (i) grant or announce any increase in the wages, salaries, compensation, bonuses, incentives, pension or other benefits payable, other than

in the ordinary course of business consistent with past practice, (ii) establish, adopt, amend or become a party to any new employee benefit or compensation plan, program, commitment, agreement or arrangement or collective bargaining agreement or other trade union agreement or amend any existing Employee Plan (including any employment agreement) in a manner that affects compensation or benefits payable, other than immaterial amendments, renewals and other changes in the ordinary course of business consistent with past practice, (iii) increase or promise to increase any benefits under any Employee Plan, other than in the ordinary course of business consistent with past practice, (iv) accelerate any vesting of compensation or benefits or pay any material compensation or benefits not otherwise due, (v) grant any rights to severance or termination pay to, or enter into any employment, consulting or severance agreement, other than in the ordinary course of business consistent with past practice, or (vi) with respect to any Employee Plan that is assumed as provided in Exhibit I, modify the actuarial assumptions used for determining benefits thereunder or fund any trusts related thereto, except, in each case, as required by Law (including, without limitation, Lorillard's obligation to engage in good faith bargaining);

(h) other than in the ordinary course, make any changes in any material respects to the working capital policies of the blu Brand Business or the PR Business or the inventory maintenance policies applicable to the Inventory;

(i) enter into any transactions or Contracts with Affiliates that would be Assumed Contracts or otherwise binding on the Transferred Assets after the Closing, other than in the ordinary course of business consistent with past practice;

(j) (i) other than in the ordinary course of business consistent with past practice, terminate, modify or amend, release, enter into, extend or waive any material right under, or discharge any other party thereto of any of their material obligations under, any lease in respect of Transferred Leased Property; or (ii) enter into any Contract that materially restrains, materially restricts or materially limits (A) the ability to sell, distribute or market any Acquired Tobacco Cigarette Brand or (B) the blu Brand Business or the PR Business from competing with or conducting any business or line of business in any geographic area, in each case other than exclusive distribution, agency or supply arrangements (not with Affiliates) entered into in the ordinary course of business consistent with past practice;

(k) fail to materially comply with any Law applicable to the operation or conduct of the blu Brand Business or PR Business;

(l) take any action that is reasonably likely to result in the termination, suspension, material modification, revocation or nonrenewal of any Permits that are material to the blu Brand Business or PR Business;

(m) enter into any new Contract that, if entered into prior to the date of this Agreement would be an Assumed Contract, or terminate, materially modify or materially amend, release, enter into, extend, waive any material right under, assign or otherwise change any material rights under or discharge any other party thereunder of any of their material obligations under any Assumed Contract, except in each case (i) in the ordinary course of business consistent with past practice or (ii) consistent with subsections (g) and (n);

(n) agree to any modification of payments or obligations under any State Settlement or agreement related to any State Settlement or in relation to the DoJ Tobacco Case, including agreements with States, other OPMs or SPMs, that by its terms applies to the Acquired Tobacco Cigarette Brands (or any of them) differently than it does to other tobacco cigarette brands owned by RAI or Lorillard, or take or fail to take any action under any State Settlement that could affect the Acquiror's payment or other obligations after the Closing or waive any credit or right under any State Settlement to which the Acquiror would be entitled after the Closing;

(o) take any action (including any action with respect to the FDA, any State or NAAG) that is reasonably likely to result in the termination, suspension, material modification, revocation or nonrenewal of the brand registrations, licenses or Certification/Listing of the Acquired Tobacco Cigarette Brands;

(p) take any action that is reasonably likely to result in a material adverse change in any obligations under the Final Judgment and Remedial Order in respect of the Acquired Tobacco Cigarette Brands; or

(q) authorize or enter into any transaction, agreement, commitment, undertaking or arrangement with respect to any of the foregoing.

Nothing in this Section 6.01 shall be deemed to limit any transfer of Excluded Assets prior to the Closing. Nothing in this Section 6.01 is intended to, or should be interpreted to, limit Lorillard's ability to engage in any legally required good faith bargaining with the unions representing Lorillard employees. Nothing in this Section 6.01 or in the remainder of this Agreement shall give the Acquiror, directly or indirectly, the right to control or direct the operations of RAI or Lorillard or any of their respective Affiliates with respect to the Transferred Assets prior to the Closing. Nothing in this Section 6.01 will restrict RAI or Lorillard or any of their respective Affiliates from taking any action required to be taken by it or from exercising any right permitted under Section 5.02, Section 5.03 or, subject to the proviso to Section 6.16(b) hereof, Section 6.03 of the Merger Agreement.

Section 6.02. Access to Information; Cooperation.

(a) From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, upon reasonable prior notice, and except as determined in good faith to be necessary to ensure compliance with any applicable Laws and subject to any applicable privileges (including the attorney-client privilege) and contractual confidentiality obligations, RAI shall, and shall cause its Affiliates and Lorillard and each of its and their respective Representatives to: (i) afford the Acquiror and its Representatives reasonable access, during normal business hours, to the properties and the Books and Records of each RAI Asset Owner and Lorillard Asset Owner relevant to the Transferred Assets; and (ii) furnish to the Acquiror and its Representatives such additional financial and operating data and other information regarding the Transferred Assets as the Acquiror may from time to time reasonably request, in each case for purposes of preparing to operate the Business immediately following the Closing, including, without limiting the foregoing, access to the following employee information: current rate of annual base salary or current wages, 2014 annual bonus

target, job title, employment status, work location and date of hire; provided that (A) such additional financial and other information is available to the Sellers or their respective Affiliates, as applicable, and (B) any such investigation shall not unreasonably interfere with any of the businesses, personnel or operations of the Sellers or any of their respective Affiliates; provided, further, that the auditors and accountants of the Sellers and their Affiliates shall not be obliged to make any work papers available to any Person except in accordance with such auditors' and accountants' normal disclosure procedures and then only after such Person has signed a customary agreement relating to such access to work papers in form and substance reasonably acceptable to such auditors or accountants. If so requested by RAI or the Acquiror, the Parties will enter into a customary joint defense agreement with respect to any information to be provided to the Acquiror pursuant to this Section 6.02(a).

(b) In addition to the obligations set forth in Section 6.22, from and after the Closing, in connection with the preparation of Tax Returns or financial statements or reporting obligations, upon reasonable prior notice, and except as determined in good faith to be necessary to (x) ensure compliance with any applicable Law, (y) preserve any applicable privilege (including the attorney-client privilege), or (z) comply with any contractual confidentiality obligations, each Party shall, and shall cause its Affiliates to afford the Representatives of the other Party, their Affiliates and their representatives reasonable access, during normal business hours, to all Books and Records, documents and other information within the knowledge, possession or control of the other Party or its Affiliates in respect of, in the case of requests by RAI, any Excluded Assets, and in respect of requests by the Acquiror, any Transferred Assets; provided that (A) such additional financial and other information is available to the other Party or its Affiliates, as applicable, (B) any such investigation shall not unreasonably interfere with the business or operations of the other Party or any of its Affiliates and (C) the auditors and accountants of the other Party or its Affiliates shall not be obligated to make any work papers available to any Person except in accordance with such auditors' and accountants' normal disclosure procedures and then only after such Person has signed a customary agreement relating to such access to work papers in form and substance reasonably acceptable to such auditors or accountants. If so requested the Parties shall enter into a customary joint defense and confidentiality agreement with respect to any information to be provided pursuant to this Section 6.02(b).

Section 6.03. Confidentiality.

(a) The terms of the letter agreement dated March 3, 2014 (the "Confidentiality Agreement"), among Imperial, RAI, Lorillard and BAT are incorporated into this Agreement by reference and shall continue in full force and effect until the Closing, at which time the confidentiality obligations under the Confidentiality Agreement shall terminate; provided, however, that Imperial's confidentiality obligations shall terminate only in respect of that portion of the Evaluation Material (as defined in the Confidentiality Agreement) relating to the Business. If, for any reason, the sale of the Transferred Assets is not consummated, the Confidentiality Agreement shall continue in full force and effect in accordance with its terms. The execution of this Agreement shall constitute written consent by RAI pursuant to the Confidentiality Agreement to all actions by the Acquiror and Imperial that are required or expressly permitted by this Agreement that would otherwise be restricted by the Confidentiality Agreement. The Confidentiality Agreement is hereby amended, as of the date of this Agreement, to include in the definition of "Representatives" all existing and prospective direct and indirect financing sources of Imperial and its Affiliates.

(b) From and after the Closing, RAI shall, and shall cause its Affiliates and its and their respective Representatives to, hold in confidence any and all confidential and proprietary information, whether written or oral, concerning the Business, except to the extent that RAI can show that such information (i) is generally available to the public through no fault of RAI, any of its Affiliates or its or their respective Representatives or (ii) is lawfully acquired by RAI, any of its Affiliates or its or their respective Representatives from and after the Closing from sources that are not prohibited from disclosing such information by a legal, contractual or fiduciary obligation. From and after the Closing, the Acquiror shall, and shall cause its Affiliates and its and their respective Representatives to, hold in confidence any and all confidential and proprietary information, whether written or oral, concerning the Retained Lorillard Brands, except to the extent that the Acquiror can show that such information (i) is generally available to the public through no fault of the Acquiror, any of its Affiliates or its or their respective Representatives or (ii) is lawfully acquired by the Acquiror, any of its Affiliates or its or their respective Representatives from and after the Closing from sources that are not prohibited from disclosing such information by a legal, contractual or fiduciary obligation. If a Party or any of its Affiliates or its or their respective Representatives is compelled to disclose any such confidential and proprietary information by judicial or administrative process or by other requirements of Law, or if it becomes necessary for such disclosing Party or any of its Affiliates to disclose such information in connection with any legal or administrative proceeding, the disclosing Party shall promptly notify the other Party in writing and shall disclose only that portion of such information as is necessary, and the disclosing Party shall provide the other Party with such appropriate protective order or other reasonable assurance that such information will be accorded confidential treatment as such other Party may reasonably request.

Section 6.04. Regulatory and Other Authorizations; Consents.

(a) Each of the Parties shall, and each shall cause its Affiliates and each of its and their respective Representatives to: (i) promptly obtain all authorizations, consents, orders, approvals, declarations, certifications, listings or Permits from, and make all filings with, all Governmental Authorities that may be, or become, necessary for its execution and delivery of, performance of its obligations pursuant to, and consummation of the transactions contemplated by, the Transaction Agreements, (ii) subject to the terms of this Agreement, take all such actions as may be requested by any such Governmental Authority to obtain such authorizations, consents, orders and approvals and (iii) subject to the terms of this Agreement, avoid the entry of, or effect the dissolution of, any Governmental Order or temporary restraining order in any suit or proceeding that would otherwise have the effect of preventing or materially delaying the consummation of the transactions contemplated by this Agreement. Each of the Parties will cooperate with the other in seeking promptly to obtain all such required authorizations, consents, orders and approvals. Subject to Section 6.04(f), no Party shall (and each shall ensure that none of its Affiliates or its or their respective Representatives shall) take any action that would reasonably be expected to have the effect of materially delaying, materially impairing or materially impeding the receipt of any required approvals.

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(b) In furtherance but not in limitation of the foregoing, and in relation to the HSR Act filing relating to the Merger, each of the Parties shall use its reasonable best efforts to cause the Governmental Authority that investigates the Merger pursuant to the HSR Act to enter a Governmental Order that incorporates, whether directly or by reference, the terms of this Agreement and the Ancillary Agreements.

(c) In addition to the obligations set forth in Section 6.04(a):

(i) each Party agrees: (A) to make or cause to be made appropriate joint advance notices, applications and submissions to States with respect to any changes in any Certification/Listing pursuant to the transactions contemplated by this Agreement and, in the case of RAI and Lorillard, the Merger Agreement, as promptly as practicable, and in any event, no later than 90 days prior to the Closing, requesting that all required changes in such Certification/Listing be made on the Closing Date, that the existing certifications remain in place until all required changes in such Certification/Listing are made, and that appropriate provisions for transition and sell-through of the Acquired Tobacco Cigarette Brands are included in such changes to the Certification/Listing; (B) to supply as promptly as practicable any additional information and documentary material that may be requested by any State or NAAG in connection with such Certification/Listing; and (C) to engage and cooperate in all communications, meetings and other actions (including litigation) reasonably required to prevent any period of delisting and ensure that the sale of the Acquired Tobacco Cigarette Brands in the States by or on behalf of Acquiror is permitted under applicable Law as of and after the Closing Date, including without limitation coordinating to ensure that the date the Acquired Tobacco Cigarette Brands are delisted (if applicable) occurs on the day that the certification changes to Acquiror and maintaining listings in place to ensure the products are continuously certified/listed.

(ii) To the extent any Certification/Listing is required in connection with any contract manufacturing arrangement following the Closing, RAI and the Acquiror agree: (A) to make or cause to be made appropriate joint advance notices, applications and submissions to States with respect to any such Certification/Listing; (B) to supply as promptly as practicable any additional information and documentary material that may be requested by any State or NAAG in connection with such Certification/Listing; and (C) to engage in all communications, meetings and other actions (including litigation) reasonably required to prevent any period of delisting and ensure that the sale of the relevant tobacco cigarette brand (including any relevant Acquired Tobacco Cigarette Brand) in the States by or on behalf such other party or any of its Affiliates is permitted under applicable Law as of and after the Closing Date.

(d) Subject to any applicable confidentiality obligations, each of the Acquiror and RAI shall promptly notify the other Party of any oral or written communication it receives from any Governmental Authority, NAAG, OPM, SPM, other signatory to or litigant in respect of any State Settlement, Certification/Listing, DC District Court, United States Department of Justice or defendant, intervenor or interested party in the DoJ Tobacco Case, permit the other party to review in advance any communication proposed to be made by such party to any Governmental Authority, NAAG, OPM, SPM, other signatory to or litigant in respect of any

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State Settlement, Certification/Listing, DC District Court, United States Department of Justice or defendant or interested party in the DoJ Tobacco Case and shall provide the other party with copies of all correspondence, filings or other communications between them or any of their Representatives, on the one hand, and any Governmental Authority, NAAG, OPM, SPM, other signatory to or litigant in respect of any State Settlement, Certification/Listing, DC District Court, United States Department of Justice or defendant or interested party in the DoJ Tobacco Case or members of its staff, on the other hand, in each case, relating to the matters that are subject of this Agreement or the Merger Agreement. No Party shall agree to participate in any meeting with any Governmental Authority, NAAG, OPM, SPM, other signatory to or litigant in respect of any State Settlement, Certification/Listing, DC District Court, United States Department of Justice or defendant or interested party in the DoJ Tobacco Case in respect of any such filings, investigation or other inquiry unless it consults with the other Party in advance and, to the extent permitted by such Governmental Authority, gives the other Party the opportunity to attend and participate at such meeting. Subject to the Confidentiality Agreement, the Parties will coordinate and cooperate fully with each other in exchanging such information and providing such assistance as the other Party may reasonably request in connection with the foregoing. Notwithstanding anything to the contrary in this Section 6.04(d), the Parties may, as they reasonably deem advisable and necessary, designate any competitively sensitive material provided to the other under this Section 6.04(d) as "outside counsel only," and such materials shall be given only to the outside counsel of the recipient Party. Materials provided to the other Party or its outside counsel may be redacted as necessary to address reasonable attorney-client privilege or confidentiality concerns. Nothing in this Section 6.04(d) shall be applicable to Tax matters. To the extent that any disclosure that would otherwise be required under this Section 6.04(d) is precluded by a confidentiality obligation of the type refered to above, the Party bound by the relevant confidentiality obligation shall notify the other Party that the relevant oral or written communication has occurred but that such Party is prevented from disclosing it under this Section 6.04(d) due to a confidentiality obligation.

(e) Each Party agrees to cooperate and use reasonable best efforts to obtain any other consents and approvals that may be required in connection with the transactions contemplated by the Transaction Agreements; provided, however, that nothing in this Section 6.04(e) will be deemed to require any of the Sellers or any of their Affiliates to make any payments or agree to amend or modify any existing material commercial terms of any Contract in connection with seeking to obtain any such consents or approvals, nor will anything in this Section 6.04(e) require the Acquiror or any of its Affiliates to take any action in relation to the Class 1 Circular, the Imperial Shareholder Resolution or any related matter other than as set out in Section 6.05 below.

(f) Notwithstanding the foregoing, nothing in this Section 6.04 or otherwise in this Agreement shall require the Acquiror or any of its Affiliates to propose, negotiate, effect or agree to, the sale, divestiture, license or other disposition of any assets or businesses or equity interests of the Acquiror or any of its Affiliates, or of the Transferred Assets or otherwise take any action that would limit its freedom of action with respect to, or its ability to retain any of the businesses or assets or equity interests of Acquiror or any of its Affiliates or of the Transferred Assets. Nothing in this Section 6.04 or otherwise in this Agreement shall require the Acquiror or any of its Affiliates to propose, negotiate, effect or agree to, the purchase, acquisition or license of any business or equity interests or assets (other than the Transferred Assets) or the assumption

In connection with seeking any consent of a Governmental Authority to the Transactions or the Merger, (i) without the prior written consent of RAI, the Acquiror shall not, and shall cause its Affiliates not to, propose, negotiate, effect or agree to, any sale, divestiture, purchase, acquisition license or other transaction of any business or equity interests or assets of RAI or Lorillard (other than the Transferred Assets) or the assumption of the Liabilities of RAI or Lorillard (other than the Assumed Liabilities) and (ii) except as contemplated by the Transaction Agreements, without the prior written consent of the other Party, no Party shall, and each Party shall cause its Affiliates not to, take any action or propose, negotiate or agree to (A) take any action that would limit another Party's freedom of action with respect to, or its ability to retain any of the businesses or assets or equity interests of such Party or any of its Affiliates or (B) any requirement that any Party or any of its Subsidiaries modify, waive or terminate any marketing, promotion, rebate or discount policy, program, arrangement or understanding in existence as of the date of this Agreement.

(g) Notwithstanding the foregoing, nothing in this Section 6.04 or otherwise in this Agreement shall (i) limit or prevent RAI from taking any actions required to be taken by it or its Subsidiaries pursuant to Section 6.03 of the Merger Agreement (subject to the proviso to Section 6.16(b)) or (ii) require RAI, Lorillard or any of their respective Subsidiaries to offer, take, commit to or accept any action, restrictions or limitations of or on RAI or Lorillard or their respective Subsidiaries, or to permit such actions, restrictions or limitations, in each case if such actions, restrictions or limitations, individually or in the aggregate, would or would reasonably be expected to result in a Substantial Detriment (as defined in the Merger Agreement).

Section 6.05. Imperial Shareholder Approval and Meeting; Class 1 Circular.

(a) The Imperial Board has unanimously adopted resolutions: (i) determining that the terms of the transactions contemplated by this Agreement are advisable and will promote the success of Imperial; (ii) approving this Agreement and the transactions contemplated by this Agreement; (iii) directing that a resolution (the "Imperial Shareholder Resolution") to approve the transactions contemplated by this Agreement for purposes of Chapter 10 of the listing rules (the "Listing Rules") produced by the Financial Conduct Authority ("FCA") under Part VI of the Financial Services and Markets Act 2000, as amended by the FCA, be submitted as soon as finalized in accordance with Section 6.05(c) to Imperial's shareholders for approval at a duly held meeting of such shareholders for such purpose (the "Imperial Shareholders Meeting"); (iv) that it will, except to the extent that the Imperial Board shall have made an Adverse Recommendation Change as permitted by Section 6.05(d), give a unanimous and unqualified recommendation to Imperial's shareholders to vote in favor of the Imperial Shareholder Resolution (the "Imperial Recommendation") and include the Imperial Recommendation in the Class 1 Circular; and (v) to release, immediately following the execution of this Agreement, an announcement in the form of Section 6.05(a) of the Acquiror Disclosure Schedule as required by Listing Rule 10.5.1R(1) and referring to the Imperial Recommendation.

(b) Except for the affirmative vote in favor of approval of the Imperial Shareholder Resolution by the holders of ordinary shares of Imperial representing a simple majority of the votes represented in person or by proxy at the Imperial Shareholders Meeting (the "Imperial Shareholder Approval"), no other corporate proceedings on the part of Imperial are necessary to authorize, adopt or approve, as applicable, the Transaction Agreements or to consummate the Transactions.

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(c) Imperial will, as soon as reasonably practicable following the date of this Agreement, prepare the Class 1 Circular and submit it to the FCA and use its reasonable best efforts to finalize the Class 1 Circular as soon as reasonably practicable. Imperial will duly call, give notice of, convene and hold the Imperial Shareholders Meeting for the sole purpose of seeking the Imperial Shareholder Approval. Imperial will use its reasonable best efforts to (i) cause the Class 1 Circular to be mailed to Imperial's shareholders and to hold the Imperial Shareholders Meeting as soon as reasonably practicable and (ii) solicit proxies in favor of, or, if any Adverse Recommendation Change is made by the Imperial Board, in relation to, the Imperial Shareholder Resolution. The Parties will use their reasonable best efforts to hold the Imperial Shareholders Meeting, the Company Stockholders Meeting (as defined in the Merger Agreement) and the Parent Shareholders Meeting (as defined in the Merger Agreement) on the same day. If on a date for which the Imperial Shareholders Meeting is scheduled, Imperial has not received proxies representing a sufficient number of ordinary shares of Imperial to obtain the Imperial Shareholder Approval, whether or not a quorum is present, Imperial will have the right to make one or more successive postponements or adjournments of the Imperial Shareholders Meeting. Imperial agrees that, unless this Agreement has been terminated in accordance with Section 10.01(g), its obligations pursuant to this Section 6.05(c) will not be affected by the making of any Adverse Recommendation Change by the Imperial Board.

(d) Imperial will include the Imperial Recommendation in the Class 1 Circular, except to the extent that the Imperial Board shall have made an Adverse Recommendation Change as set out below in this Section 6.05(d). Except as set forth in this Section 6.05(d), neither the Imperial Board nor any committee thereof will withhold, withdraw (or qualify or modify in any manner adverse to RAI or Lorillard), or propose publicly to withhold or withdraw (or qualify or modify in any manner adverse to RAI or Lorillard), the Imperial Recommendation (any such action being referred to as an "Adverse Recommendation Change"). Notwithstanding the foregoing or anything else to the contrary in this Agreement, at any time prior to obtaining the Imperial Shareholder Approval, the Imperial Board may make an Adverse Recommendation Change only if an Intervening Event occurs and the Imperial Board determines in good faith (after consultation with its outside counsel and financial advisor) that the failure to do so would be inconsistent with its fiduciary duties under applicable Law.

Section 6.06. Insurance.

(a) With respect to events or circumstances relating to the Transferred Assets, Assumed Liabilities or the Transferred Employees that occurred or existed prior to the Closing Date that are covered by any Seller's occurrence-based liability insurance policies and any workers' compensation insurance policies and/or comparable workers' compensation self-insurance, state or country programs that are in effect prior to the Closing Date (the "Pre-Closing Insurance"), the Acquiror may make claims under such policies after the Closing, subject to the terms and conditions thereof, and RAI shall take such actions as may reasonably be requested by the Acquiror in connection with the tendering of such claims to the applicable insurers under such Pre-Closing Insurance and to provide the Acquiror with the net proceeds it realizes with respect to such claims.

(b) With respect to any open claims against RAI's or Lorillard's insurance policies relating to the Transferred Assets, Assumed Liabilities or Transferred Employees prior to the Closing Date, RAI shall use its reasonable best efforts, at the Acquiror's expense, to pursue such claims and obtain such expected proceeds; provided that the Acquiror complies with the requirements specified in Section 6.06(a).

(c) RAI will comply with its obligations under Section 6.04 of the Merger Agreement.

Section 6.07. License to Seller Intellectual Property.

(a) Effective immediately following the Closing, each Seller hereby grants, and will cause its Affiliates to hereby grant, to the Acquiror, a perpetual, royalty-free, fully paid up, non-exclusive, non-transferable (except in the case of an intra-group corporate reorganization among Affiliates or a sale of all or substantially all of the business related to an Acquired Brand) license, without the right to sub-license (except to (i) an Affiliate of the Acquiror or (ii) a third party providing services to the Acquiror or any Affiliate of the Acquiror in relation to the Business) to use the Seller Intellectual Property being used in the Business at Closing (other than Trademarks), solely in connection with the operation of the Business as conducted within the six months prior to the Closing and the subsequent evolution of such Business.

(b) The rights licensed by RAI and its Affiliates pursuant to Section 6.07(a) are furnished "as is", with all faults and without representation or warranty of any kind, express, implied, statutory or otherwise, including any warranty of merchantability, fitness for any particular purpose, title, non-infringement, quality, usefulness, commercial utility, adequacy, compliance with any law, domestic or foreign, and implied warranties arising from course of dealing or course of performance.

Section 6.08. Intellectual Property License Agreement. Prior to the Closing, RAI and the Acquiror shall negotiate and agree on an intellectual property license agreement, such agreement to be on terms consistent with those set out in Exhibit E to this Agreement (the "Intellectual Property License Agreement"). At or prior to the Closing, RAI and the Acquiror shall execute and deliver the Intellectual Property License Agreement.

Section 6.09. Further Action Regarding Intellectual Property.

(a) From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI will use its reasonable best efforts to cause the Lorillard Asset Owners to conduct the Relevant Trademark Action in accordance with the provisions of this Section 6.09(a):

(i) as soon as reasonably practicable following the date of this Agreement, the relevant Lorillard Asset Owners shall meet with the Acquiror to discuss the relevant Lorillard Asset Owners' strategy with respect to the conduct of the Relevant Trademark Action;

(ii) the relevant Lorillard Asset Owners shall conduct the Relevant Trademark Action in such a manner as would be customary for a prudent and diligent trademark owner, giving reasonable consideration to the prospective interest of the Acquiror in the blu Brand following the Closing;

(iii) the relevant Lorillard Asset Owners shall keep the Acquiror regularly informed with respect to the progress of the Relevant Trademark Action and shall promptly answer any reasonable enquiries received from the Acquiror in relation to the Relevant Trademark Action;

(iv) the relevant Lorillard Asset Owners shall keep the Acquiror advised of all material communications and all actual and prospective filings and submissions in connection with the Relevant Trademark Action and shall provide the Acquiror with a reasonable opportunity to review and comment on any such communications, filings and submissions;

(v) the relevant Lorillard Asset Owners shall reasonably consult with the Acquiror in relation to all material decisions to be taken by the relevant Lorillard Asset Owners in relation to the Relevant Trademark Action (including, without limitation, all decisions relating to (1) the survey evidence that will need to be adduced in the State of California in relation to the Relevant Trademark Action, (2) protective measures to be adopted by the Lorillard Asset Owners to mitigate against the RTA Claimants bringing actions equivalent to the Relevant Trademark Action outside the United States, (3) whether the Relevant Trademark Action should be resolved by arbitration, mediation or any other form of alternative dispute resolution, and (4) how the relevant Lorillard Asset Owners will respond to any preliminary or other injunction requests relating to the Relevant Trademark Action or any actions equivalent to the Relevant Trademark Action outside the United States) and shall provide the Acquiror with a reasonable opportunity to consider and comment on any proposed decision of the Lorillard Asset Owners in advance of any such decision being taken;

(vi) the relevant Lorillard Asset Owners shall give reasonable consideration to any comments and representations made by the Acquiror in relation to (1) any communications, filings and submissions provided to the Acquiror in accordance with Section 6.09(a)(iv), and (2) any decision in relation to which the relevant Lorillard Asset Owners consult with the Acquiror in accordance with Section 6.09(a)(v); and

(vii) the relevant Lorillard Asset Owners shall not take any action in relation to the Relevant Trademark Action (including any decision regarding the settlement of the Relevant Trademark Action) which would or intends to (i) materially restrict the Acquiror's rights with respect to the blu Brand following the Closing, (ii) place any material obligation on the Acquiror with respect to the use of the blu Brand (including the right to use the blu Brand) following the Closing (including any obligation to pay royalties following the Closing or any obligation to include distinguishing indicia on any product sold under the blu Brand), or (iii) otherwise have any material adverse impact on either the Acquiror's rights with respect to the blu Brand or the Acquiror's conduct of the blu Brand Business following the Closing, in each case unless the relevant Lorillard Asset Owners have obtained the Acquiror's prior written consent to the decision (such consent not to be unreasonably withheld or delayed).

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Nothing contained in this Section 6.09(a) will give RAI, directly or indirectly, the right to control or direct Lorillard or any of its Affiliates' operations prior to the Effective Time of the Merger, and the Acquiror acknowledges that, in relation to this Section 6.09(a) and prior to the Effective Time of the Merger, Lorillard will exercise, consistent with the terms and conditions of this Agreement, control and supervision over its respective operations and the operations of its respective Subsidiaries. Nothing in this Agreement, including any of the actions, rights or restrictions set forth herein, will be interpreted in such a way as to place RAI, Lorillard or the Acquiror in violation of any applicable Law. The Acquiror will, and RAI will use the its reasonable best efforts to cause Lorillard to, enter into a customary joint defense agreement with respect to information to be provided to the Acquiror pursuant to this Section 6.09(a). Such terms shall be entirely without prejudice to the other provisions of this Section 6.09(a), which shall apply irrespective of whether or not any such joint defense agreement has been entered into.

(b) If, after the Closing, RAI or the Acquiror identifies any item of Business Intellectual Property that was not previously transferred by the Sellers to the Acquiror, then the Sellers shall, and RAI shall cause the applicable Seller to, promptly transfer such Business Intellectual Property to the Acquiror for no additional consideration, whereupon it shall become subject to the terms set forth in the Intellectual Property License Agreement.

Section 6.10 Supplier Facilitation. To the extent required by the Acquiror (or any of its Affiliates) for the continued manufacturing of the Acquired Tobacco Cigarette Brands in accordance with any Law or Governmental Order enacted, promulgated or enforced by the FDA or any other Governmental Authority, RAI and its Affiliates shall (a) upon the request of the Acquiror or any of its Affiliates, provide the Acquiror and its Affiliates with the identity of, and will reasonably facilitate introductions with and access to, each present and past supplier of goods or services with respect to each Acquired Tobacco Cigarette Brand (excluding any past suppliers that only provided any such goods or services prior to February 1, 2007), and (b) at no time prevent or seek to prevent any such supplier from contracting with the Acquiror (or any of its Affiliates) relating to the supply of goods or services required for the continued manufacturing of the Acquired Tobacco Cigarette Brands in accordance with any Law or Governmental Order enacted, promulgated or enforced by the FDA or any other Governmental Authority (including, to the extent necessary, waiving any exclusivity arrangements in place that would otherwise prevent any such supplier from providing goods or services necessary for manufacturing each Acquired Tobacco Cigarette Brand).

Section 6.11 Transition Services Agreement.

(a) Prior to the Closing, RAI and the Acquiror shall negotiate and agree to the form of TSA, which form will be on terms consistent with those set out in Exhibit B hereto pursuant to which the Parties, or their respective Affiliates, each agree to provide the Transitional Services to the other Party or its Affiliates.

(b) It is acknowledged by RAI and the Acquiror that, as at the date of this Agreement, the Transitional Services have not been identified or described in a services schedule to this Agreement and, therefore, RAI, or an Affiliate of RAI, and the Acquiror, or an Affiliate of the Acquiror, shall work together to (i) identify all Transitional Services; (ii) identify any additional services that were provided to the Business during the Comparison Period by any

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Seller or any Affiliate of any Seller and that are reasonably required for the Acquiror's conduct of the Business after the Closing, and once agreed these additional services shall be deemed to be Transitional Services; and (iii) develop and agree to full service descriptions for such services (the "Service Descriptions"). Each of the Parties shall use its reasonable best efforts to identify and develop Service Descriptions for all Transitional Services prior to the Closing. Once agreed, the Service Descriptions will be set forth on a schedule to the TSA. Without limiting the foregoing, Transitional Services will include RAI or one or more of its Affiliates using its reasonable best efforts to provide certain services to the Acquiror for a period of up to 12 months after the Closing in the event that any required change in any Certification/Listing in connection with the transactions contemplated by this Agreement has not been made on or before the Closing Date, including (without limitation) taking, and causing its Affiliates to take, all actions reasonably necessary to seek to provide continuous and uninterrupted sale of the relevant Acquired Tobacco Cigarette Brand(s) in the relevant State(s) from and after the Closing, including without limitation, to the extent necessary, by distributing the relevant Acquired Tobacco Cigarette Brand(s) on the Acquiror's behalf.

(c) At or prior to the Closing, one or more Affiliates of RAI and the Acquiror, or an Affiliate of the Acquiror, shall execute and deliver the TSA. If for any reason, the TSA is not executed and delivered by the Closing, the Parties, or their respective Affiliates, shall provide the Transitional Services to the other Party or their respective Affiliates on the terms set out in Exhibit B until such time as the TSA has been executed and delivered.

Section 6.12. Further Action.

(a) From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, each of the Parties (i) shall execute and deliver, or shall cause to be executed and delivered, such documents and other papers and shall take, or shall cause to be taken, such further actions as may be reasonably required to carry out the provisions of the Transaction Agreements and give effect to the Transactions (including any agreement or filing necessary to effect the assignment of RAI Brands Intellectual Property and the Lorillard Brands Intellectual Property) and (ii) subject to the terms of this Agreement and the Merger Agreement, shall (and shall cause their respective Affiliates to) refrain from taking any actions that would reasonably be expected to impair, delay or impede the Closing. Each Party shall keep the other Party reasonably apprised of the status of the matters relating to the completion of the transactions contemplated hereby, including with respect to the negotiations relating to the satisfaction of the conditions set forth in Article IX.

(b) Except as otherwise provided in this Agreement, if (i) the legal title to or beneficial interest in any asset that pursuant to the terms of this Agreement should have been transferred to the Acquiror remains vested in RAI or any of its Affiliates after the Closing Date; or (ii) any Liability that pursuant to the terms of this Agreement should have been assumed by the Acquiror remains vested in RAI or any of its Affiliates after the Closing Date, then the Parties shall execute all deeds and documents and do, or shall cause the doing of all things, as may be required for the purpose of transferring (free from any Lien after the Closing) the relevant interest in such asset or such Liability to the Acquiror or one of its Affiliates as may be nominated by the Acquiror.

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(c) Except as otherwise provided in this Agreement, if (i) the legal title to or beneficial interest in any asset (other than a Transferred Asset) that pursuant to the terms of this Agreement should not have been transferred to the Acquiror, or (ii) any Liability that pursuant to the terms of this Agreement should not have been assumed by the Acquiror has been transferred to or assumed by the Acquiror or any of its Affiliates in connection with this Agreement, then the Parties shall execute all deeds and documents and do, or shall cause the doing of all things, as may be required for the purpose of transferring (free from any Lien after the Closing) the relevant interest in such asset or such Liability to RAI or one of its Affiliates as may be nominated by RAI.

(d) The Acquiror shall use its reasonable best efforts to obtain the proceeds of the Debt Financing upon the terms and subject to the conditions described in the Financing Agreements to pay the Required Amount when due, including using reasonable best efforts to satisfy on a timely basis all conditions in the Financing Agreements, the satisfaction of which are within the control of the Acquiror.

(e) From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI shall, and shall cause its Affiliates and each of its and their respective Representatives to, and shall use reasonable best efforts to cause Lorillard and its Affiliates and each of its and their respective Representatives to, provide all cooperation reasonably requested by the Acquiror in connection with the arrangement of the Debt Financing, the arrangement of any further financing relating to the transactions contemplated by the Transaction Agreements, including the issue of any bonds or hybrid debt instruments, whether under Reg S or via a Rule 144A offering ("Bond Financing") and the preparation of the Class 1 Circular, including but not limited to using reasonable best efforts to (i) cause appropriate officers and employees of the Business (A) to be available, on a customary basis and on reasonable advance notice, to meet with prospective lenders, rating agencies and investors in meetings, presentations, road shows and due diligence sessions (including one-on-one meetings with the parties acting as lead arrangers or agents for, and prospective lenders and purchaser of, the Debt Financing or the Bond Financing and members of senior management and other Representatives of the Business), (B) to provide reasonable and customary management and legal representations to auditors and (C) to provide reasonable and timely assistance with the preparation of business projections, rating agency presentations and similar materials, (ii) otherwise reasonably cooperate with the marketing efforts of the Acquiror and its financing sources for any of the Debt Financing or the Bond Financing, (iii) furnish the Acquiror with timely financial and other pertinent information regarding the Business as shall exist (or if not existing, using commercially reasonable efforts to prepare such financial or other pertinent information) and as may be reasonably requested by the Acquiror, (iv) assist the Acquiror in satisfying the conditions set forth in the Financing Agreements, (v) assist the Acquiror (including by participating in drafting sessions) in the timely preparation of offering, information or syndication documents for any of the Debt Financing, Bond Financing or any other alternative to all or any portion thereof or of the Class 1 Circular ("Offering Documents"), (vi) facilitate the pledging of collateral and obtaining surveys and title insurance and estoppel letters as reasonably requested by the Acquiror, (vii) obtain customary comfort letters from the auditors of the Sellers and consent from such auditors for use of any of their audit reports (including but not limited to by including such reports in any Offering Documents) and SAS 100 reviews, and (viii) obtain customary legal opinions or other certificates or documents as may reasonably be requested by

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the Acquiror. The Acquiror shall promptly, upon request by any Seller, reimburse such Seller for any cost, liability or expense incurred by such Seller or any of its Affiliates in connection with such co-operation. Additionally, such co-operation shall only be provided (i) to the extent it does not materially impact day-to-day executive commitments and (ii) subject to any confidentiality or regulatory restrictions.

Section 6.13. Non-Use of Intellectual Property. Except as otherwise permitted pursuant to this Agreement, any Ancillary Agreement or any other agreement between RAI or its Affiliates and the Acquiror or its Affiliates, from and after the Closing, RAI shall not (and shall cause its Affiliates and its and their respective Representatives not to) (i) use or (insofar as it can reasonably do so) allow to be used any Trademark included in the Business Intellectual Property or any other name intended or likely to be confused with such a Trademark; (ii) make use of any know-how of a secret or confidential nature included in the blu Brand Intellectual Property, which shall include know-how relating to manufacturing processes, product development and applications; or (iii) make use of any other Business Intellectual Property.

Section 6.14. No Shop. Except to the extent permitted by Section 5.02 or Section 5.03 of the Merger Agreement, from the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI shall not, and shall cause its Affiliates and its and their respective Representatives not to, (a) solicit, initiate, entertain, consider, encourage or accept the submission of any proposal or offer from any third party relating to the acquisition (whether by merger, purchase of stock, purchase of assets or otherwise) of all or substantially all or any significant part of the Business, or (b) participate in any discussions or negotiations (and each of the foregoing shall immediately cease any discussions or negotiations that are ongoing) regarding, furnish any information with respect to, assist or participate in any effort or attempt by any third party to do or seek any of the foregoing.

Section 6.15. Ancillary Agreements. The Parties agree to use their reasonable best efforts to finalize the Ancillary Agreements (the terms of which, where applicable, shall be consistent with the term sheets or form of agreements attached to this Agreement) other than the Route to Market Agreement and the Reciprocal Manufacturing Agreement as soon as reasonably practicable following the date of this Agreement.

Section 6.15. Merger Agreement. From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, unless the Acquiror otherwise gives its prior written consent (which consent shall not be unreasonably withheld or delayed), (a) RAI shall comply in all material respects with its obligations under Section 6.01 of the Merger Agreement, (b) RAI shall comply in all material respects with its obligations under Section 6.03 of the Merger Agreement, except to the extent that the failure to so comply would not reasonably be expected to materially adversely affect the ability of the Parties to consummate the Transactions (including the sale of the Business to the Acquiror in accordance with this Agreement); provided, however, that except to the extent set forth in this clause (b), nothing in this Section 6.16 or in any other provision of this Agreement shall constitute an agreement by the Acquiror to amend or terminate, or waive or release any right under, this Agreement or the Lorillard Transfer Agreement, or any consent by the Acquiror to the amendment or termination hereof or thereof, or the waiver or release of any right hereunder or thereunder (even if RAI is required to take any such action pursuant to Section 6.03 of the

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Merger Agreement), and (c) RAI shall not amend or waive compliance by Lorillard of the following provisions of the Merger Agreement: Section 5.01(b) (introductory paragraph), (iv), (vii), and (xii), Section 6.01, Section 6.03, the definition of "Substantial Detriment", or Section 8.01(b).

Section 6.17. Compliance with the Final Judgment and Remedial Order. From the date of this Agreement and both before and after the Closing, RAI shall, and shall cause each of its Affiliates to, (x) prior to the Closing, on behalf of themselves and (y) following the Closing, on behalf of the Acquiror and its Affiliates, comply with the obligations under the Final Judgment and Remedial Order in respect of the Acquired Tobacco Cigarette Brands arising out of, or related to (i) the creation and maintenance of document depositories and websites providing access to all industry documents disclosed in litigation, (ii) the provision of regularly-updated information concerning all waivers and losses of privilege and confidentiality; provided, in each case that RAI and/or Lorillard and/or any of their respective Affiliates has conduct of the relevant proceedings pursuant to the terms of this Agreement or otherwise ((i) and (ii) together being the "DoJ Tobacco Case Litigation Document Disclosure Requirement"), (iii) the disclosure of disaggregated marketing data to the extent related to the period ending on the Closing Date (the "DoJ Tobacco Case Marketing Data Disclosure Requirement"), and (iv) any other obligations under the Final Judgment and Remedial Order, to the extent related to the period ending on the Closing Date.

Section 6.18. DoJ Tobacco Case Corrective Statement Requirements under the Final Judgment and Remedial Order.

(a) Without prejudice to Section 6.17, and subject to any applicable confidentiality obligations, each of the Parties shall, and shall cause each of its respective Affiliates and each of its and their respective Representatives to, make all such communications with, seek consents from, and provide all such information to the United States Department of Justice and other defendants, intervenors and Persons interested in the DoJ Tobacco Case, to make all motions or filings with, and provide all such information and evidence to, the DC District Court, and take all such other steps, as are necessary and/or expedient in connection with the submission of the Acquiror to the jurisdiction of the DC District Court and the entering of the DC District Court into an order subjecting the Acquiror to the Final Judgment and Remedial Order as soon as reasonably practicable after the date of this Agreement and in any event before the End Date, including obtaining a finding that the Acquiror has "the capacity to comply with the obligations" of the Final Judgment and Remedial Order as required for the purposes of the Final Judgment and Remedial Order. To the extent that any Party is prevented from taking any action that would otherwise be required under this Section 6.18(a) as a result of a confidentiality obligation of the type referred to above, the Party bound by the relevant confidentiality obligation shall notify the other Party that it is so prevented from taking the relevant action.

(b) Each of the Parties shall, and shall cause each of its respective Affiliates and each of its and their respective Representatives to, use their respective reasonable best efforts to obtain the consent of the United States Department of Justice, intervenors and, if applicable, any other defendants or Persons interested in the DoJ Tobacco Case and/or the Final Judgment and Remedial Order to the DoJ Tobacco Case, and an order from the DC District Court, for the DoJ Tobacco Case Corrective Statement Requirement Waiver.

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(c) RAI shall and shall cause its Affiliates and its and their respective Representatives, and shall cause Lorillard and its Affiliates and its and their respective Representatives: (i) to comply with any reasonable requests of the Acquiror in obtaining the DoJ Tobacco Case Corrective Statement Requirement Waiver or such other dispensations from the Final Judgment and Remedial Order as are reasonably acceptable to the Acquiror; and (ii) not to take any action, without the prior written consent of the Acquiror that will or is reasonably likely to delay, impair or impede the obtaining of the DoJ Tobacco Case Corrective Statement Requirement Waiver or such other dispensations.

(d) Subject to any applicable confidentiality obligations, each of the Parties shall, and shall cause each of its respective Affiliates and each of its and their respective Representatives to, keep each other fully informed in relation to all material communications (whether written or oral) made or received, and to fully confirm and support the other in respect of all positions maintained, and other steps taken, in accordance with this Section 6.18. To the extent that any disclosure that would otherwise be required under this Section 6.18(d) is precluded by a confidentiality obligation of the type referred to above, the Party bound by the relevant confidentiality obligation shall notify the other Party that the relevant oral or written communication has occurred but that such Party is prevented from disclosing it under this Section 6.18(d) due to a confidentiality obligation.

Section 6.19. Communications with NAAG, States, the Independent MSA/PSS Auditor and other Parties. As soon as practicable after the date of this Agreement, and both before and after the Closing, each of the Parties shall, and shall cause each of its respective Affiliates and each of its and their respective Representatives to, make all such communications with and provide all such information to NAAG, the States, the Independent MSA/PSS Auditor and any other relevant Persons and take all such other steps (including filing dispute letters with the Independent MSA/PSS Auditor and engaging in or cooperating in any dispute, litigation or arbitration) as are necessary and/or expedient for the purposes of: (a) causing NAAG to change the brands listing with respect to the Acquired Tobacco Cigarette Brands on or as soon as practicable after the Closing; (b) ensuring that the Acquired Tobacco Cigarette Brands remain certified and/or are not de-listed in any of the States at any time before, on or after the Closing or are re-certified in each of the States either before, on or as soon as practicable after the Closing (as applicable); and (c) obtaining the agreement as necessary of the States, the Independent MSA/PSS Auditor and NAAG to the Agreed Assumption Terms. Each of the Parties shall, and shall cause each of their respective Affiliates and each of its and their respective Representatives to, keep the other Party fully informed and fully support each other in relation to all communications made, information provided, positions maintained and other steps taken under this Section 6.19.

Section 6.20. Agreed Assumption Terms. Each of the Parties confirms on its own behalf and on behalf of its Affiliates, that they each agree to the Agreed Assumption Terms, and each of the Parties undertakes that from and after the date of this Agreement and both before and after the Closing it shall, and shall cause each of its Affiliates and each of its and their respective Representatives to adhere fully to and not deviate in any respect from the Agreed Assumption Terms including in any communications with any of the States, OPMs, SPMs, NAAG, the Independent MSA/PSS Auditor, other signatories to or litigants in respect of the State Settlements and/or other relevant Persons and/or in connection with any litigation,

arbitration, proceeding, dispute, challenge, objection or similar Action under or related to any State Settlement or otherwise relating to the Agreed Assumption Terms. Each of the Acquiror and RAI further undertakes from and after the Closing, to take and to cause each of its Affiliates and each of its and their respective Representatives to take all such steps as are necessary or expedient (including giving any relevant waivers and/or consents and/or engaging in or cooperating in any disputes, litigation or arbitration) to cause the Agreed Assumption Terms, as applicable, to become fully effective and binding on each of the States. Each of the Parties shall, and shall cause each of its respective Affiliates and each of its and their respective Representatives to, keep each other fully informed and fully support each other in relation to all material communications made, positions maintained and other steps taken under this Section 6.20.

Section 6.21. Removal of Excluded Assets; Transfer of Equipment and Inventory.

(a) Subject to this Section 6.21, at or prior to the Closing, RAI shall use its reasonable best efforts to remove any and all physical assets that are Excluded Assets (other than Lorillard Equipment and Lorillard Leaf) from the Transferred Real Property.

(b) From and after the completion of the relevant contract manufacturing arrangement under the Reciprocal Manufacturing Agreement, RAI and the Acquiror will cooperate with one another to arrange for the transfer of (i) Lorillard Equipment to RAI (or its designated Affiliate), at RAI's sole expense, and (ii) the Equipment set forth on Section 2.01(a)(x) of the Disclosure Schedule to the Acquiror (or its designated Affiliate), at the Acquiror's sole expense.

(c) As soon as practicable following the Closing, (i) the Acquiror will, at the Acquiror's sole expense, cause all Inventory (other than RAI Leaf) acquired by the Acquiror pursuant to this Agreement held by RAI or its Affiliates to be removed from RAI's facilities, and (ii) RAI will, at RAI's sole expense, cause all inventory other than Lorillard Leaf, blu Brand Inventory or RAI Brands Finished Goods located on a Transferred Real Property to be removed.

Section 6.22. Preparation of Audited Financial Statements. From the date of this Agreement until the Closing, or, if earlier, the termination of this Agreement in accordance with its terms, RAI will and will use its reasonable best efforts to cause Lorillard to, cooperate with the Acquiror, its Affiliates and their respective Representatives in a timely manner in order to assist them with the preparation of (a) an audited balance sheet of the Business as at December 31, 2013, 2012 and 2011, (b) an audited income statement of the Business for each of the years ended December 31, 2013, 2012, and 2011, or (c) any other historical financial statements and pro forma financial information for the Class 1 Circular or any other offering documents for any securities offerings by, or any further bank financial facilities of, the Acquiror or its Affiliates for which such financial information is reasonably necessary or advisable, in each case including (i) permitting the Acquiror and its Affiliates to use any audited or unaudited financial statements of RAI, Lorillard or their respective Affiliates as are in existence, (ii) permitting the Acquiror, its Affiliates, and their Representatives, to have reasonable access to the support documentation prepared by RAI, Lorillard or their respective Affiliates, and their Representatives in relation to the carve out of the Transferred Assets and receive from the Acquiror, its Affiliates, and their

Representatives reasonably detailed explanations regarding any of the assumptions underlying and any changes made to such financial information, (iii) requesting the delivery from RAI's, Lorillard's or their respective Affiliates' independent public accountants, as applicable, of relevant comfort letters necessary or advisable in connection with the foregoing (subject to customary procedures and practice), (iv) requesting the delivery from RAI's, Lorillard's or their respective Affiliates' independent public accountants of relevant consent letters necessary in connection with the foregoing (subject to customary procedures and practice) and (v) if any requested financial statements are not available, assisting the Acquiror or its Affiliates, and their respective independent public accountants in the preparation of such financial statements. The Acquiror shall promptly, upon request by any Seller, reimburse such Seller for any out-of-pocket cost or expense incurred by such Seller or any of its Affiliates in connection with providing assistance pursuant to this Section 6.22.

Section 6.23. Maintenance of Corporate Existence of Lorillard. RAI shall cause Lorillard to remain in existence as a separate corporate entity and in good standing under the Laws of the State of Delaware until the 18-month anniversary of the Closing Date. Following such 18-month period, RAI may merge Lorillard into RAI or another subsidiary of RAI, so long as the surviving corporation of such merger (or successive mergers) remains in existence until the eighth anniversary of the Closing Date.

Section 6.24. Imperial Guaranty. (a) In order to induce RAI to enter into this Agreement, Imperial hereby unconditionally, absolutely and irrevocably guarantees (such guaranty, the "Imperial Guaranty") to RAI (i) the full, complete and punctual payment by the Acquiror of the cash portion of the Purchase Price under this Agreement when due, (ii) the full, complete and punctual payment, performance and satisfaction when, as, if and to the extent due, of all of the Acquiror's present and future obligations, Liabilities and agreements under this Agreement, but only, in the case of this clause (ii), to the extent such obligations, Liabilities and agreements are required to be performed by the Acquiror at or prior to the Closing, and (iii) the payment by the Acquiror of any judgment against the Acquiror (or any related settlement) resulting from a breach of the Acquiror's obligations under any of the Ancillary Agreements. The obligations under the Imperial Guaranty are absolute and unconditional and shall remain in full force and effect without regard to (i) any agreement or modification to any of the terms of this Agreement or any other agreement which may hereafter be made relating thereto, in each case in accordance with the terms of this Agreement, (ii) any exercise, non-exercise or waiver by any Seller of any right, power, privilege or remedy under or in respect of this Agreement, (iii) any insolvency, bankruptcy, dissolution, liquidation, reorganization or the like of the Acquiror or Imperial at any time, or (iv) absence of any notice to, or knowledge by, Imperial of the existence or occurrence of any of the matters or events set forth in the foregoing subparagraphs (i) though (iii). The Imperial Guaranty under this Section 6.24 shall continue and shall remain in full force and effect until all guaranteed obligations shall have been fully performed and satisfied when, as, if and to the extent due. The Imperial Guaranty is a continuing guarantee of payment and performance and not only of collection. Imperial agrees that the provisions of this Section 6.24 may be enforced by RAI directly against Imperial without the necessity at any time of resorting to or exhausting any other remedy against the Acquiror and without naming the Acquiror as a co-defendant.

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(b) Imperial hereby represents and warrants to RAI that:

(i) Imperial is a public limited company duly organized, validly existing and in good standing under the Laws of England and Wales; (ii) Imperial has full power and authority to execute and deliver the Imperial Guaranty and, with respect to Section 6.05 and Article XII, this Agreement, and to perform its obligations under the Imperial Guaranty and this Agreement, (iii) the execution and delivery by Imperial of this Imperial Guaranty and, with respect to Section 6.05 and Article XII, this Agreement, and the performance of its obligations under the Imperial Guaranty and, with respect to Section 6.05 and Article XII, this Agreement, have been duly authorized by all requisite corporate action on the part of Imperial, subject to receipt of the Imperial Shareholder Resolution; and (iv) the Imperial Guaranty and, with respect to Section 6.05 and Article XII, this Agreement, has been duly executed and delivered by Imperial, and (assuming due authorization, execution and delivery by the other Parties) the Imperial Guaranty and, with respect to Section 6.05 and Article XII, this Agreement, constitutes legal, valid and binding obligations of Imperial, enforceable against Imperial in accordance with its terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

Section 6.25. Lorillard Transfer Agreement. To the extent that there is a conflict between this Agreement and the Lorillard Transfer Agreement, the provisions of this Agreement shall prevail. The Acquiror further agrees to take such actions as may be required to be able to assume the Assumed CBAs. The Acquiror will not amend or modify the Lorillard Transfer Agreement or waive any right or obligation thereunder. The assets transferred and liabilities assumed under the Lorillard Transfer Agreement shall be deemed to have been transferred under this Agreement for purposes of, among other things, the defined terms and indemnification provisions contained herein.

Section 6.26. FDA Information Sharing. From and after the Closing, upon the reasonable request of the Acquiror, RAI will provide the Acquiror with data and information in its possession (a) underlying each Substantial Equivalence Report filed in relation to the Acquired Brands and (b) that may be requested in respect of such Substantial Equivalence Reports.

Section 6.27. Advisor Conflicts, Access and Cooperation. It is acknowledged that Lorillard from time to time has retained certain firms and individuals to act as counsel, contractors or other advisors in connection with the Lorillard Business. RAI hereby agrees that, following the Closing, the Acquiror and its Affiliates may engage such firms or individuals currently providing services to Lorillard, solely to the extent related to services currently provided to Lorillard. RAI hereby waives, on behalf of itself and its Affiliates (and shall waive, following the completion of the Merger, on behalf of Lorillard and its Affiliates) any conflict of interest of the relevant firms and individuals in connection with the engagement by the Acquiror or its Affiliates of such firms or individual.

Section 6.28. Marketing Restriction.

(a) Other than to a Governmental Authority, RAI shall not make any public statement: (i) that any Acquired Brand has any relationship to, or is associated with, any brand

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marketed by RAI; or (ii) that draws any comparison between any Acquired Brand and any brand marketed by RAI based on similarities drawn from RAI's knowledge of a Substantial Equivalence Report associated with such Acquired Brand.

(b) Other than to a Governmental Authority, the Acquiror shall not make any public statement: (i) that any Retained Lorillard Brand or any brand marketed by RAI or its Affiliates (other than the RAI Brands) has any relationship to, or is associated with, any Acquired Brand; and (ii) that draws any comparison between any Acquired Brand and any Retained Lorillard Brand or any brand marketed by RAI or its Affiliates (other than the RAI Brands) based on similarities drawn from the Acquiror's knowledge of a Substantial Equivalence Report associated with such Acquired Brands, the Retained Lorillard Brands or any brand marketed by RAI or its Affiliates.

Section 6.29. Migration Plan. Notwithstanding anything to the contrary herein, the Parties will negotiate in good faith to finalize Exhibit F to the Reciprocal Manufacturing Agreement within 90 days of the date hereof.

ARTICLE VII

EMPLOYEE MATTERS

Section 7.01. Employee Matters. With respect to employee matters, the Parties have made the agreements and covenants set forth in Exhibit D to this Agreement, which is hereby incorporated into this Agreement.

ARTICLE VIII

TAX MATTERS

Section 8.01. Transfer Taxes. All transfer, documentary, sales, use, stamp, registration, and other such Taxes, and fees (including any penalties and interest) incurred in connection with this Agreement and the Lorillard Transfer Agreement (including any real property transfer Tax, stamp duty Tax and any other similar Tax) (the "Transfer Taxes") shall be borne 50% by Acquiror and 50% by RAI. The Parties will cooperate with one another in obtaining any available reductions, exemptions or waivers from any Transfer Taxes.

ARTICLE IX

CONDITIONS TO CLOSING

Section 9.01. Conditions to Obligations of the Parties. The obligation of each party to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment at or prior to the Closing or the Lorillard Transfer Closing, as the case may be, of each of the following conditions:

(a) Antitrust. Either (i) the Transactions are pursuant to and in accordance with an order of a US federal court in an action brought by the United States Federal Trade Commission or Department of Justice in connection with the Merger, or (ii) the United States Federal Trade Commission shall in connection with the Merger have accepted for public comment an agreement containing consent order that incorporates, whether directly or by reference, the terms of the Transaction Agreements, or the Antitrust Division of the United States Department of Justice shall in connection with the Merger have submitted to a US federal court a proposal for consent judgment that is subject to public comment that incorporates, whether directly or by reference, the terms of the Transaction Agreements, or (iii) the waiting period under the HSR Act applicable to the Transactions shall have expired or been terminated.

(b) No Law or Governmental Order. There shall be no Law or Governmental Order in existence that prohibits or materially restrains the sale or transfer of the Transferred Assets or the other transactions contemplated by this Agreement.

(c) Imperial Shareholder Approval. The Imperial Shareholder Approval shall have been obtained.

(d) DoJ Tobacco Case. The DC District Court shall have entered an order subjecting the Acquiror to the Final Judgment and Remedial Order, with respect to the Acquired Tobacco Cigarette Brands only.

(e) Satisfaction of the Conditions to the Transactions Contemplated by the Merger Agreement. The Effective Time of the Merger shall have occurred; provided, however, that with respect to the Lorillard Transfer Closing this condition shall be deemed satisfied if (i) all of the conditions set forth in Article VII of the Merger Agreement (other than those conditions that by their nature are to be satisfied at the closing of the transactions contemplated by the Merger Agreement, but each of which shall be capable of being satisfied upon the closing of the transactions contemplated by the Merger Agreement) shall have been satisfied or waived by the party entitled to the benefit of the same under the Merger Agreement and (ii) the Acquiror shall have received a written certificate signed by a duly authorized officer of RAI, certifying that (A) the condition in clause (i) of this Section 9.01(e) has been satisfied, (B) it stands ready and willing to consummate the Merger immediately following the consummation of the Lorillard Transfer Closing and (C) it irrevocably confirms that, if the Lorillard Transfer Closing occurs, then the closing of the Merger under the Merger Agreement will occur immediately thereafter.

Section 9.02. Conditions to Obligations of RAI. The obligation of RAI to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment at or prior to the Closing or the Lorillard Transfer Closing, as the case may be, or waiver by RAI, in its sole discretion, of each of the following conditions:

(a) Representations and Warranties; Covenants. (i) The Fundamental Representations of the Acquiror set forth in Article V shall be true and correct in all material respects on and as of the date of this Agreement and on and as of the Closing Date, with the same effect as if made on the Closing Date, (ii) each of the other representations and warranties of the Acquiror contained in this Agreement shall be true and correct on and as of the Closing Date with the same effect as if made on the Closing Date (other than representations and

warranties that expressly relate to an earlier date, which representations shall have been true and correct as of such date); provided that the condition in this clause (ii) shall be deemed satisfied unless the effect of such representations and warranties not being so true and correct (read for purposes of this Section 9.02(a) only without any materiality, Material Adverse Effect or similar qualification) on the Closing Date or on such earlier date, taken together, would materially impair the ability of the Acquiror to consummate the transactions contemplated by, or perform its obligations under, the Transaction Agreements, (iii) the covenants contained in this Agreement required to be complied with by Imperial or the Acquiror on or before the Closing shall have been complied with in all material respects; and (iv) RAI shall have received a certificate signed by a duly authorized officer of the Acquiror, certifying that the conditions in clauses (i), (ii) and (iii) have been satisfied.

Section 9.03. Conditions to Obligations of the Acquiror. The obligations of the Acquiror to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment at or prior to the Closing or the Lorillard Transfer Closing, as the case may be, or waiver by the Acquiror in its sole discretion, of each of the following conditions:

(a) Representations and Warranties; Covenants. (i) The Fundamental Representations of RAI set forth in Article III and Article IV shall be true and correct in all material respects on and as of the Closing Date, with the same effect as if made on the Closing Date; (ii) each of the other representations and warranties of RAI contained in this Agreement shall be true and correct on and as of the Closing Date with the same effect as if made on the Closing Date (other than representations and warranties that expressly relate to an earlier date, which representations shall have been true and correct as of such date); provided that the condition in this clause (ii) shall be deemed satisfied unless the effect of such representations and warranties not being so true and correct (read for purposes of this Section 9.03(a) only without any materiality or Material Adverse Effect or similar qualification) on the Closing Date or on such earlier date, taken together, has had, or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect; (iii) the covenants contained in this Agreement required to be complied with by RAI on or before the Closing shall have been complied with in all material respects; and (iv) the Acquiror shall have received a certificate signed by a duly authorized officer of RAI, certifying that the conditions in clauses (i), (ii) and (iii) have been satisfied.

(b) NAAG. No written communication from NAAG to any of the Acquiror, RAI or Lorillard, or any of their respective Affiliates, shall have been issued and remain in effect that indicates that NAAG will not change on or after the Closing the brands listing with respect to the Acquired Tobacco Cigarette Brands in accordance with the Transactions.

(c) Certification by the States. No written communication from any one or more States (or from NAAG on behalf of one or more States) to any of the Acquiror, RAI or Lorillard, or any of their respective Affiliates, shall have been issued and remain in effect that provides that such State intends or such States intend to de-list or not to (re-)certify any of the Acquired Tobacco Cigarette Brands, where such de-listing or failure to (re-)certify would be reasonably likely to result in the inability of the Acquiror to sell any or all of the Acquired Brands in any State which has, or States which in aggregate have, an MSA Allocable Share of 5% or greater.

(d) Agreed Assumption Terms. No State, the Independent MSA/PSS Auditor or NAAG in respect of any State Settlement shall have made any written objection to any of Acquiror, RAI or Lorillard, or any of their respective Affiliates, to any of the Agreed Assumption Terms and not withdrawn such objection.

(e) FIRPTA Certificates. The Acquiror shall have received one or more duly completed and executed certificates reasonably satisfactory to Acquiror pursuant to Section 1445 of the Code from each Seller of any U.S. real property interest, certifying that such Seller is not a foreign person within the meaning of Section 1445 of the Code.

ARTICLE X

TERMINATION, AMENDMENT AND WAIVER

Section 10.01. Termination. This Agreement may be terminated prior to the Closing:

(a) by the mutual written consent of RAI and the Acquiror;

(b) by RAI, if Imperial or the Acquiror shall have breached any representation or warranty or shall have failed to comply with any covenant or agreement applicable to Imperial or the Acquiror that would cause any of the conditions set forth in Section 9.01 or 9.02 not to be satisfied, and such condition is incapable of being satisfied by the End Date; provided, however, that RAI is not then in material breach of this Agreement;

(c) by the Acquiror, if RAI shall have breached any representation or warranty or failed to comply with any covenant or agreement applicable to RAI that would cause any of the conditions set forth in Section 9.01 or Section 9.03 not to be satisfied, and such condition is incapable of being satisfied by the End Date; provided, however, that neither Imperial nor the Acquiror is then in material breach of this Agreement;

(d) by either RAI or by the Acquiror, if the Closing has not taken place on or before the End Date. The "End Date" will mean the first anniversary of this Agreement; provided, however, that each of RAI and the Acquiror will not be permitted to terminate this Agreement pursuant to this Section 10.01(d) if the failure of the Closing to occur by the End Date is attributable to a failure on the part of such party to perform any covenant or obligation in this Agreement required to be performed by such party at or prior to the Closing Date; provided, further, that unless RAI and the Acquiror mutually agree in writing to the contrary prior to the End Date, the initial End Date will be automatically, without further action by or consent of the Parties, extended by six months if, on the initial End Date, the only conditions to Closing that have not been satisfied or waived (other than conditions that by their nature are to be satisfied at or immediately prior to the Closing) are: (i) the conditions set forth in Section 9.01(e) due to the failure of one or more Regulatory Conditions (as defined in the Merger Agreement) to be satisfied, (ii) one or more of the conditions set forth in Section 9.01(a) in connection with a temporary restraining order, preliminary injunction, permanent injunction or other Governmental Order issued solely in connection with any applicable antitrust, competition, trade regulation or similar Law, or (iii) one or more of the conditions set forth in Section 9.03(b), Section 9.03(c) and Section 9.03(d);

(e) by either RAI or the Acquiror, in the event of the issuance of a final, nonappealable Governmental Order restraining or prohibiting the sale or transfer of the Transferred Assets;

(f) by RAI, in the event that (i) the End Date is extended pursuant to Section 10.01(d), (ii) the condition to the closing of the Merger set forth in Section 7.01(c) of the Merger Agreement in respect of the expiration or termination of the applicable waiting period under the HSR Act shall not have been satisfied and (iii) the United States Federal Trade Commission shall have informed RAI, Lorillard and the Acquiror that consummation of the transactions contemplated by this Agreement will not result in such condition being satisfied; provided, however, that RAI will not have the right to terminate this Agreement pursuant to this Section 10.01(f) if RAI is then in material breach of its obligations under Section 6.03 of the Merger Agreement;

(g) by RAI, in the event that (i) an Adverse Recommendation Change shall have occurred and shall not have been withdrawn or (ii) Imperial shall have failed to include the Imperial Recommendation in the Class 1 Circular (it being acknowledged that such failure will be permitted only in the circumstances provided for in Section 6.05(d) and otherwise shall be a breach of this Agreement for which Imperial is liable);

(h) by either RAI or the Acquiror, if the Imperial Shareholder Approval is not obtained at the Imperial Shareholders Meeting duly convened therefor (unless such Imperial Shareholders Meeting has been adjourned, in which case at the final adjournment thereof) at which a vote on the Imperial Shareholder Resolution was taken; or

(i) by either RAI or the Acquiror, upon termination of the Merger Agreement in accordance with its terms; provided, however, that RAI shall have the right to terminate this Agreement under this subsection (i) only if at the time of such termination of the Merger Agreement it has no current intention to enter into a new definitive acquisition agreement with Lorillard or an Affiliate of Lorillard.

Section 10.02. Notice of Termination. Any Party desiring to terminate this Agreement pursuant to Section 10.01 shall give written notice of such termination to the other Party.

Section 10.03. Effect of Termination.

(a) In the event of the termination of this Agreement as provided in Section 10.01, this Agreement shall forthwith become void and there shall be no liability on the part of any Party, except as set forth in Section 6.03, Section 6.24, Section 10.03 and Article XI; provided, however, that nothing in this Agreement shall relieve a Party from liability for (i) any breach by such Party of the terms and provisions of this Agreement prior to such termination or (ii) fraud.

(b) If this Agreement is terminated pursuant to Section 10.01(i), and RAI receives a Company Termination Fee (as defined in the Merger Agreement) in connection with the termination of the Merger Agreement, then RAI shall promptly pay to the Acquiror in cash an amount equal to $210,600,000 of such Company Termination Fee received from Lorillard.

(c) The Acquiror will pay to RAI the Imperial Termination Fee in accordance with this Section 10.03(c) if RAI terminates this Agreement pursuant to Section 10.01(g) (so long as a Parent Adverse Recommendation Change (as defined in the Merger Agreement) shall not be in effect at the time of termination); provided that if this Agreement is terminated by a Party pursuant to Section 10.01(d) (solely in the event that the Imperial Shareholders Meeting has not occurred at least five Business Days prior to the End Date, and a Parent Adverse Recommendation Change shall not be in effect at the time of termination) or Section 10.01(h) at any time at which RAI would have been permitted to terminate this Agreement pursuant to Section 10.01(g), this Agreement will be deemed to be terminated pursuant to Section 10.01(g) for purposes of this Section 10.03. Any Imperial Termination Fee payable pursuant to the terms of this Agreement will be paid by the Acquiror to RAI by wire transfer of same-day funds as promptly as reasonably practicable following the date of termination of this Agreement (and, in any event, within two Business Days thereof). For the avoidance of doubt, the Imperial Termination Fee shall not become payable if this Agreement is terminated or rescinded for any reason other than as set out in this Section 10.03(c). In no event shall the Acquiror be obligated to pay the Imperial Termination Fee on more than one occasion.

Section 10.04. Extension; Waiver. At any time prior to the Closing, either RAI or the Acquiror may (a) extend the time for the performance of any of the obligations or other acts of the other Party, (b) waive any inaccuracies in the representations and warranties contained in this Agreement or in any document delivered pursuant to this Agreement or (c) waive compliance with any of the agreements or conditions contained in this Agreement, but such extension or waiver shall not operate as an extension or waiver of, or estoppel with respect to, any subsequent or other failure. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the Party granting such extension or waiver.

ARTICLE XI

INDEMNIFICATION

Section 11.01. Indemnification by RAI.

(a) From and after the Closing, subject to the provisions of Article XI and Section 12.01, RAI shall indemnify, defend and hold harmless the Acquiror and its Affiliates, and each of the heirs, executors, successors and assigns of any of the foregoing (collectively, the "Acquiror Indemnified Parties") against all Losses that such Acquiror Indemnified Party may suffer or incur, or become subject to (including, for the avoidance of doubt (but subject to Sections 11.03 and 12.01), any Losses an Acquiror Indemnified Party may suffer in connection with or resulting from the sale or transfer of Transferred Assets (other than the blu Brand Business or the Transferred Assets or Assumed Liabilities, to the extent related thereto) to the extent the underlying cause of such Loss is then indemnifiable pursuant to this Agreement), arising from, as a result of, in connection with or otherwise with respect to:

(i) (A) the failure of any representations or warranties made by RAI in this Agreement or in any Ancillary Agreement to be true and correct as of the date such representation or warranty was made or as if such representation or warranty was made on and as of the Closing Date (or with respect to representations and warranties that are made as of a specific date, the failure of such representations and warranties to be true and correct as of such date) (provided that in determining whether any representation or warranty in Article III of this Agreement or any Ancillary Agreement was true and correct as of any date for purposes of this Article XI and in determining the amount of Losses in respect of the failure of any such representation or warranty to be true and correct as of any particular date any qualifications or limitations as to materiality (whether by reference to Material Adverse Effect or otherwise) contained in such representation or warranty shall be disregarded) or (B) any breach or failure by RAI to perform, or cause to be performed, any of its covenants or obligations contained in this Agreement or in any other Transaction Agreement, in each case, which covenant or obligation is required to be performed prior to the Closing;

(ii) any breach or failure by RAI to perform, or cause to be performed, any of its covenants or obligations contained in this Agreement or in any other Transaction Agreement, in each case, which covenant or obligation is required to be performed from and after the Closing;

(iii) the ownership or operation by RAI or any of its Affiliates of any Excluded Asset;

(iv) any Excluded Liability (other than the Seller Tobacco Liabilities but including, for the avoidance of doubt, any Straddle Tobacco Action Liabilities), including the failure of the Sellers to perform or in due course pay and discharge or cause to be paid and discharged any such Excluded Liability;

(v) any Seller Tobacco Liability (including the failure of the Sellers to perform or in due course pay and discharge or cause to be paid and discharged any such Seller Tobacco Liabilities); provided that, in the event that any Action giving rise to any Seller Tobacco Liability also gives rise to any Acquiror Tobacco Liability, the indemnification provided for in this Section 11.01(a)(v) in respect of such Action will be calculated as follows:

(A) where the Action is brought in relation to the alleged personal injury or other damage to person(s) caused by smoking or alleged addiction of one or more individuals to one or more of the Acquired Tobacco Cigarette Brands, the indemnification provided for in this Section 11.01(a)(v) in respect of the Losses associated with such Action shall extend to the pro-rata portion of all Losses arising out of or in connection with such Action (to the extent relating to the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing, promotion, use or consumption of,

or exposure to, tobacco products, including smoking and health-related claims and related to one or more of the Acquired Tobacco Cigarette Brands) calculated on the basis of:

(1) the period of time such individual or individuals used, consumed or were exposed to tobacco products relating to one or more of the Acquired Tobacco Cigarette Brands prior to the Closing Date,

as a percentage of,

(2) the total period of time such individual or individuals used, consumed or were exposed to tobacco products relating to one or more of the Acquired Tobacco Cigarette Brands; or

(B) where the Action relates to any claim other than set out in Section 11.01(a)(v)(A) above, the indemnification provided for in this Section 11.01(a)(v) in respect of the Losses associated with such Action shall extend to the pro-rata portion of all Losses arising out of or in connection with such Action (to the extent relating to the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing, promotion, use or consumption of, or exposure to, tobacco products and related to one or more of the Acquired Tobacco Cigarette Brands), as follows:

(1) if the Losses are attributable, by specific reference in any final judicial decision, to the Acquired Tobacco Cigarette Brands (that are the subject of the Action) over a specific period of time, the pro-rata portion shall be calculated on the basis of

(I) the number of units of cigarettes of such Acquired Tobacco Cigarette Brands that were sold by any and all manufacturers of such Acquired Tobacco Cigarette Brands between the beginning of such specific period and the Closing Date (the number of such units as determined in accordance with Section 11.08),

as a percentage of,

(II) the number of units of cigarettes of such Acquired Tobacco Cigarette Brands that were sold by any and all manufacturers of such Acquired Tobacco Cigarette Brands during such entire specific period (the number of such units as determined in accordance with Section 11.08); or

(2) if the Losses are not attributable, by specific reference in any final judicial decision, to the Acquired Tobacco Cigarette Brands (that are the subject of the Action) over a specific period of time, the pro-rata portion shall be calculated on the basis of

(I) the number of units of cigarettes of such Acquired Tobacco Cigarette Brands that were sold by any and all manufacturers of such Acquired Tobacco Cigarette Brands prior to the Closing Date (the number of such units as determined in accordance with Section 11.08)

as a percentage of,

(II) the number of units of cigarettes of such Acquired Tobacco Cigarette Brands that were sold by any and all manufacturers of such Acquired Tobacco Cigarette Brands prior to, on and after the Closing Date until the date on which the Liabilities with respect to such Action are determined or settled (the number of such units as determined in accordance with Section 11.08).

(vi) any Seller Plaintiff Fees that are paid or required to be paid by any Acquiror Indemnified Party on or after the Closing Date;

(vii) any Liability arising under Title IV or Section 302 of ERISA or Sections 412 or 4971 of the Code or similar foreign laws to the extent such Liability relates to a defined benefit plan sponsored by Lorillard or RAI, or any portion thereof, that is not assumed pursuant to Exhibit D;

(viii) any breach by the Sellers of the Agreed Assumption Terms, that results in the relevant Acquiror Indemnified Party being liable to make a greater payment under the MSA or the PSS Agreements with respect to any period after the Closing Date than it would have been liable to pay with respect to such period had the Agreed Assumption Terms been fully applied (in which event the Acquiror Indemnified Parties shall be indemnified for the difference between the amount that it is liable to pay and the amount that it would have been liable to pay);

(ix) any failure to comply with any obligation set forth in Section 6.18;

(x) the costs, expenses, fines, penalties and/or sanctions associated with the compliance by the Acquiror and/or any of its Affiliates, with any obligation imposed on it arising out of, or in connection with, the DoJ Tobacco Case Corrective Statement Requirement, as constituted on the date of this Agreement; provided that any costs or expenses arising from the requirements to publish the corrective statements on package "onserts" or on any websites maintained by or on behalf of the Acquiror to be made in respect of the Acquired Tobacco Cigarette Brands shall be excluded; or

(xi) any Liability relating to the obligations of the Acquiror or its Affiliates under the Separation Agreement, dated as of May 7, 2008, by and among Loews Corporation, Lorillard, Inc., Lorillard Tobacco Company, Lorillard Licensing Company, LLC, One Park Media Services, Inc. and Plisa S.A.

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(b) Notwithstanding any other provision to the contrary, (i) RAI shall not be required to indemnify, defend or hold harmless any Acquiror Indemnified Party against any Losses pursuant to Section 11.01(a)(i), (A) with respect to any claim (it being understood that a claim or series of claims arising from substantially the same act, circumstance, event, development, fact, occurrence or omission shall be treated as a single claim) unless such claim involves Losses in excess of $250,000 (nor shall such item be applied to or considered for purposes of calculating the aggregate amount of the Acquiror Indemnified Parties' Losses), and (B) unless and until the aggregate of all Losses to which the Acquiror Indemnified Parties are entitled to indemnification under Section 11.01(a)(i) (but for this Section 11.01(b)) exceeds $70 million, and (ii) the cumulative indemnification obligation of RAI under Section 11.01(a)(i) shall in no event exceed $425 million; provided, however, that the limitations set forth in clauses (i)(B) and (ii) above shall not apply with respect to any Loss resulting from a breach of a Fundamental Representation.

Section 11.02. Indemnification by the Acquiror.

(a) From and after the Closing, subject to the provisions of Article XI and Section 12.01, the Acquiror shall indemnify, defend and hold harmless RAI and its Affiliates and each of the heirs, executors, successors and assigns of any of the foregoing (collectively, the "RAI Indemnified Parties") against all Losses that such RAI Indemnified Party may suffer or incur, or become subject to, as a result of:

(i) (A) the failure of any representations or warranties made by Imperial or the Acquiror in this Agreement or in any Ancillary Agreement to be true and correct on and as of the Closing Date (or with respect to representations and warranties that are made as of a specific date, the failure of such representations and warranties to be true and correct as of such date) (provided that in determining whether any representation or warranty in this Agreement or any Ancillary Agreement was true and correct as of any date for purposes of this Article XI and in determining the amount of Losses in respect of the failure of any such representation or warranty to be true and correct as of any particular date any qualifications or limitations as to materiality contained in such representation or warranty shall be disregarded) or (B) any breach or failure by Imperial or the Acquiror to perform, or cause to be performed, any of its covenants or obligations contained in this Agreement or in any other Transaction Agreement, in each case, which covenant or obligation is required to be performed prior to the Closing;

(ii) any breach or failure by Imperial or the Acquiror to perform any of its covenants or obligations contained in this Agreement or in any other Transaction Agreement, in each case, which covenant or obligation is required to be performed from and after the Closing;

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(iii) any breach or failure by Imperial to perform under the Imperial Guaranty;

(iv) any Assumed Plaintiff Fees that are paid or required to be paid by any RAI Indemnified Party on or after the Closing Date;

(v) any breach by the Acquiror of the Agreed Assumption Terms that results in any additional liability on RAI or Lorillard as a result of the transactions contemplated by this Agreement that was not contemplated by the Agreed Assumption Terms; or

(vi) any Assumed Liability (including the failure of the Acquiror to perform or in due course pay and discharge any such Assumed Liability), including any Liability expressly assumed by the Acquiror pursuant to Exhibit D hereof, and any Acquiror Tobacco Liability and the portion of any Losses determined to be an Acquiror Tobacco Liability pursuant to Section 11.01(a)(v).

(b) Notwithstanding any other provision to the contrary, (i) the Acquiror shall not be required to indemnify, defend or hold harmless any RAI Indemnified Party against any Losses pursuant to Section 11.02(a)(i), (A) with respect to any claim unless such claim involves Losses in excess of $250,000 (nor shall such item be applied to or considered for purposes of calculating the aggregate amount of the RAI Indemnified Parties' Losses) and (B) unless and until the aggregate amount of all Losses to which the RAI Indemnified Parties are entitled to indemnification under Section 11.02(a)(i) (but for this Section 11.02(b)) exceeds $70 million; and (ii) the cumulative indemnification obligation of the Acquiror under Section 11.02(a)(i) shall in no event exceed $425 million; provided, however, that the limitations set forth in clauses (i)(B) and (ii) above shall not apply to any Loss resulting from a breach of a Fundamental Representation.

Section 11.03. Notification of Claims.

(a) A Person that may be entitled to be indemnified under any of the Transaction Agreements (the "Indemnified Party"), shall promptly notify the party or parties liable for such indemnification (the "Indemnifying Party") in writing of any pending or threatened claim or demand that the Indemnified Party has determined has given or would reasonably be expected to give rise to a right of indemnification (including a pending or threatened claim or demand asserted by a third party against the Indemnified Party, such claim being a "Third Party Claim"), describing in reasonable detail the facts and circumstances with respect to the subject matter of such claim or demand; provided, however, that the failure to provide such notice shall not release the Indemnifying Party from any of its obligations under this Article XI except to the extent the Indemnifying Party is materially prejudiced by such failure.

(b) Upon receipt of a notice of a claim for indemnity from an Indemnified Party pursuant to Section 11.03(a), the Indemnifying Party shall be entitled to assume the

defense and control of any Third Party Claim and shall be responsible for all costs and attorney fees of such defense, but shall, if it determines to assume such defense, allow the Indemnified Party a reasonable opportunity to participate in the defense of such Third Party Claim with its own counsel and at its own expense; provided, however, that with respect to a Third Party Claim, the Indemnifying Party shall not be entitled to assume such defense (and shall in such event bear the reasonable fees, costs and expenses of separate counsel for the Indemnified Party) where the defendants in, or targets of, such Third Party Claim include both an Indemnified Party and Indemnifying Party, and the Indemnified Party shall have reasonably concluded, based on the advice of outside counsel, that there is a material conflict of interest between the Indemnifying Party and the Indemnified Party with respect to such Third Party Claim. Notwithstanding the foregoing, the Indemnifying Party shall not be entitled to assume the defense of any Third Party Claim (other than an Action related to Straddle Tobacco Action Liabilities) if the Third Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnified Party that the Indemnified Party reasonably determines (upon advice of its outside counsel) cannot be separated from any related claim for money damages. If such equitable or other relief portion of the Third Party Claim can be so separated from that for money damages, the Indemnifying Party shall (subject as aforesaid) be entitled to assume the defense of the portion relating to money damages and, in such event, the Indemnifying Party shall continue to be liable for the reasonable fees and expenses of counsel employed by the Indemnified Party with respect to the portion of the defense of such Third Party Claim that the Indemnifying Party has not assumed. The indemnification required by Section 11.01 or 11.02, as the case may be, shall be made by periodic payments of the amount thereof during the course of the investigation or defense, as and when invoices are received or the Loss is incurred. RAI or the Acquiror, as the case may be, shall, and shall cause each of its Affiliates and Representatives to, cooperate fully with the Indemnifying Party in the defense of any Third Party Claim and the Indemnifying Party shall keep the Indemnified Party reasonably informed of developments in connection with the defense or prosecution of such Third Party Claim. The Indemnifying Party shall be authorized to consent to a settlement of, or the entry of any judgment arising from, any Third Party Claim, without the consent of any Indemnified Party (except in relation to any Third Party Claim that relates to both Seller Tobacco Liabilities and Acquiror Tobacco Liabilities, in respect of which any settlement shall require the prior written consent of RAI, in the case the Acquiror is the Indemnifying Party, or the Acquiror, in the case RAI is the Indemnifying Party); provided that (i) the Indemnifying Party shall pay or cause to be paid all amounts arising out of such settlement or judgment concurrently with the effectiveness of such settlement or resolution (except in relation to any Third Party Claim that relates to both Seller Tobacco Liabilities and Acquiror Tobacco Liabilities, in respect of which any amounts payable in connection with such settlement or judgment shall in paid by the Indemnifying Party and the Indemnified Party in accordance with Section 11.01(a)(v)), (ii) such settlement or judgment shall not encumber any of the assets of any Indemnified Party or provide for injunctive or other nonmonetary relief affecting the Indemnified Party, or otherwise provide for any restriction or condition that would apply to or adversely affect any Indemnified Party or the conduct of any Indemnified Party's business, (iii) to the extent that the Indemnified Party may have any Liability with respect to such Third Party Claim, the complete and unconditional release of any Indemnified Party potentially affected by such Third Party Claim shall be made a condition of any such settlement or other resolution, and (iv) such settlement shall not include any admission of wrongdoing or misconduct by the Indemnified Party.

Decision and Order

(c) Following an assumption by the Indemnifying Party of a Third Party Claim pursuant to Section 11.03(b), the Indemnified Party may reassume control of any defense of a Third Party Claim if the Indemnifying Party fails to prosecute the defense of such Third Party Claim within a period of 20 calendar days after receipt of written notice of such failure to prosecute by the Indemnified Party. In addition, following an assumption by RAI of a Third Party Claim pursuant to Section 11.03(b) where the Third Party Claim relates to both Seller Tobacco Liabilities and Acquiror Tobacco Liabilities, the Acquiror may elect to assume control of the defense of the part of such Third Party Claim that relates to Acquiror Tobacco Liabilities at its own expense. The Indemnifying Party shall be liable for the reasonable fees, costs and expenses of counsel employed by the Indemnified Party (i) for any period during which the Indemnifying Party has not assumed the defense thereof, or (ii) following reassumption of control pursuant to the first sentence of this Section 11.03(c).

(d) In the event any Indemnifying Party receives a notice of a claim for indemnity from an Indemnified Party pursuant to Section 11.03(a) that does not involve a Third Party Claim (such claim being a "Direct Claim"), the Indemnifying Party shall notify the Indemnified Party within 45 days following its receipt of such notice if the Indemnifying Party disputes its liability to the Indemnified Party under this Article XI. If the Indemnifying Party does not so notify the Indemnified Party, the Direct Claim specified by the Indemnified Party in such notice shall be conclusively deemed to be a liability of the Indemnifying Party under this Article XI, and the Indemnifying Party shall pay, subject to the limitations set forth in Sections 11.01(b) and 11.02(b), if and as applicable, the amount of such liability to the Indemnified Party on demand or, in the case of any notice in which the amount of the Direct Claim (or any portion thereof) is estimated, on such later date when the amount of such Direct Claim (or any portion thereof) becomes finally determined. If the Indemnifying Party has timely disputed its liability with respect to such Direct Claim as provided above, the Indemnifying Party and the Indemnified Party shall resolve such dispute in accordance with Section 12.12.

Section 11.04. Exclusive Remedies. RAI and the Acquiror acknowledge and agree that, subject to Section 12.13, following the Closing, the indemnification provisions of Sections 11.01 and 11.02 shall be the sole and exclusive remedies of any RAI Indemnified Party and any Acquiror Indemnified Party, respectively, for any Losses (including any Losses from claims for breach of contract, warranty, tortious conduct (including negligence) or otherwise and whether predicated on common law, statute, strict liability, or otherwise (but not in the case of fraud or intentional misrepresentation)) that it may at any time suffer or incur, or become subject to, as a result of, or in connection with, any breach of any representation or warranty in this Agreement by the Acquiror or RAI, respectively, or any failure by the Acquiror or RAI, respectively to perform or comply with any covenant or agreement in this Agreement that, by its terms, was to have been performed, or complied with, by the Acquiror or RAI, respectively. Without limiting the generality of the foregoing, the Parties hereby irrevocably waive any right of rescission they may otherwise have or to which they may become entitled.

Section 11.05. Effect of Investigation. The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party (including by any of its Representatives) or by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known that

any such representation or warranty is, was or might be inaccurate or by reason of the Indemnified Party's waiver of any condition set forth in Section 9.02 or Section 9.03, as the case may be.

Section 11.06. Consolidation, Merger, Conveyance, Transfer, Disposition and Divestiture. If RAI (a) consolidates with or merges with any other Person, or (b) conveys, transfers or otherwise disposes of or divests (including by way of sale, assignment, license, lease, pledge or hypothecation) all or substantially all of its properties or assets to any other Person, then as a condition to the effectiveness of such consolidation, merger, conveyance, transfer, disposition or divestiture, such other Person shall automatically become jointly and severally bound by the provisions of this Article XI.

Section 11.07. Additional Limitations.

(a) Notwithstanding anything in this Agreement to the contrary, nothing in this Section 11.07 shall apply in respect of the provisions set out in Section 11.01(a)(iv), Section 11.01(a)(v) and Section 11.02(a)(vi).

(b) Notwithstanding anything in this Agreement to the contrary, no Acquiror Indemnified Party will be entitled to indemnification pursuant to this Article XI or otherwise for any Losses that such Acquiror Indemnified Party may suffer or incur, or become subject to, as a result of related to: (i) the conduct or operation of the blu Brand Business prior to or at the Closing, (ii) any Transferred Assets or Assumed Liabilities, to the extent related to the blu Brand Business, or (iii) the failure of any representations or warranties made by RAI in this Agreement or in any Ancillary Agreement, other than Fundamental Representations, to be true and correct to the extent relating to the blu Brand Business or the Transferred Assets or Assumed Liabilities, to the extent related to the blu Brand Business.

(c) No Indemnified Party will be entitled to indemnification pursuant to this Article XI or otherwise for any punitive or exemplary damages (other than punitive or exemplary damages paid by the Indemnified Party to a third party in connection with a Third Party Claim).

(d) An Indemnified Party will use commercially reasonable efforts to pursue available coverage under insurance policies maintained by such Indemnified Party for any Losses otherwise subject to indemnity hereunder. If an Indemnified Party actually receives any insurance proceeds or other recoveries from third parties (other than any Indemnified Party) pursuant to indemnification or otherwise prior to being indemnified with respect to Losses under this Article XI, the payment under this Article XI with respect to such Losses shall be reduced by the amount of such insurance proceeds or other recoveries actually received, in each case, net of any costs and expenses (including reasonable fees and expenses of attorneys), deductibles, retentions, or increase in premiums incurred in connection with or as a result of collecting such proceeds or other recoveries (such net amount, a "Net Recovery"). If an Indemnified Party actually receives any insurance proceeds or other recoveries from third parties (other than any Indemnifying Party) pursuant to indemnification or otherwise after being indemnified with respect to all or a portion of any Losses under this Article XI, the Indemnified Party shall pay to the Indemnifying Party who made such payment the lesser of (i) the amount of the Net Recovery with respect to such Losses and (ii) the amount paid by such Indemnifying Party to the Indemnified Party with respect to such Losses.

Section 11.08. Determination of Sales Volumes. For the purposes of Section 11.01(a)(v), the number of units of cigarettes of the Acquired Tobacco Cigarette Brands sold shall be determined: (a) by reference to Management Science Associates, Inc., or (b) to the extent not available from Management Science Associates, Inc., by reference to Participating Manufacturer's Reported volumes (MSA); or (c) to the extent not available from Management Science Associates, Inc. or Participating Manufacturer's Reported volumes (MSA), by such other method as shall be agreed by the Parties, acting reasonably.

ARTICLE XII

GENERAL PROVISIONS

Section 12.01. Survival. The representations and warranties contained in or made pursuant to this Agreement or in any certificate furnished pursuant to this Agreement shall terminate at the close of business on the 18-month anniversary of the Closing Date; provided, however, that (a) Sections 3.13 and 4.10 (*Intellectual Property*), and Sections 3.14 and 4.12 (*Environmental Matters*) shall terminate at the close of business on the third anniversary of the Closing Date, and (b) the Fundamental Representations shall survive the Closing indefinitely (with respect to each such representation and warranty, the applicable time for which such representation and warranty survives the Closing is referred to herein as the "Survival Period"). The Parties intend to modify the statute of limitations and agree that no claims or causes of action may be brought against RAI or the Acquiror based upon, directly or indirectly, any of the representations or warranties contained in this Agreement after the applicable Survival Period, other than claims or causes of action as to which RAI or the Acquiror, as applicable, has given written notice in accordance with Section 11.03 to the other prior to the expiration of the applicable Survival Period. With respect to any such claims or causes of action as to which such notice has been given prior to the expiration of the applicable Survival Period, the Survival Period shall be automatically extended, and the related representation and warranty shall not terminate, until the final resolution of the claim or cause of action. The covenants and agreements contained in or made pursuant to this Agreement, in any other Transaction Agreement or in any certificate furnished pursuant to this Agreement shall survive the Closing and remain in full force and effect in accordance with their terms.

Section 12.02. Certain Acknowledgements by the Acquiror. The Acquiror acknowledges for the benefit of the Sellers and their respective Affiliates that:

(a) without prejudice to Section 11.05, prior to the Closing, the Acquiror has completed inquiries and investigations into, and, based thereon, has formed an independent judgment concerning, the Transferred Assets, the blu Brand Business, the PR Business and the Assumed Liabilities, and any other rights or obligations to be transferred, directly or indirectly, pursuant to the Transaction Agreements;

(b) except as expressly set forth in Articles III or IV or the Ancillary Agreements, no Seller nor any of Seller's Affiliates or Representatives or any other Person has made or will have made any representation or warranty, express or implied, with respect to the Transferred Assets or Assumed Liabilities or the accuracy or completeness of any information regarding the Transferred Assets or Assumed Liabilities furnished or made available to Imperial and the Acquiror and their respective Affiliates and Representatives;

(c) at the Closing or the Lorillard Transfer Closing, as the case may be, the Acquiror will acquire the Transferred Assets without any representation or warranty from a Seller or any Person acting on behalf of a Seller as to the design, condition, quality, safety, merchantability or fitness for any particular purpose and without any other representation or warranty, except as otherwise expressly represented or warranted in Article III or IV or the Ancillary Agreements and that, except as expressly set forth in Article III or IV or the Ancillary Agreements, each Seller expressly disclaims and negates any representations or warranties of any kind, whether express or implied, relating to the condition, merchantability or fitness for a particular purpose of the Transferred Assets, including any warranty relating to the condition (environmental or otherwise) of the Transferred Assets, their suitability for the Acquiror's purposes, the status of the maintenance or operation of the Transferred Assets, or the environmental condition of any Transferred Owned Property or Transferred Leased Property, including any buildings, structures, soil, surface water or groundwater;

(d) without limiting the generality of the foregoing provisions of this Section 12.02 and except as expressly set forth in Articles III or IV, it is understood that any financial statements, cost estimates and any financial or other projections or other predictions that may be contained or referred to in offering materials, as well as any information, documents or other materials (including any such materials contained in any "data room" or reviewed by Imperial or the Acquiror or any of their respective Affiliates or Representatives pursuant to the Confidentiality Agreement) or management presentations that have been provided to Imperial or the Acquiror or any of their respective Affiliates or Representatives are not, and will not be deemed to be, representations or warranties of any Seller (nor are they or will they be deemed to be exceptions to any representation or warranties of any Seller), and except as expressly set forth in Articles III or IV, no representation or warranty is made as to the accuracy or completeness of any of the foregoing; and

(e) except as expressly set forth in this Agreement or the Ancillary Agreements, at the Closing or the Lorillard Transfer Closing, as the case may be, the Acquiror will accept the Transferred Assets "as is", "where is", in their then present environmental condition and physical condition, subject only to the representations and warranties, covenants and indemnities contained in this Agreement, with all faults and without any other representation or warranty of any nature whatsoever, and acknowledges that without such acceptance, the sale to the Acquiror of the Transferred Assets would not be made and, except as expressly required by this Agreement, no Seller shall be under any obligation whatsoever to undertake any improvement, repair, modification, alteration, remediation, or other work of any kind with respect to any of the Transferred Assets.

Section 12.03. Expenses. Except as may be otherwise specified in the Transaction Agreements, all costs and expenses, including fees and disbursements of counsel,

financial advisers, accountants and brokers, incurred in connection with the Transaction Agreements and the transactions contemplated by the Transaction Agreements shall be paid by the Person incurring such costs and expenses, whether or not the Closing shall have occurred; provided, however, that all filing and other similar fees payable in connection with all filings required under the HSR Act relating to the Transactions and the Merger will be paid by RAI and Lorillard in accordance with the terms of the Merger Agreement.

Section 12.04. Notices. All notices, requests, claims, demands and other communications under the Transaction Agreements shall be in writing and shall be given or made (and shall be deemed to have been duly given or made upon receipt) by delivery in person, by overnight courier service, by facsimile with receipt confirmed (followed by delivery of an original via overnight courier service) or by registered or certified mail (postage prepaid, return receipt requested) to the respective parties at the following addresses (or at such other address for a party as shall be specified in a notice given in accordance with this Section 12.04):

(a) if to RAI:

Reynolds American Inc.
401 North Main Street
Winston-Salem, NC 27101
Attention: Martin L. Holton III
Facsimile: (336) 726-4725

with a copy to:

Jones Day
222 East 41st Street
New York, NY 10017
Attention: Jere R. Thomson, Esq.
Randi C. Lesnick, Esq.
Facsimile: (212) 755-7306

(b) if to the Acquiror:

Lignum-2, L.L.C.
5900 North Andrews Avenue
Suite 1100
Fort Lauderdale, FL 33309
Attention: Rob Wilkey
General Counsel
Facsimile: (954) 958-7907

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with a copy to:

Imperial Tobacco Group PLC
121 Winterstoke Road
Bristol BS3 2LL
United Kingdom
Attention: John Downing
Company Secretary
Facsimile: +44 (0) 117 963 7201

and with a copy to:

Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
Attention: Eric S. Shube, Esq.
Jeremy A. Parr, Esq.
Facsimile: (212) 610-6399

(c) if to Imperial:

Imperial Tobacco Group PLC
121 Winterstoke Road
Bristol BS3 2LL
United Kingdom
Attention: John Downing
Company Secretary
Facsimile: +44 (0) 117 963 7201

and with a copy to:

Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
Attention: Eric S. Shube, Esq.
Jeremy A. Parr, Esq.
Facsimile: (212) 610-6399

Section 12.05. Public Announcements. No Party or any Affiliate or Representative of such Party shall issue or cause the publication of any press release or public announcement or otherwise communicate with any news media in respect of this Agreement or the transactions contemplated by this Agreement without the prior written consent of the other Parties (which consent shall not be unreasonably withheld or delayed), except as may be required by Law or stock exchange rules, in which case the Party required to publish such press release or public announcement shall allow the other Parties a reasonable opportunity to comment on such press release or public announcement in advance of such publication; provided, however, that

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RAI shall not be required to obtain the Acquiror's or its Affiliates' prior written consent in order to issue or cause the publication of any press release or public announcement or otherwise communicate with any news media, if such press release, public announcement or other communication refers to the Merger Agreement or the Merger without including a reference to this Agreement or the transactions contemplated by this Agreement.

Section 12.06. Severability. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced under any Law or as a matter of public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated by this Agreement is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated by this Agreement be consummated as originally contemplated to the greatest extent possible.

Section 12.07. Entire Agreement. Except as otherwise expressly provided in the Transaction Agreements or for documents that specifically reference this Section 12.07, the Transaction Agreements constitute the entire agreement of RAI, the other Sellers and/or their Affiliates, on the one hand, and Imperial, the Acquiror and/or their Affiliates, on the other hand, with respect to the subject matter of the Transaction Agreements and supersede all prior agreements, undertakings and understandings, both written and oral, other than the Confidentiality Agreement to the extent not in conflict with this Agreement, between or on behalf of RAI, the other Sellers and/or their Affiliates, on the one hand, and Imperial, the Acquiror and/or their Affiliates, on the other hand, with respect to the subject matter of the Transaction Agreements.

Section 12.08. Assignment. This Agreement shall not be assigned by operation of Law or otherwise without the prior written consent of RAI and the Acquiror; provided that (a) both RAI and the Acquiror may assign any or all of their respective rights and obligations under this Agreement to any of their respective Affiliates, and (b) following the Closing, the Acquiror may assign its rights under this Agreement to its sources of Debt Financing, Bond Financing or other sources of financing available to it as collateral security; provided, further, however, that no such assignment shall release RAI or the Acquiror from any liability or obligation under this Agreement. Any attempted assignment in violation of this Section 12.08 shall be void. This Agreement shall be binding upon, shall inure to the benefit of, and shall be enforceable by the Parties and their respective permitted successors and assigns.

Section 12.09. No Third-Party Beneficiaries. Except as provided in Article XI with respect to RAI Indemnified Parties and Acquiror Indemnified Parties, this Agreement is for the sole benefit of the Parties and their permitted successors and assigns and nothing in this Agreement or any other Transaction Agreements, including Article VII and Exhibit D hereto, express or implied, is intended to or shall confer upon any other Person, including any union or any employee or former employee of any Seller or the Business, or entity any legal or equitable right, benefit or remedy of any nature whatsoever, including any rights of employment for any specified period, under or by reason of this Agreement.

Section 12.10. Amendment. No provision of this Agreement or any other Transaction Agreement, including any Exhibits or Schedules thereto, may be amended, supplemented or modified except by a written instrument making specific reference hereto or thereto signed by all the parties to such agreement. No consent from any Indemnified Party under Article XI (other than the Parties) shall be required in order to amend this Agreement.

Section 12.11. Disclosure Schedules. Any disclosure with respect to a Section or Schedule of this Agreement, including any Section of the Disclosure Schedule or the Acquiror Disclosure Schedule, shall be deemed to be disclosed for another Section or Schedule of this Agreement, including any Section of the Disclosure Schedule or the Acquiror Disclosure Schedule, to the extent that such disclosure is sufficient so that the relevance of such disclosure to such other Section or Schedule is reasonably apparent on its face.

Section 12.12. Governing Law; Submission to Jurisdiction; Waivers.

(a) This Agreement and each other Transaction Agreement (and any claims or disputes arising out of or related hereto or thereto or to the transactions contemplated hereby and thereby or to the inducement of any Party to enter herein and therein, whether for breach of contract, tortious conduct or otherwise and whether predicated on common law, statute or otherwise) shall in all respects be governed by, and construed in accordance with, the Laws of the State of Delaware, including all matters of construction, validity and performance, in each case without reference to any conflict of Law rules that might lead to the application of the Laws of any other jurisdiction. The Parties hereby declare that it is their intention that this Agreement shall be regarded as made under the laws of the State of Delaware and that the laws of said State shall be applied interpreting its own provisions in all cases where legal interpretation shall be required. Each Party agrees (i) that this Agreement involves at least $100,000.00, and (ii) that this Agreement has been entered into by the Parties in express reliance upon 6 Del. C. § 2708.

(b) Each of the Parties agrees that any Dispute shall be resolved only in the Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court. In that context, and without limiting the generality of the foregoing, each Party by this Agreement irrevocably and unconditionally:

(i) submits for itself and its property in any Action relating to the Transaction Agreements, or for recognition and enforcement of any judgment in respect thereof, to the exclusive jurisdiction of Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court, and appellate courts having jurisdiction of appeals from any of the foregoing, and agrees that all claims in respect of any such Action shall be heard and determined in such Delaware court or, to the extent permitted by Law, in such federal court;

(ii) consents that any such Action may and shall be brought in such courts and waives any objection that it may now or hereafter have to the venue or jurisdiction of any such Action in any such court or that such Action was brought in an inconvenient court and agrees not to plead or claim the same;

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(iii) agrees (A) to the extent such Party is not otherwise subject to service of process in the State of Delaware, to appoint and maintain an agent in the State of Delaware as such Party's agent for acceptance of legal process, and (B) that, to the fullest extent permitted by applicable law, service of process may also be made on such Party by prepaid certified mail with a proof of mailing receipt validated by the United States Postal Service constituting the evidence of valid service, and that service made pursuant to (A) or (B) above shall, to the fullest extent permitted by applicable Law, have the same legal force and effect as if served upon such Party personally within the State of Delaware; and

(iv) agrees that nothing in the Transaction Agreements shall affect the right to effect service of process in any other manner permitted by the Laws of the State of Delaware.

Section 12.13. Specific Performance. The Parties hereby acknowledge and agree that the failure of any Party to perform its agreements and covenants hereunder, including its failure to take all actions as are necessary on its part to consummate the transactions contemplated hereby, will cause irreparable injury to the other Parties, for which money damages, even if available, will not be an adequate remedy. Accordingly, each Party hereby consents to the issuance of injunctive relief by any court of competent jurisdiction to compel performance of such Party's obligations and to the granting by any court of the remedy of specific performance of its obligations hereunder, in addition to any other rights or remedies available hereunder or at law or in equity. Each Party hereby waives any requirements for the securing or posting of any bond with such remedy. Without limiting the foregoing, with respect to the failure of any party to cause the Closing to occur when it is otherwise intended to occur pursuant to the terms of this Agreement, each Party agrees, on its behalf and on behalf of its Affiliates, that the preferred, intended and mutually agreed sole and exclusive remedy for such breach is specific performance by (and related injunctive relief against) the breaching Party of its obligation to consummate the transactions contemplated hereby, and such parties further agree in such circumstances not to assert that a remedy of specific performance is unenforceable, invalid, contrary to law or inequitable for any reason nor to assert that money damages would provide an adequate remedy for such breach.

Section 12.14. Bulk Sales Laws. The Acquiror and RAI each hereby waive compliance by the Sellers with the provisions of the "bulk sales", "bulk transfer" or similar Laws of any state or any jurisdiction outside the United States that may otherwise be applicable with respect to the sale of any of the Transferred Assets.

Section 12.15. Rules of Construction. Interpretation of the Transaction Agreements shall be governed by the following rules of construction: (a) words in the singular shall be held to include the plural and vice versa, and words of one gender shall be held to include the other gender as the context requires; (b) references to the terms Article, Section, paragraph, Exhibit and Schedule are references to the Articles, Sections, paragraphs, Exhibits and Schedules of this Agreement unless otherwise specified; (c) the terms "hereof", "herein", "hereby", "hereto", and derivative or similar words refer to this entire Agreement, including the Schedules and Exhibits hereto; (d) references to "$" shall mean US dollars; (e) the word "including" and words of similar import when used in the Transaction Agreements shall mean

"including without limitation," unless otherwise specified; (f) the word "or" shall not be exclusive; (g) references to "written" or "in writing" include in electronic form; (h) provisions shall apply, when appropriate, to successive events and transactions; (i) the headings contained in the Transaction Agreements are for reference purposes only and shall not affect in any way the meaning or interpretation of the Transaction Agreements; (j) the Parties have each participated in the negotiation and drafting of the Transaction Agreements and if an ambiguity or question of interpretation should arise, the Transaction Agreements shall be construed as if drafted jointly by the parties thereto and no presumption or burden of proof shall arise favoring or burdening any Party by virtue of the authorship of any of the provisions in any of the Transaction Agreements; (k) a reference to any Person includes such Person's successors and permitted assigns; (l) any reference to "days" means calendar days unless Business Days are expressly specified; (m) when calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded, if the last day of such period is not a Business Day, the period shall end on the next succeeding Business Day; and (n) an item arising with respect to a specific representation or warranty shall be deemed to be "reflected on" or "set forth in" a balance sheet or financial statements, only to the extent such item is specifically set forth or specifically provided for on the balance sheet or financial statement.

Section 12.16. Counterparts. Each of the Transaction Agreements may be executed in one or more counterparts, and by the different parties to each such agreement in separate counterparts, each of which when executed shall be deemed to be an original but all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to any Transaction Agreement by facsimile shall be as effective as delivery of a manually executed counterpart of any such Agreement.

Section 12.17. Waiver of Jury Trial. EACH PARTY HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT, ANY OTHER TRANSACTION AGREEMENTS OR ANY TRANSACTION CONTEMPLATED HEREBY OR THEREBY. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER TRANSACTION AGREEMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 12.17.

IN WITNESS WHEREOF, RAI and the Acquiror have caused this Agreement to be executed on the date first written above by their respective duly authorized officers.

REYNOLDS AMERICAN INC.

By /s/ Susan M. Cameron
Name: Susan M. Cameron
Title: President and Chief Executive Officer

LIGNUM-2, L.L.C.

By /s/ Rob Wilkey
Name: Rob Wilkey
Title:

Solely with respect to Sections 6.05 and 6.24 and ARTICLE XII:

IMPERIAL TOBACCO GROUP PLC

By /s/ Conrad Tate
Name: Conrad Tate
Title:

EXHIBIT A

DEFINITIONS

"Accounting Referee" shall have the meaning set forth in Section 2.11.

"Acquired Brands" means the Winston Brand, Salem Brand, KOOL Brand, Maverick Brand and blu Brand, and (if deemed to be a RAI Brand pursuant to Section 2.05) the Doral Brand.

"Acquired Tobacco Cigarette Brands" means the Winston Brand, Salem Brand, KOOL Brand and Maverick Brand, and (if deemed to be a RAI Brand pursuant to Section 2.05) the Doral Brand.

"Acquiror" shall have the meaning set forth in the Preamble.

"Acquiror Disclosure Schedule" means the schedule dated as of the date of this Agreement delivered by the Acquiror to RAI and that forms a part of this Agreement.

"Acquiror Indemnified Parties" shall have the meaning set forth in Section 11.01(a).

"Acquiror's PRE Plan" shall have the meaning set forth in Exhibit D.

"Acquiror Tobacco Liabilities" shall have the meaning set forth in Section 2.01(c)(v).

"Action" means any claim, action, suit, arbitration, inquiry, investigation or other proceeding of any nature (whether criminal, civil, legislative, administrative, regulatory, prosecutorial or otherwise) by or before any court, arbitrator or Governmental Authority or similar body.

"Adverse Recommendation Change" shall have the meaning set forth in Section 6.05(d).

"Affiliate" means, with respect to any specified Person, any other Person that, at the time of determination, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with such specified Person. Notwithstanding anything herein to the contrary, (a) none of BAT or any of its Affiliates or Subsidiaries will be considered an Affiliate of RAI or any of its Subsidiaries, and neither RAI nor any of its Subsidiaries will be considered an Affiliate of any of the foregoing, and (b) unless and until the Merger is consummated, none of Lorillard or any of its Affiliates or Subsidiaries will be considered an Affiliate of RAI, and neither RAI nor any of its Subsidiaries will be considered an Affiliate of any of the foregoing.

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"Agreed Assumption Terms" means the agreed treatment of the Acquired Tobacco Cigarette Brands from and after the Closing under the State Settlements as set out in Exhibit F.

"Agreement" means this Asset Purchase Agreement dated as of July 15, 2014, among the Parties, including the Disclosure Schedule, the Acquiror Disclosure Schedule and the Exhibits, and all amendments to such agreement made in accordance with Section 12.10.

"Allocation" shall have the meaning set forth in Section 2.11.

"Ancillary Agreements" means the Route to Market Agreement, Assignment and Assumption Agreement, Intellectual Property License Agreement, the Reciprocal Manufacturing Agreement and the TSA.

"Assignment and Assumption Agreement" means an assignment and assumption agreement in customary form among the Sellers and the Acquiror.

"Assumed CBAs" shall have the meaning set forth in Exhibit D.

"Assumed Contracts" shall have the meaning set forth in Section 2.01(a)(iii).

"Assumed Liabilities" shall have the meaning set forth in Section 2.01(c).

"Assumed Plaintiff Fees" shall have the meaning set forth in Section 2.01(c)(vii).

"BAT" means British American Tobacco p.l.c.

"blu Brand" means the "e-vapor" brand known as blu and the brand known as SkyCig.

"blu Brand Business" means (a) the manufacture, distribution, development, research, marketing, advertising, sale and service relating to electronic cigarettes, any component parts of electronic cigarettes or the packaging of electronic cigarettes and any electronic cigarette accessories under the blu Brand and (b) the design, supply, advertising, marketing and sale of electronic cigarettes under the SkyCig brand.

"blu Brand Intellectual Property" means Lorillard Brands Intellectual Property related to the blu Brand.

"blu Brand Inventory" shall have the meaning set forth in Section 2.01(a)(ii).

"Bond Financing" shall have the meaning set forth in Section 6.12(c).

"Books and Records" shall have the meaning set forth in Section 2.01(a)(ix).

"Business" means the PR Business, the blu Brand Business, all other Transferred Assets and the Assumed Liabilities.

"Business Day" means any day that is not a Saturday, a Sunday or other day on which the Department of State of the State of Delaware or the commercial banks in the City of New York, New York or the City of London, England are required or authorized by Law or executive order to be closed.

"Business Intellectual Property" means, collectively, the KAI Brands Intellectual Property and the Lorillard Brands Intellectual Property.

"Cash Compensation" shall have the meaning set forth in Exhibit D.

"Certification/Listing" means any approval, certification, listing or publication required by any State as a condition of selling a tobacco cigarette brand in that State under the statute commonly known as the "Model Act" or "Qualifying Statute" or "complementary legislation" pursuant to the MSA or any other applicable State statute, regulation or policy.

"Class 1 Circular" means the shareholder circular of Imperial and related documents in connection with the Transactions.

"Closing" shall have the meaning set forth in Section 2.03.

"Closing Date" shall have the meaning set forth in Section 2.03.

"COBRA" shall have the meaning set forth in Exhibit D.

"Code" means the United States Internal Revenue Code of 1986, as amended.

"Comparison Period" means the period of 12 months immediately prior to the date of this Agreement.

"Confidentiality Agreement" shall have the meaning set forth in Section 6.03(a).

"Contracts" means all contracts, subcontracts, agreements, collective bargaining agreements, leases, subleases, licenses, commitments, sales and purchase orders, and other instruments, arrangements or understandings of any kind.

"Control" means, as to any Person, the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise. The terms "Controlled by", "under common Control with" and "Controlling" shall have correlative meanings.

"Copyrights" shall have the meaning set forth in the definition of Intellectual Property.

"Cut-Off Time" shall have the meaning set forth in Section 2.08.

"Danville Facility" means the facilities located at 200 Kentuck Road in Danville, Virginia.

"DC District Court" means the United States District Court for the District of Columbia.

"Debt Financing" shall have the meaning set forth in Section 5.06(a).

"Direct Claim" shall have the meaning set forth in Section 11.03(d).

"Disclosure Schedule" means the schedule dated as of the date of this Agreement delivered by RAI to the Acquiror and that forms a part of this Agreement.

"Dispute" means any dispute, controversy or claim arising out of or relating to the transactions contemplated by the Transaction Agreement, or the validity, interpretation, breach or termination of any such agreement, including claims seeking redress or asserting rights under any Law.

"Doral Brand" shall have the meaning set forth in Section 2.05.

"DoJ Tobacco Case" means the case filed in 1999 by the United States Department of Justice against, among others, Philip Morris USA, Inc. (as successor to Philip Morris, Inc.), R.J. Reynolds Tobacco Co., Brown and Williamson Tobacco Company, Lorillard Tobacco Company, The Liggett Group, Inc. British American Tobacco (Investments) Ltd., The Council for Tobacco Research-USA, Inc. and the Tobacco Institute, Inc. with reference "Civil Action No. 99-2496 (GK)", including all related appeals and proceedings.

"DoJ Tobacco Case Corrective Statement Requirement" means the order of the DC District Court under the Final Judgment and Remedial Order on the defendants in the DoJ Tobacco Case to make certain corrective statements, as specified in Section III.B of the Final Judgment and Remedial Order, see 449 F. Supp. 2d 1, 938-41 (2006), and modified by subsequent orders of the DC District Court.

"DoJ Tobacco Case Corrective Statement Requirement Waiver" means an order or ruling from the DC District Court granting the Acquiror relief from the obligation under the Final Judgment and Remedial Order to comply with the DoJ Tobacco Case Corrective Statement Requirement in respect of the Acquired Tobacco Cigarette Brands from and after the Closing.

"DoJ Tobacco Case Litigation Document Disclosure Requirement" shall have the meaning set forth in Section 6.17.

"DoJ Tobacco Case Marketing Data Disclosure Requirement" shall have the meaning set forth in Section 6.17.

"Dutch IPCo" means a corporation, registered in the Netherlands, which shall acquire the blu Brand Intellectual Property.

"Effective Time of the Merger" shall mean the "Effective Time" as defined in the Merger Agreement.

"Employee Plans" means, collectively, the RAI PR Employee Plans and the Lorillard Employee Plans.

"End Date" shall have the meaning set forth in Section 10.01(d).

"Environmental Action" means any Action concerning Environmental Laws or environmental, health or safety matters, including (a) any actual or alleged non-compliance with any Environmental Law or Environmental Permit, (b) any actual or alleged presence or Release of, or exposure to, any Hazardous Materials at any location; (c) any Liabilities assumed or retained by contract, operation of law or otherwise; (d) actual or alleged personal injuries, property or natural resources damages or diminution of property value, or contractual obligations relating to any of the foregoing, but excluding any Acquiror Tobacco Liabilities.

"Environmental Law" means any Law, Governmental Order or Contract issued, promulgated or entered into by or with any Governmental Authority, in each case applicable to the Business, relating to pollution or to protection of the environment, natural resources, flora and fauna, the climate and human health and safety, including any Laws relating to the use, handling, management, recycling, transportation, treatment, storage, disposal or Release of Hazardous Materials.

"Environmental Permit" means a RAI Brands Environmental Permit or a Lorillard Brands Environmental Permit.

"Equipment" shall have the meaning set forth in Section 2.01(a)(x).

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time, and the rules and regulations promulgated thereunder.

"ERISA Affiliate" means any Person that is or would be deemed a "single employer" with the RAI Parties or Lorillard Asset Owners under Section 414(b), (c), (m) or (o) of the Code or Section 4001 of ERISA.

"Exchange Act" means the United States Securities Exchange Act of 1934, as amended, and the rules and regulations under such Act.

"Excluded Assets" shall have the meaning set forth in Section 2.01(b).

"Excluded Liabilities" shall have the meaning set forth in Section 7.01(d).

"FCA" shall have the meaning set forth in Section 6.05(a).

"FDA" means the United States Food and Drug Administration.

"Final Judgment and Remedial Order" means the final judgment and remedial order from the DC District Court, dated August 17, 2006, with respect to the DoJ Tobacco Case, as well as any supplements, amendments or further orders, whether on appeal or in the DC District Court, modifying, deleting or adding to the provisions of such order.

"Financing Agreements" shall have the meaning set forth in Section 5.06(a).

"Fundamental Representations" means the representations and warranties set forth in Section 3.01 (*Incorporation and Qualification of the RAI Parties*), Section 3.02 (*Authority; Execution and Delivery; Enforceability*), Section 3.12(c) (*Sufficiency of, and Title to, the Assets*), Section 3.25 (*Brokers*), Section 4.01 (*Incorporation and Qualification of the Lorillard Asset Owners*), Section 4.09(c) (*Sufficiency of, and Title to, the Assets*), Section 4.23 (*Brokers*), Section 5.01 (*Incorporation and Qualification of the Acquiror*), Section 5.25 (*Authority; Performance*), Section 5.02 (*Authority; Execution and Delivery, Enforceability*) and Section 5.07 (*Brokers*).

"Governmental Authority" means any United States federal, state or local or any supra-national or non-US government, political subdivision, governmental, regulatory or administrative authority, instrumentality, board, agency, body or commission, self-regulatory organization or any court, tribunal, or judicial or arbitral body.

"Governmental Order" means any order, writ, judgment, injunction, decree, stipulation, determination, settlement or award entered by or with any Governmental Authority.

"Greensboro Facility" means the manufacturing facility located at 2525 E. Market St. in Greensboro, North Carolina.

"Growers Trust" means the agreement described in Clause (f) of the definition of State Settlements.

"Hazardous Materials" means any chemical, material, substance or waste that in relevant form or concentration is prohibited, limited or regulated under any Environmental Law (including, without limitation, asbestos or asbestos-containing materials).

"HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations under such Act.

"Imperial Bankers" shall have the meaning set forth in Section 5.07.

"Imperial Board" shall have the meaning set forth in Recital F.

"Imperial Guaranty" shall have the meaning set forth in Section 6.24.

"Imperial Recommendation" shall have the meaning set forth in Section 6.05(a).

"Imperial Shareholder Approval" shall have the meaning set forth in Section 6.05(b).

"Imperial Shareholder Resolution" shall have the meaning set forth in Section 6.05(a).

"Imperial Shareholders Meeting" shall have the meaning set forth in Section 6.05(a).

"Imperial Termination Fee" means $2,100,000,000 in cash.

"Indebtedness" means (a) the principal of and premium (if any) in respect of all indebtedness for borrowed money, including accrued interest and any cost associated with prepaying any such debt, (b) the principal of and premium in respect of obligations evidenced by bonds, debentures, notes or other similar instruments, including accrued interest, (c) the principal component of all obligations to pay the deferred and unpaid purchase price of property and Equipment that have been delivered, (d) capital leases, (e) negative balances in bank accounts, (f) amounts in respect of checks in transit, (g) net cash payment obligations under swaps, options, derivatives and other hedging agreements or arrangements that will be payable upon termination thereof (assuming they were terminated on the date of determination), (h) all liabilities relating to securitization or factoring programs or arrangements, and (i) all indebtedness of another Person referred to in clauses (a) through (h) above guaranteed directly or indirectly, jointly or severally, in any manner (other than with respect to indebtedness included in clauses (a) through (h) above).

"Indemnified Party" shall have the meaning set forth in Section 11.03(a).

"Indemnifying Party" shall have the meaning set forth in Section 11.03(a).

"Independent MSA/PSS Auditor" means, with respect to the MSA or any State Settlement, PwC or, if PwC ceases to serve as the MSA's Independent Auditor or ceases to provide payment calculations under any other State Settlement, any successor to PwC under the MSA or such State Settlement.

"Intellectual Property" means all of the following whether arising under the Laws of the United States or of any other jurisdiction: (a) patents, patent applications (including patents issued thereon), patentable inventions, design patents and industrial designs, and statutory invention registrations, including reissues, divisions, continuations, continuations in part, extensions and reexaminations thereof, all rights therein provided by international treaties or conventions, (b) registered and unregistered trademarks, service marks, trade names, service names, trade dress, logos, slogans, domain names, and designs and other identifiers of same, including all goodwill associated therewith, and any and all common law rights, and registrations and applications for registration thereof, all rights therein provided by international treaties or conventions, and all reissues, extensions and renewals of any of the foregoing ("Trademarks"), (c) registered and material unregistered copyrights and copyright applications, copyrightable works, copyrights, moral rights, mask work rights, database rights and design rights, in each case, whether or not registered, and registrations and applications for registration thereof, and all rights therein provided by international treaties or conventions ("Copyrights"), and (d) confidential and proprietary information (including trade secrets, processes, know-how, ideas, discoveries, creations, inventions and improvements (whether patentable or unpatentable and whether or not reduced to practice), research and development, formulas, algorithms, recipes for product, compositions, manufacturing and production processes and techniques, methods, procedures, schematics, technology, technical data, designs, drawings, flowcharts, block diagrams, specifications, customer and supplier lists, pricing and cost information and business and marketing plans and proposals), but excluding Software and all copyrights and other rights therein.

"Intellectual Property License Agreement" shall have the meaning set forth in Section 6.08.

"Intervening Event" means an event, fact, development, occurrence or circumstance relating to or materially affecting the Business or Imperial or its Affiliates, as the context requires, occurring or arising after the date of this Agreement, that was not known (or, if known, the consequences of which were not known) to the Imperial Board as at the date of this Agreement.

"Inventory" shall have meaning set forth in Section 2.01(a)(ii)(E).

"IRS" means the Internal Revenue Service.

"IT Systems" means hardware, network and telecommunications equipment (including personal computers, laptops, telephones and other mobile devices) and Internet-related information technology.

"Key Lorillard Employees" means any Lorillard Employee whose annual compensation is greater than $100,000.

"Knowledge" of any Person means, with respect to any matter in question, in the case of RAI, means (a) with respect to the representations and warranties of RAI in Article IV relating to Lorillard, (i) the actual knowledge of the individuals named on Schedule A of the Disclosure Schedule giving effect to actual due diligence conducted by such individuals or delivered to such individuals on or prior to July 13, 2014 in written materials with respect to the Transactions, but without requiring or otherwise obligating any such individual to have affirmatively conducted any due diligence or investigation or to have made any inquiry of any person and (ii) the knowledge based on Lorillard's representations to RAI as to such matters and (b) with respect to all other provisions in the Agreement, the actual knowledge after due inquiry of the individuals named on Schedule A of the Disclosure Schedule.

"KOOL Brand" means the tobacco cigarette brand known as KOOL.

"Law" means any US federal, state, local or non-US statute, law, ordinance, regulation, directive, rule, code, order, ordinance (including zoning), executive order or decrees, edicts or binding interpretation by a Governmental Authority or other requirement or rule of law, including the common law.

"Liabilities" means liabilities, claims, demands, expenses, commitments, Losses, costs or obligations of every kind and description.

"Lien" means any mortgage, deed of trust, pledge, hypothecation, security interest, encumbrance, sublease, declaration, condition, covenant, destruction, right-of-way, easement, encroachment, restriction, title defect, option, right of first refusal or first offer or other third party (or governmental) right, encumbrance, lien or charge of any kind or nature.

"Listing Rules" shall have the meaning set forth in Section 6.05(a).

"Lorillard" shall have the meaning set forth in the Preamble.

"Lorillard Assets" shall have the meaning set forth in Section 4.01.

"Lorillard Asset Owners" shall have the meaning set forth in Recital B.

"Lorillard Bankers" shall have the meaning set forth in Section 4.23.

"Lorillard Brands" shall have the meaning set forth in Recital D.

"Lorillard Brands Environmental Permit" means any Permit required by a Governmental Authority for the operation of the Maverick Brand or the blu Brand Business under any Environmental Law.

"Lorillard Brands Intellectual Property" means, collectively, all (i) Intellectual Property that is owned by any of the Lorillard Asset Owners and that is used exclusively in or is exclusively related to, or arising, directly or indirectly, exclusively out of the operation of the blu Brand Business or the business related to the Maverick Brand and (ii) Trademarks exclusively related to the Lorillard Brands, including the registered Intellectual Property set forth on Section 4.10 of the Disclosure Schedule.

"Lorillard Defined Contribution Plans" shall have the meaning set forth in Exhibit D.

"Lorillard Defined Contribution Trusts" shall have the meaning set forth in Exhibit D.

"Lorillard Employee" shall have the meaning set forth in Section 4.15(a).

"Lorillard Employee Plans" shall have the meaning set forth in Section 4.15(a).

"Lorillard Equipment" shall have the meaning set forth in Section 2.01(b)(viii).

"Lorillard Financial Information" shall have the meaning set forth in Section 4.02(a).

"Lorillard Leaf" shall have the meaning set forth in Section 2.01(b)(xii)(B).

"Lorillard Material Adverse Effect" means Material Adverse Effect, provided that the phrase "the Transferred Assets or the Business" in the definition of Material Adverse Effect shall be replaced by "the Lorillard Business (other than the Retained Lorillard Brands)".

"Lorillard Pension Plan" shall have the meaning set forth in Exhibit D.

"Lorillard Pension Trust" shall have the meaning set forth in Exhibit D.

"Lorillard Raw Materials Inventory" shall have the meaning set forth in Section 2.01(a)(ii)(D).

"Lorillard SEC Documents" means all reports, schedules, forms, statements and other documents (including exhibits and other information incorporated therein) filed by Lorillard with the SEC.

"Lorillard Transfer Agreement" shall have the meaning set forth in Recital H.

"Lorillard Transfer Closing" shall have the meaning set forth in Recital H.

"Lorillard Transfer Payment" shall have the meaning set forth in Recital H.

"Losses" means all losses, demands, claims, Actions, assessments, Liabilities, damages, deficiencies, fines, penalties, costs, expenses, commitments, judgments, orders, decrees or settlements, environmental investigation and remediation costs, obligations and claims (including any Action brought by any Governmental Authority or Person), in each case whether or not resulting from Third Party Claims, including interest and penalties recovered by a third party with respect thereto and out-of-pocket expenses and reasonable attorneys' and accountants' fees and expenses incurred in the investigation or defense of any of the same in asserting, preserving or enforcing any Acquiror Indemnified Party's or RAI Indemnified Party's rights hereunder, suffered or incurred by such Acquiror Indemnified Party or RAI Indemnified Party.

"Material Adverse Effect" means any change, effect, event, circumstance, development or occurrence that, individually or in the aggregate with all other changes, effects, events, circumstances, developments or occurrences, (a) has had a material adverse effect on the Transferred Assets or the Business, taken as a whole or (b) would prevent or materially impair the ability of the Sellers to perform their obligations under this Agreement or consummate the Transactions; provided that in no event will any effect resulting or arising from or relating to any of the following matters be considered, either alone or in combination, to constitute or contribute to a Material Adverse Effect: (i) changes in economic or political conditions or the financing, banking, currency or capital markets in general, including with respect to interest rates or currency exchange rates; (ii) changes in Laws or changes in accounting requirements or principles (or interpretation or enforcement thereof); (iii) changes affecting industries, markets or geographical areas in which the Business is operated; (iv) the negotiation, announcement, execution, pendency or performance of the Transaction Agreements or the Merger Agreement or the consummation of the Transactions or the Merger; (v) conduct by any Seller or any of its Subsidiaries for which the Acquiror gave its express prior written consent; (vi) any natural disaster or any conditions resulting from natural disasters; (vii) acts of terrorism, sabotage, military action, armed hostilities or war (whether or not declared) or any outbreak, escalation or worsening thereof; (viii) any Menthol Regulatory Action; (ix) any actions required under the Transaction Agreements or the Merger Agreement to obtain any approval or authorization under any antitrust Laws for the consummation of the Transactions or the Merger; or (x) the failure, in and of itself, of a Seller to meet any internal or published projections, forecasts, estimates or predictions in respect of revenues, earnings or other financial or operating metrics before, on or after the date of this Agreement (it being understood that the underlying facts giving rise or contributing to such change may be taken into account into determining whether there has been, or is reasonably expected to be, a "Material Adverse Effect"); provided, however, that changes, effects, events or occurrences referred to in clauses (i), (ii), (iii), (vii) or (viii) will be considered in determining whether there has been, or is reasonably expected to be, a "Material Adverse

Effect" to the extent that such changes are materially disproportionately adverse to the Business, taken as a whole, as compared to other participants in the industry (in which case only the incremental materially disproportionate impact or impacts may be taken into account in determining whether there has been, or is reasonably expected to be, a "Material Adverse Effect").

"Material Lorillard Asset Permits" shall have the meaning set forth in Section 4.08.

"Material Lorillard Brands Customer" means the largest 10 customers (whether retailers or distributors) of the Maverick Brand or the blu Brand Business, measured in terms of annual revenues of the Lorillard Brands for the year ended December 31, 2013.

"Material Lorillard Brands Supplier" means the 10 largest suppliers of the Maverick Brand or the blu Brand Business measured in terms of annual expenditures of the Lorillard Brands for the year ended December 31, 2013.

"Material RAI Brands Customer" means the largest 10 customers (whether retailers or distributors) of the RAI Brands or the PR Business, measured in terms of annual revenues of the RAI Brands for the year ended December 31, 2013.

"Material RAI Brands Supplier" means the 10 largest suppliers of the RAI Parties as a whole, measured in terms of annual expenditures for the year ended 2013, the supplied products of which are material to the production of the Winston Brand, KOOL Brand, the Salem Brand and the PR Business.

"Maverick Brand" means the business of the development, design, manufacture, packaging, labelling, production, delivery, sale, resale, distribution, marketing and promotion of a tobacco cigarette brand known as Maverick.

"Maverick Brand Business" means the business related to the Maverick Brand.

"Maverick Brand Finished Goods" shall have the meaning set forth in Section 2.01(a)(ii)(C).

"Maverick Brand MSAI Percentage" means an amount equal to the quotient of (A) the amount of shipments of Maverick Brand products divided by (B) the aggregate amount of shipments of all Lorillard tobacco cigarette brands, in each case as reported in Management Science Associates, Inc. monthly reporting of shipments from wholesale to retail for the year-to-date period beginning on January 1 of the year in which the Closing occurs and ending on the Business Day immediately preceding the Closing Date; provided, that if such year-to-date period is less than four months, the Maverick Brand MSAI Percentage will be determined based on shipments for the 12-month period ended December 31 of the year immediately preceding the year in which the Closing Date occurs.

"Menthol Regulatory Action" means any Law, Governmental Order or Action enacted, promulgated, proposed or threatened by the FDA or any other Governmental Authority that could have the effect of banning or materially restricting the use of menthol in any product sold or distributed by RAI or Lorillard or any of their respective Subsidiaries.

"Merger" shall have the meaning set forth in Recital C.

"Merger Agreement" shall have the meaning set forth in Recital C.

"MSA Assumption Agreement" means the assumption agreement in respect of the MSA to be entered into by the Acquiror at the Closing substantially in the form set out in Exhibit H.

"MSA" means the Master Settlement Agreement, dated as of November 23, 1998, among the 46 US states, the District of Columbia and five US territories listed on the signature pages thereto, Phillip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and various Subsequent Participating Manufacturers as listed on the NAAG list of "Participating Manufacturers", as amended, supplemented or replaced.

"MSA Allocable Share" has the meaning given to it in Exhibit A to the MSA.

"MSA Settling States" means the States, commonwealths, districts, territories and other Governmental Authorities that are parties to the MSA.

"Multiemployer Plan" shall have the meaning set forth in Section 3.17(b).

"Newport Brand" means the tobacco cigarette brand known as Newport.

"NAAG" means the National Association of Attorneys General.

"Net Recovery" shall have the meaning set forth in Section 11.07(d).

"Objections Notice" shall have the meaning set forth in Section 2.11.

"OFAC" means the U.S. Department of the Treasury's Office of Foreign Assets Control.

"Offering Documents" shall have the meaning set forth in Section 6.12(e)(v).

"OPM" means an "Original Participating Manufacturer" as such term is defined in the MSA.

"Permits" shall have the meaning set forth in Section 2.01(a)(viii).

"Permitted Liens" means the following Liens: (a) Liens of carriers, warehousemen, mechanics, materialmen, workmen, repairmen and other Liens imposed by Law made in the ordinary course and on a basis consistent with past practice; (b) easements, covenants, rights-of-way, zoning ordinances and other similar charges or encumbrances that do not impair, and could not reasonably be expected to impair, in any material respect, the value, marketability or continued use of the Transferred Real Property; (c) non-exclusive licenses of

Intellectual Property; (d) Liens for Taxes, assessments or other governmental charges or levies that are not yet due or payable or that are being contested in good faith by appropriate proceedings or that may thereafter be paid without penalty; (e) Liens created by or through, or resulting from any facts or circumstances relating to, the Acquiror or its Affiliates; and (f) Liens arising out of, under or in connection with this Agreement or the other Transaction Agreements.

"Person" means any natural person, general or limited partnership, corporation, limited liability company, limited liability partnership, firm, association or organization or other legal entity.

"PR Business" means the distribution, marketing, advertising, sale and service in Puerto Rico of the RAI Brands.

"Pre-Closing Insurance" shall have the meaning set forth in Section 6.06(a).

"Pre-Closing Tax Period" means (i) any Tax period ending on or before the Closing Date and (ii) with respect to a Tax period that commences before but ends after the Closing Date, the portion of such period up to and including the Closing Date.

"Proposed Transferred Employees" shall have the meaning set forth in Exhibit D.

"PSS Agreements" means the State Settlements other than the MSA and the Growers Trust.

"Purchase Price" shall have the meaning set forth in Section 2.04.

"PwC" means Pricewaterhouse Coopers LLP, the independent auditor under the State Settlements.

"RAI" shall have the meaning set forth in the Preamble.

"RAI Assets" shall have the meaning set forth in Section 3.01.

"RAI Asset Owners" shall have the meaning set forth in Recital B.

"RAI Banker" shall have the meaning set forth in Section 3.25.

"RAI Brands" shall have the meaning set forth in Recital D.

"RAI Brands Environmental Permit" means any Permit required by a Governmental Authority for the operation of the RAI Brands or the PR Business under any Environmental Law.

"RAI Brands Finished Goods" shall have the meaning set forth in Section 2.01(a)(ii)(B).

"RAI Brands Intellectual Property" means, collectively, all (i) Intellectual Property that is owned by any of the RAI Asset Owners and that is used exclusively in or exclusively related to, or arising, directly or indirectly, exclusively out of the operation of the PR

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Business or the business related to the RAI Brands, (ii) Trademarks exclusively related to the PR Business or the RAI Brands and (iii) Intellectual Property owned by any of the RAI Asset Owners in all current product specifications for tobacco cigarettes marketed under the RAI Brands, including the registered Intellectual Property set forth on Section 3.13 of the Disclosure Schedule.

"RAI Brands Material Adverse Effect" means Material Adverse Effect, provided that the phrase "the Transferred Assets or the Business" in the definition of Material Adverse Effect shall be replaced by "the RAI Brands".

"RAI Brands MSAI Percentage" means an amount equal the quotient of (A) the amount of shipments of any RAI Brands products divided by (B) the aggregate amount of shipments of all RJRT tobacco cigarette brands, in each case as reported in Management Science Associates, Inc. monthly reporting of shipments from wholesale to retail for the year-to-date period beginning on January 1 of the year in which the Closing occurs and ending on the Business Day immediately preceding the Closing Date; provided, that if such year-to-date period is less than four months, the RAI Brands MSAI Percentage will be determined based on shipments for the 12-month period ended December 31 of the year immediately preceding the year in which the Closing Date occurs.

"RAI Financial Information" shall have the meaning set forth in Section 3.05(a).

"RAI Indemnified Parties" shall have the meaning set forth in Section 11.02(a).

"RAI Lease" shall have the meaning set forth in Section 2.01(a)(i)(E).

"RAI Parties" shall have the meaning set forth in Recital A.

"RAI PR Employee" shall have the meaning set forth in Section 3.17(a).

"RAI PR Employee Plans" shall have the meaning set forth in Section 3.17(a).

"RAI SEC Documents" means all reports, schedules, forms, statements and other documents (including exhibits and other information incorporated therein) filed by RAI with the SEC.

"Reciprocal Manufacturing Agreement" means the Reciprocal Manufacturing Agreement, substantially in the form attached as Exhibit G, to be entered into by an Affiliate of RAI and the Acquiror at the Closing.

"Release" means any actual or threatened release, spill, emission, leaking, pumping, dumping, injection, pouring, deposit, disposal, discharge, dispersal, emptying, escaping, leaching or migration into or through the environment (including ambient air, surface water, groundwater, land surface or subsurface strata) or within or from any building, structure, facility or fixture.

"Relevant Trademark Action" means the Action with case no. 2:14-CV-02596 RGK (FFMx) between the RTA Claimants and the RTA Defendant in the United States District

Court, Central District of California in relation to the RTA Defendant's alleged infringement of the Zippo BLU Trademarks, including the RTA Defendant's related complaint for a declaratory judgment of trademark non-infringement and counterclaims for cancellation of the Zippo BLU Trademarks.

"Representative" of a Person means the directors, officers, employees, advisors, agents, consultants, attorneys, accountants, investment bankers or other representatives of such Person.

"Required Amount" shall have the meaning set forth in Section 5.06(a).

"Restricted Employees" shall have the meaning set forth in Exhibit D.

"Restricted Party" means any Person that is (a) listed on, or owned or controlled by a Person listed on, or acting on behalf of a Person listed on any Sanctions List, or (b) located in, incorporated under the laws of, or acting on behalf of a Person located in or organized under the laws of any country or territory that is the target of territory-wide Sanctions (which as of the date of this Agreement are Cuba, Iran, North Korea, Sudan and Syria).

"Retained Lorillard Brands" means all Lorillard tobacco cigarette brands, including the Newport Brand, but excluding the Maverick Brand.

"Retained Lorillard Employee" shall have the meaning set forth in Exhibit D.

"RJRT" means R. J. Reynolds Tobacco Company, a wholly owned Subsidiary of RAI.

"RJRT Tobacco Inventory" means all RJRT tobacco leaf inventory, reconstituted tobacco sheets, work-in-progress and tobacco by-products (excluding tobacco virgin stems and virgin tobacco scrap) for use in RJRT U.S. domestic and Puerto Rico cigarette production (other than any such inventory related to sales to Santa Fe Natural Tobacco Company, Inc.).

"Route to Market Agreement" shall have the meaning set forth in Recital G.

"RTA Claimants" means ZippMark, Inc. and Zippo Manufacturing Company.

"RTA Defendant" means LOEC, Inc.

"Salem Brand" means the tobacco cigarette brand known as Salem.

"Sanctions List" means the "Specially Designated Nationals and Blocked Persons" list maintained by OFAC or any similar list maintained by the United States Department of State, any other U.S. Governmental Authority, the United Nations, the European Union or its Member States, Her Majesty's Treasury of the United Kingdom or any other relevant Governmental Authority.

"SEC" means the U.S. Securities and Exchange Commission.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations under such Act.

"Seller Intellectual Property" means all Intellectual Property that is owned by any of the Sellers or their Affiliates other than the Lorillard Brands Intellectual Property and the RAI Brands Intellectual Property.

"Seller Plaintiff Fees" means all plaintiffs' attorneys' fees and other legal costs in relation to the State Settlements in respect of the Acquired Tobacco Cigarette Brands, relating to any periods, whether before, on or after the Closing Date excluding, for the avoidance of doubt, Assumed Plaintiff Fees.

"Seller Plan" shall have the meaning set forth in Exhibit D.

"Seller Tobacco Liabilities" shall have the meaning set forth in Section 2.01(d)(i).

"Sellers" shall have the meaning set forth in Recital B.

"Service Descriptions" shall have the meaning set forth in Section 6.11(b).

"Settling Defendants" means the Persons other than the Previously Settled States that are parties to the PSS Agreements.

"Severance Agreement" shall have the meaning set forth in Exhibit D.

"Software" means any and all (a) computer programs, including any and all software implementation of algorithms, models and methodologies, whether in source code, object code, human readable form or other form, (b) databases and compilations, including any and all data and collections of data, whether machine readable or otherwise, (c) descriptions, flow charts and other work products used to design, plan, organize and develop any of the foregoing, screens, user interfaces, report formats, firmware, development tools, templates, menus, buttons and icons, and (d) all documentation including user manuals and other training documentation relating to any of the foregoing.

"Specified Employee" shall have the meaning set forth in Exhibit D.

"SPM" means a "Subsequent Participating Manufacturer" as such term is defined in the MSA.

"State Settlements" means (a) the MSA and (b) the Settlement Agreement, dated as of August 25, 1997, among the State of Florida, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and United States Tobacco Company, as amended by the Stipulation of Amendment to Settlement Agreement and For Entry of Consent Decree, dated as of September 11, 1998, (c) the Settlement Agreement and Stipulation for Entry of Consent Decree, dated as of May 8, 1998, among the State of Minnesota, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company, (d) the Comprehensive Settlement Agreement and Release, dated as of October 17, 1997, among the

State of Mississippi, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company, as amended by the Stipulation of Amendment to Settlement Agreement and For Entry of Agreed Order, dated as of July 2, 1998, (e) the Comprehensive Settlement Agreement and Release, dated as of January 16, 1998, among the State of Texas, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and United States Tobacco Company, as amended by the Stipulation of Amendment to Settlement Agreement and For Entry of Consent Decree, dated as of July 24, 1998, in each case, as amended, supplemented or replaced, and (f) the National Tobacco Growers Settlement Trust, dated July 19, 1999, among Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and R.J. Reynolds Tobacco Company, as settlors, The Chase Manhattan Bank, as trustee, and the Grower States listed therein, as amended, supplemented or replaced.

"States" means the 50 States and Commonwealths of the United States, the District of Columbia and any U.S. territory or possession, including, but not limited to, Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Marianas Islands.

"Straddle Tobacco Action Liabilities" means all Liabilities arising out of or in connection with any smoking and health-related Action filed in the Straddle Tobacco Action Period arising out of, in connection with or relating to: (a) the manufacture, packaging, labeling, delivery, sale, resale, distribution, marketing or promotion of one or more of the Acquired Tobacco Cigarette Brands; or (b) the use or consumption of, or exposure to one or more Acquired Tobacco Cigarette Brands and provided that such Action also gives rise to Seller Tobacco Liabilities; provided, however, that Straddle Tobacco Action Liabilities will exclude any Losses of RAI and its Affiliates arising solely in relation to the Straddle Tobacco Action Period to the extent that any such Losses were incurred as a result of any of the following (whether by way of an increase to an existing Straddle Tobacco Action Liability or as a separate Straddle Tobacco Action Liability): (a) any changes in Law (or interpretation thereof) after the Closing Date; (b) any manufacturing defects or design defects in any of the products relating to the Acquired Tobacco Cigarette Brands that were manufactured by or on behalf of the Acquiror (other than by RAI or its Affiliates on behalf of the Acquiror, where RAI or its Affiliates are responsible for any such defects) after the Closing Date; (c) the marketing of the Acquired Tobacco Cigarette Brands by or on behalf of the Acquiror to, or otherwise targeted at, minors after the Closing Date; or (d) any misrepresentation or untrue statement of fact made by the Acquiror after the Closing Date in relation to the Acquired Tobacco Cigarette Brands, save to the extent that any of such matters were materially consistent with the products or the practices of RAI or Lorillard in the twelve month period prior to Closing.

"Straddle Tobacco Action Period" means the period commencing on the Closing Date and ending on the date that is eight years from the Closing Date.

"Subsidiary" of any Person means any corporation, general or limited partnership, joint venture, limited liability company, limited liability partnership or other Person that is a legal entity, trust or estate of which (or in which) (a) the issued and outstanding capital stock having ordinary voting power to elect a majority of the board of directors (or a majority of another body performing similar functions) of such corporation or other Person (irrespective of

whether at the time capital stock of any other class or classes of such corporation or other Person shall or might have voting power upon the occurrence of any contingency), (b) more than 50% of the interest in the capital or profits of such partnership, joint venture or limited liability company or (c) more than 50% of the beneficial interest in such trust or estate, is directly or indirectly owned or Controlled by such Person.

"Substantial Equivalence Report" means a report filed by RAI (manufacturer) or Lorillard (manufacturer), as applicable, in accordance with Section 905(j) of the Family Smoking Prevention and Tobacco Control Act

"Survival Period" shall have the meaning set forth in Section 12.01.

"Tax" or "Taxes" means all income, excise, gross receipts, ad valorem, value-added, sales, use, employment, franchise, profits, gains, property, transfer, use, payroll, intangibles or other taxes, fees, stamp taxes, duties, charges, levies or assessments of any kind whatsoever (whether payable directly or by withholding), together with any interest and any penalties, additions to tax or additional amounts imposed by any Governmental Authority with respect thereto.

"Tax Liability" means a Liability attributable to Taxes.

"Tax Returns" means all returns and reports (including elections, declarations, disclosures, schedules, estimates and information returns) required to be supplied to a Tax authority relating to Taxes, and any amended Tax Returns.

"Third Party Claim" shall have the meaning set forth in Section 11.03(a).

"Third Party Rights" shall have the meaning set forth in Section 2.02(a).

"Trademark" shall have the meaning set forth in the definition of Intellectual Property.

"Transaction Agreements" means this Agreement and each of the Ancillary Agreements.

"Transactions" means the transactions contemplated by the Transaction Agreements.

"Transfer Taxes" shall have the meaning set forth in Section 8.01.

"Transferred Assets" shall have the meaning set forth in Section 2.01(a).

"Transferred Employees" shall have the meaning set forth in Exhibit D.

"Transferred Leased Property" shall have the meaning set forth in Section 2.01(a)(i).

"Transferred Owned Property" shall have the meaning set forth in Section 2.01(a)(i).

"Transferred Real Property" means Transferred Leased Property and Transferred Owned Property.

"Transferring IT Systems" means any IT Systems constituting a Transferred Asset pursuant to Section 2.01(a)(x).

"Transitional Services" means services to be performed by the Parties or certain of their Affiliates in accordance with Exhibit B or Section 6.11 in order to allow for an orderly transition of ownership of the assets and businesses acquired by the Acquiror and the continued operation of such businesses, as well as the continued operation of the businesses retained by RAI and its Affiliates, in each case as currently conducted.

"TSA" shall have the meaning set forth in Recital G.

"USGAAP" means the generally accepted accounting principles used in the United States.

"WARN Act" shall have the meaning set forth in Exhibit D.

"Winston Brand" means the tobacco cigarette brand known as Winston.

"Zippo BLU Trademarks" means the trademarks for BLU owned by, or licensed to, either of the RTA Claimants and registered with the United States Patent and Trademark Office, including without limitation, U.S. Trademark Registration Nos. 3299190, 3299195, 3464056, 3469390, 3606674 and 3680360.

EXHIBIT B

TRANSITION SERVICES AGREEMENT TERM SHEET

Parties	(1) RAI (or a RAI Affiliate)
	(2) Acquiror (or an Acquiror Affiliate)
Duration	2 years from Closing or such longer time as the Parties may determine.
Charges	Cost plus basis.
Services	To be determined (to include without limitation the services described in Section 6.11)
Confidentiality	To be aligned with the APA (Section 6.03).
System Security	The Parties shall comply with, and shall ensure that its personnel, agents and subcontractors comply with, all reasonable written policies, standards and procedures provided by RAI to Acquiror in relation to any access of RAI's IT systems by Acquiror in order for Acquiror to receive the benefit of the Transitional Services.
Liability	No liability for indirect/consequential loss.
	No party limits its liability for fraud.
Assignment and sub-contracting	Neither party may assign, sub-license or sub-contract other than to an Affiliate without the prior written consent of the other party which shall not be unreasonably withheld or delayed.
Governing law	Laws of the State of Delaware

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EXHIBIT C

ROUTE TO MARKET AGREEMENT

[see attached]

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Decision and Order

Exhibit C

ROUTE TO MARKET AGREEMENT

DATED JULY 15, 2014

IMPERIAL TOBACCO GROUP PLC

and

REYNOLDS AMERICAN INC.

ALLEN & OVERY

ALLEN & OVERY LLP

LONDON

CONTENTS

Decision and Order

THIS AGREEMENT is dated July 15, 2014

BETWEEN:

(1) IMPERIAL TOBACCO GROUP PLC a limited liability company incorporated under the laws of England and Wales (the **Buyer**); and

(2) REYNOLDS AMERICAN INC. a corporation incorporated under the laws of North Carolina (the **Seller**).

(each a **Party** and together the **Parties**).

BACKGROUND

(A) Pursuant to an Agreement and Plan of Merger, dated July 15, 2014 entered into among Lorillard, Inc., a Delaware Corporation (**Lorillard**), the Seller and Lantern Acquisition Co., a Delaware corporation and wholly owned subsidiary of the Seller (**Lantern Acquisition Co.** and, such agreement, the **Merger Agreement**), Lorillard has agreed, subject to the terms of the Merger Agreement, to merge with and into Lantern Acquisition Co. with Lorillard as the surviving corporation, such that the Seller will, on consummation of the Merger, own 100% of Lorillard (the **Merger**).

(B) The Seller is, as of the Effective Date, engaged in, among other things, the business of the manufacture, sale, and marketing of certain tobacco cigarette brands known as Winston, Kool and Salem (collectively, the **Seller Brands**). Lorillard is, as of the Effective Date, engaged in, among other things, the business of the manufacture, sale, and marketing of a tobacco cigarette brand known as Maverick and an "e-vapor" brand known as blu (collectively, the **Lorillard Brands** and, together with the Seller Brands, the **Brands**).

(C) Pursuant to an asset purchase agreement entered into between the Buyer and the Seller on or around the Effective Date (the **Asset Purchase Agreement**), the Seller has agreed, following consummation of the Merger, to sell to the Buyer (or its nominated Affiliate(s)) certain of the assets of the Seller and its relevant Affiliates used in the businesses of the Brands (the **Business**) on the terms and subject to the conditions set out in the Asset Purchase Agreement.

(D) In connection with the sale of the Business, each Party agrees to comply with the Route to Market Obligations (as defined below) on the terms and conditions set out in this agreement.

IT IS AGREED:

1. INTERPRETATION

1.1 In this agreement:

Action means any claim, action, suit, arbitration, inquiry, investigation or other proceeding of any nature (whether criminal, civil, legislative, administrative, regulatory, prosecutorial or otherwise) by or before any court, arbitrator or Governmental Authority or similar body.

Affiliate means, with respect to any specified Person, any other Person that, at the time of determination, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with such specified Person. Notwithstanding anything herein to the contrary, none of BAT or any of its Affiliates or subsidiaries will be considered an Affiliate of Seller or any of its subsidiaries, and neither Seller nor any of its subsidiaries will be considered an Affiliate of any of the foregoing.

American Snuff Company means American Snuff Company, LLC, a subsidiary of the Seller.

ASC Brands means all brands of smokeless tobacco products manufactured, sold, or distributed by American Snuff Company.

Asset Purchase Agreement has the meaning given to it in Recital (C).

BAT means British American Tobacco p.l.c.

B or B Brands means the "e-vapor" brand known as blu.

Brands has the meaning given in Recital (B).

Business has the meaning given to it in Recital (C).

Business Day means any day that is not a Saturday, a Sunday or other day on which the Department of State of the State of Delaware or the commercial banks in the City of New York, New York or the City of London, England are required or authorized by Law or executive order to be closed.

Buyer Allocated Space has the meaning given to it in paragraph 2(c) of Part 2 of Schedule 1.

Buyer's Representative means the individual(s) designated by the Buyer for the purposes of clauses 9.2 and 9.3.

Closing means closing of the Asset Purchase Agreement (as defined therein).

Consumer Database means the active consumer database of RJRT.

Control means, as to any Person, the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise, and the terms **Controlled by**, **under common Control with** and **Controlling** shall have correlative meanings.

Dispute means any dispute, controversy or claim arising out of or relating to this agreement, or the validity, interpretation, breach or termination of this agreement, including claims seeking redress or asserting rights under any Law.

Effective Date means the date of this agreement.

Governmental Authority means any U.S. federal, state or local or any supra-national or non-U.S. government, political subdivision, governmental, regulatory or administrative authority, instrumentality, board, agency, body or commission, self-regulatory organization or any court, tribunal, or judicial or arbitral body.

Implementation Date has the meaning given to it in paragraph 3.2(b) of Part 2 of Schedule 1.

Initial Period has the meaning given to it in paragraph 3.2(a) of Part 2 of Schedule 1.

K or K Brand means the tobacco cigarette brand known as KOOL.

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Law means any U.S. federal, state, local or non-U.S. statute, law, ordinance, regulation, directive, rule, code, order, ordinance (including zoning), executive order or decrees, edicts or binding interpretation by a Governmental Authority or other requirement or rule of law, including the common law.

Local SOM means the local trading area share of market of a Party for its cigarette brands (excluding, in the case of the Seller, any V Brand Products) provided that the geographic area for such a share of market is no larger than a U.S. state.

Lorillard means Lorillard, Inc., a Delaware corporation.

Lorillard Brands has the meaning given in Recital (B).

Lorillard Retail Contracts means each contract between Lorillard and/or any of its subsidiaries and any Retailer in the Territory related among other things to pricing and promotions, space and merchandising on the cigarette fixture, and signage (for avoidance of confusion, as of the Effective Date, Lorillard Retail Contracts are called "Excel Merchandising Agreements" and "Non-Excel Merchandising Agreements"). **Lorillard Retail Contracts** do not include any contracts which relate exclusively to the B Brand.

M or M Brand means the tobacco cigarette brand known as Maverick.

Merger Agreement has the meaning given to it in Recital (A).

Natural American Spirit means the tobacco cigarette brand known as "Natural American Spirit" which is manufactured and sold by Santa Fe.

Off-set Signage means the cigarette brand signs located in or outside a retail outlet communicating brand images, brand equity messages or prices and which are not located on or within a cigarette merchandising fixture (pack or carton rack).

Outlet SOM means the outlet share of market of a Party for its cigarette brands (excluding, in the case of the Seller, any V Brand Products). For any outlet that is part of a chain, the aggregated market share for such chain may be used as the Outlet SOM if a Party so chooses.

Person means any natural person, general or limited partnership, corporation, limited liability company, limited liability partnership, firm, association or organization or other legal entity.

POS means point of sale.

Primary Brand Users means those consumers listed on the Consumer Database who have specified any of the Seller Brands as their Primary Usage Brand.

Primary Usage Brand means the tobacco cigarette brand, if any, specified as the usual brand by a consumer listed on the Consumer Database.

Representatives means, with respect to a person, the directors, officers, employees, advisors, agents, consultants, attorneys, accountants, investment bankers or other representatives of such Person.

Retail Cigarette Contract means a contract between a tobacco manufacturer and a Retailer in the Territory related among other things to pricing and/or promotion of cigarette products, space and merchandising on the cigarette fixture, and signage for cigarette products. A Retail Cigarette Contract does *not* include a contract between a tobacco manufacturer and a Retailer in the Territory related solely to smokeless tobacco products or e-cigarette tobacco products.

Retailer means a person that sells tobacco cigarettes directly to adult consumers at a physical establishment.

RJRT means R.J. Reynolds Tobacco Company (or, if the Seller party to any Retail Cigarette Contract relating to the Seller Brands is an Affiliate of RJRT rather than RJRT itself, the relevant Affiliate).

RJRT Retail Contracts means each contract between RJRT and any Retailer in the Territory related among other things to pricing and promotions, space and merchandising on the cigarette fixture, and signage (for avoidance of confusion, as of the Effective Date, RJRT Retail Contracts are called "Retail Partners Marketing Plan Contracts"). **RJRT Retail Contracts** do not include any contracts which relate exclusively to the ASC Brands or the V Brand.

Route to Market Obligations has the meaning given to it in clause 2.

Salem or S Brand means the tobacco cigarette brand known as Salem.

Santa Fe means Santa Fe Natural Tobacco Company, a subsidiary of the Seller.

Seller Brand Products means any product marketed under any of the Seller Brands.

Seller Brands has the meaning given in Recital (B).

Seller's Representative means the individual(s) designated by the Seller for the purposes of clauses 9.2 and 9.3.

Shelf Space Obligations means the obligations set out in Schedule 1.

Shelf Space Payment means an amount in cash equal to $7 million.

Standstill Period means the period of five months commencing on the date of Closing and ending on the last day of the fifth month after the date of Closing.

Subsequent Period has the meaning given to it in paragraph 3.2(b) of Part 2 of Schedule 1.

Territory means the fifty states and District of Columbia in the United States of America and excludes territories of the United States of America.

Tobacco Brands means the W, K, S and M Brands.

U.S. means the United States of America.

V Brand means the e-cigarette brand known as Vuse e-cigarettes.

V Brand Products means any product marketed under the V Brand.

Winston or W Brand means the tobacco cigarette brand known as Winston.

Wholesale Channel Obligations means the obligations set out in Schedule 2.

Wholesaler means a Person that sells tobacco products directly to Retailers.

Interpretation of this agreement will be governed by the following rules of construction: (a) words in the singular shall be held

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to include the plural and vice versa, and words of one gender shall be held to include the other gender as the context requires; (b) references to the terms "clause," "part," "paragraph," and "schedule" are references to the clauses, parts, paragraphs and schedules of or to this agreement unless otherwise specified; (c) the terms "hereof", "herein", "hereby", "hereto", and derivative or similar words refer to this entire agreement, including the schedules hereto; (d) references to "$" shall mean U.S. dollars; (e) the word "including" and words of similar import when used in this agreement shall mean "including without limitation," unless otherwise specified; (f) the word "or" shall not be exclusive; (g) references to "written" or "in writing" include in electronic form; (h) provisions shall apply, when appropriate, to successive events and transactions; (i) the headings contained in this agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this agreement; (j) the Parties have each participated in the negotiation and drafting of this agreement and if an ambiguity or question of interpretation should arise, this agreement shall be construed as if drafted jointly by the parties thereto and no presumption or burden of proof shall arise favoring or burdening any Party by virtue of the authorship of any of the provisions in any of this agreements; (k) a reference to any Person includes such Person's successors and permitted assigns; (l) any reference to "days" means calendar days unless Business Days are expressly specified; and (m) when calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this agreement, the date that is the reference date in calculating such period shall be excluded, if the last day of such period is not a Business Day, the period shall end on the next succeeding Business Day.

1.3 Clause 1.1 to 1.2 of this agreement applies unless the contrary intention appears.

1.4 The schedules to this agreement form part of it and are incorporated into it.

2. ROUTE TO MARKET OBLIGATIONS

2.1 In consideration of, in the case of the Seller, the Buyer making the Shelf Space Payment to the Seller and, in the case of each Party, the other Party entering into the Asset Purchase Agreement and carrying out its obligations pursuant to this agreement, each Party shall comply with the following obligations in the Territory:

(a) Shelf Space Obligations; and

(b) Wholesale Channel Obligations,

(together, the **Route to Market Obligations**).

2.2 Each Party shall have the right to inspect and monitor the other Party's compliance or non-compliance (as the case may be) with clause 2.1 above and, in the case of non-compliance, to require the other Party to comply with such obligations within 10 Business Days after the date of receipt of written notice from the aggrieved Party.

2.3 This agreement does not require either Party to engage in conduct that is contrary to Law.

2.4 For the avoidance of doubt, the Parties acknowledge and agree that none of the provisions of this agreement shall apply with respect to American Snuff Company, the ASC Brands, Santa Fe, Natural American Spirit, the B Brand or any cigar brands.

3. PAYMENT AT CLOSING

3.1 At Closing, the Buyer shall make a payment to the Seller of an amount equal to the Shelf Space Payment.

4. CONSUMER DATABASE

4.1 As soon as practicable after Closing, the Seller shall, to the extent legally permissible, provide the Buyer with the name and contact information for each Primary Brand User on the Consumer Database in a form which is readily usable by the Buyer and shall provide hard and electronic copies of the name and contact information for each Primary Brand User if the Buyer so requests.

4.2 After Closing, the Seller and/or its subsidiaries shall not initiate contact for marketing purposes (whether by mail, e-mail, telephone, or otherwise) with the Primary Brand Users who are on the Consumer Database as of the date of Closing and whose names and contact information are provided to Seller; *except that* Seller and/or its subsidiaries may contact for marketing purposes any Primary Brand User who, after the date of Closing, either: (i) initiates contact in any manner with Seller and/or its subsidiaries (by way of example, that consumer visits a brand website of Seller) or (ii) is engaged by Seller and/or its subsidiaries via an in-person consumer engagement.

4.3 For litigation purposes, Seller will retain all information in the Consumer Database. In addition, for litigation purposes, if after the date of Closing, Buyer adds adult smoker names or information to any consumer database, Buyer agrees on an ongoing basis to take all necessary steps to provide counsel for Seller with any and all collected data upon request.

5. REMEDIES

5.1 The Parties hereby acknowledge and agree that the failure of any Party to perform its agreements and covenants under this agreement, including its failure to take all actions as are necessary on its part to fulfill the obligations contemplated hereby, will cause irreparable injury to the other Party, for which money damages, even if available, will not be an adequate remedy. Accordingly, each Party hereby consents to the issuance of injunctive relief by any court of competent jurisdiction to compel performance of such Party's obligations and to the granting by any court of the remedy of specific performance of its obligations hereunder, in addition to any other rights or remedies available hereunder or at Law or in equity. Each Party hereby waives any requirements for the securing or posting of any bond with such remedy.

6. NOTICES

All notices, requests, claims, demands and other communications under this agreement shall be in writing and shall be given or made (and shall be deemed to have been duly given or made upon receipt) by delivery in person, by overnight courier service, by facsimile with receipt confirmed (followed by delivery of an original via overnight courier service) or by registered or certified mail (postage prepaid, return receipt requested) to the other Party at the following addresses (or at such other address for a Party as shall be specified in a notice given in accordance with this clause 6):

(a) If to the Seller:

Reynolds American Inc.
401 North Main Street
Winston-Salem, NC 27101
Attention: Martin L. Holton III

with a copy to:

Jones Day
222 East 41st Street
New York, NY 10017
Attention: Jere R. Thomson, Esq.
Randi C. Lesnick, Esq.
Facsimile: (212)326-3939

(b) if to the Buyer:

Lignum-2, L.L.C.
5900 North Andrews Avenue
Suite 1100
Fort Lauderdale, FL 33309
Attention: Rob Wilkey
General Counsel
Facsimile: (954)958-7907

with a copy to:

Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
Attention: Eric S. Shube, Esq.
Jeremy Parr, Esq.
Facsimile: (212)610-6399

7. ASSIGNMENT

7.1 This agreement shall not be assigned by either Party by operation of Law or otherwise without the prior written consent of the other Party provided that either Party may, subject to Law, assign any or all of its rights and obligations under this agreement to any of its respective Affiliates.

7.2 Any attempted assignment in violation of this clause 7 shall be void and this agreement shall be binding upon, shall inure to the benefit of, and shall be enforceable by, the Parties hereto and their respective permitted successors and assigns.

8. GENERAL

8.1 **No partnership or agency**

Nothing in this agreement shall be deemed to constitute a partnership between the Parties, nor to make either Party the agent of the other Party for any purpose.

8.2 **Counterparts**

This agreement may be executed in any number of counterparts, all of which, taken together, shall constitute one and the same agreement, and any Party may enter into this agreement by executing a counterpart. Facsimile signatures shall be valid and binding to the same extent as the original signatures.

8.3 **Waiver**

The rights of each Party under this agreement:

(a) may be exercised as often as necessary;

(b) are cumulative and not exclusive of rights or remedies provided by Law; and

(c) may be waived only in writing and specifically.

Delay in exercising or non-exercise of any such right is not a waiver of that right.

8.4 A waiver (whether express or implied) by one of the Parties of any of the provisions of this agreement or of any breach of or default by the other Party in performing any of those provisions shall not constitute a continuing waiver and that waiver shall not prevent the waiving Party from subsequently enforcing any of the provisions of this agreement not waived or from acting on any subsequent breach of or default by the other Party under any of the provisions of this agreement.

8.5 **Amendments**

No provision of this agreement, including any schedules hereto, may be amended, supplemented or modified except by a written instrument making specific reference hereto and signed by all of the Parties.

8.6 **Severability**

The provisions contained in each clause and sub-clause of this agreement shall be enforceable independently of each of the others and their validity shall not be affected if any of the others are invalid. If any of those provisions is void but would be valid if some part of the provision were deleted, the provision in question shall apply with such modification as may be necessary to make it valid.

8.7 **Further assurance**

Each Party undertakes to sign all documents and to do all other acts that are or may be necessary to give full effect to this agreement.

8.8 **Costs**

Each Party shall pay the costs and expenses, including fees and disbursements of counsel, incurred by it in connection with the entering into of this agreement.

8.9 **Entire agreement**

This Agreement constitutes the entire agreement between the Parties relating to the subject matter of this Agreement and supersedes all previous agreements, undertakings and understandings, whether written or oral, between or on behalf of the Parties with respect to the subject matter of this Agreement.

9. GOVERNING LAW AND JURISDICTION

9.1 This agreement (and any claims or disputes arising out of or related hereto whether for breach of contract, tortious conduct or otherwise and whether predicated on common law, statute or otherwise) shall in all respects be governed by, and construed in accordance with, the Laws of the State of Delaware, including all matters of construction, validity and performance, in each case without reference to any conflict of law rules that might lead to the application of the Laws of any other jurisdiction.

9.2 In the event of a Dispute either Party may by written notice to the other Party refer the Dispute to the Buyer's Representative and the Seller's Representative who shall seek to resolve the Dispute in good faith as soon as practicable and in any event within ten (10) Business Days of such notice.

9.3 If the Buyer's Representative and the Seller's Representative are unable to resolve any Dispute within the time period specified in clause 9.2, either Party may file an Action in the Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court. In that context, and without limiting the generality of the foregoing, each Party by this agreement irrevocably and unconditionally:

(a) submits to the exclusive jurisdiction of the Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court, and appellate courts having jurisdiction of appeals from any of the foregoing, and agrees that all claims in respect of any such Action shall be heard and determined in such Delaware court or, to the extent permitted by Law, in such federal court;

(b) consents that any such Action may and shall be brought in such courts and waives any objection that it may now or hereafter have to the venue or jurisdiction of any such Action in any such court or that such Action was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such Action may be effected by mailing a copy of such process by registered or certified mail (or any substantially similar form of mail), postage prepaid, to such Party at its address as provided in clause 6; and

(d) agrees that nothing in this agreement shall affect the right to effect service of process in any other manner permitted by the Laws of the State of Delaware.

10. WAIVER OF JURY TRIAL

EACH PARTY HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS CLAUSE 10.

THIS AGREEMENT has been signed on behalf of the Parties on the date which appears first on page 1.

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SCHEDULE 1

SHELF SPACE OBLIGATIONS

PART 1

PERIOD BETWEEN EFFECTIVE DATE AND CLOSING

1. Each Party and/or its respective Affiliates shall co-operate with each other in good faith with respect to any communications made to Retailers, beginning on and from the Effective Date and terminating on the date of Closing, to effectuate the terms of this agreement and shall consult with each other with respect to the content and timing of such communications. This paragraph does not govern in any fashion any communications concerning matters not specifically related to effectuating the terms of this agreement.

2. The following provisions in this paragraph 2 shall apply beginning on and from the Effective Date and terminating on the date of Closing:

(a) The Seller will offer for sale the Seller Brand Products in accordance with historical practices and in substantially the same manner as immediately prior to the Effective Date.

(b) The Seller and its Affiliates shall not instruct its or their respective Representatives to request that any customer cease or decrease its purchases of the Tobacco Brands.

(c) Neither Party shall cause or require Lorillard to alter the amount of shelf space, or any positions on Off-set Signage and in-store POS material, allocated to the M Brand under the Lorillard Retail Contracts.

(d) Seller will cause RJRT to utilize retail shelf space under the RJRT Retail Contracts in accordance with historical business practices including that (i) Seller will be engaged in a national roll-out of V Brand Products, (ii) Seller's and RJRT's historical business practices include making changes to product locations on retail shelf space when there are new product introductions, (iii) RJRT will utilize its retail shelf space for V Brand Products, and (iv) the V Brand Products roll-out may result in a change in the location where the Seller Brand Products are merchandised or otherwise domiciled in a Retailer's outlet.

PART 2

STANDSTILL PERIOD

1. **Obligations in respect of the Seller Brand Products and RJRT Retail Contracts**

During the Standstill Period:

(a) RJRT will utilize the retail shelf space procured by the RJRT Retail Contracts in accordance with historical business practices. Given that it anticipates presenting to Retailers a new Retail Cigarette Contract program during the Standstill Period, Seller will ensure that RJRT will not engage in a significant resetting of its retail shelf space during this time. Thus, to the extent that there are visible facings of the Seller Brands in the space procured by the RJRT Retail Contracts at the time of Closing, subject to the proviso immediately following, those Seller Brands will remain visible during the Standstill Period; *provided, however*, Buyer acknowledges and agrees that during the Standstill Period, (i) Seller may be engaged in its national roll-out of V Brand Products, (ii) Seller's and RJRT's historical business

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practices include making changes to product locations on retail shelf space when there are new product introductions, (iii) RJRT will utilize certain of its retail shelf space for V Brand Products, and (iv) the V Brand Products roll-out may result in a change in the location where the Seller Brand Products are merchandised or otherwise domiciled in a Retailer's outlet.

(b) Buyer and its Affiliates shall not make changes, or instruct its or their respective Representatives to make changes, at any time, to the retail shelf space procured by the RJRT Retail Contracts, except that Buyer or its Representatives may remove the Seller Brand Products to relocate those products to shelf located outside of retail shelf space procured by the RJRT Retail Contracts. The Parties shall address any issues that arise in relation to any re-merchandising activities specified in this paragraph in a commercially reasonable fashion.

(c) Seller will ensure that RJRT shall not instruct its Representatives to cause the removal of any Seller Brand Products from any non-contracted retail shelf space on which such Seller Brand Products are displayed.

(d) The Seller shall not and shall ensure that its Affiliates do not instruct its or their respective Representatives to request that any customer in any way to cease or decrease its purchases of the Seller Brands.

(e) For retail outlets that have Off-set Signage for the Seller Brands, the Parties agree to instruct their respective Representatives not to make changes to the amounts of and locations of the signage. Buyer may, however, on any pricing signage make changes to the pricing to reflect its post-Closing pricing on any of the Seller Brands.

2. Obligations in respect of the M Brand and Lorillard Retail Contracts

During the Standstill Period:

(a) The Seller shall not and shall ensure that its Affiliates do not instruct its or their respective Representatives to request that any customer in any way cease or decrease its purchases of the M Brand.

(b) Seller agrees to provide Buyer with visible retail shelf space for the Tobacco Brands, in the amount described in paragraph 2(c) below, on the following terms and with the stated limitations:

(i) The provided shelf space will be in those retail outlets that are signed to a Lorillard Retail Contract at the time of closing and remain signed to said contract for the duration of the Standstill Period. The shelf space provisions in paragraphs 2(b), 2(c), and 2(e) shall not apply to any new retail outlets which open for business during the Standstill Period or any existing retail outlets which undergo a change of ownership during the Standstill Period.

(ii) Seller shall maintain, and perform the obligations under, the Lorillard Retail Contracts including making any payments due to retailers under such contracts.

(iii) If a retailer chooses to terminate a Lorillard Retail Contract, the number of facings allocated to the Buyer under such terminated Lorillard Retail Contract shall be reduced to zero.

(iv) Seller may enforce all terms of Lorillard Retail Contracts, and if Seller chooses in its good faith business judgment (for reasons of non-compliance or other reasons

consistent with historic business practices) to terminate a Lorillard Retail Contract, the number of facings allocated to the Buyer under such terminated Lorillard Retail Contract shall be reduced to zero.

(v) The location of the facings will be in the space secured by the Lorillard Retail Contracts and generally in the location occupied at the time of Closing by the M Brand. The Newport brand will remain in the number one position in the shelf space procured by the Lorillard Retail Contracts.

(vi) The provision of any shelf space depends on retailer acceptance, and Buyer agrees that Seller will not be liable in any fashion to Buyer for retailer non-acceptance.

(vii) The provision of shelf space requires and depends on a retailer's independent decision to stock (and continue to stock) the Tobacco Brands.

(c) The Seller shall allocate the number of facings set out in paragraphs (i) and (ii) below under the Lorillard Retail Contracts to the Buyer, for use for the duration of the Standstill Period:

(i) in excel and non-excel contracted stores of Lorillard that have 27 facings or more, the greater of (i) 15 facings and (ii) the number of visible product facings of single packs of the M Brand in place as of the time of Closing; and

(ii) in excel and non-excel contracted stores of Lorillard that have less than 27 facings, the number of visible product facings of single packs of the M Brand in place as of the time of Closing.

Buyer may merchandise any of the Tobacco Brands (but no other brands of products) in the provided space (the **Buyer Allocated Space**).

(d) For retail outlets that have Off-set Signage for the M Brand, the Parties agree to instruct their respective Representatives not to make changes to the amounts of and locations of the signage. Buyer may, however, on any pricing signage make changes to the pricing of the M Brand to reflect its post-Closing pricing.

(e) The Seller shall permit the Buyer to merchandise in-store POS material for the Tobacco Brands within the Buyer Allocated Space in such manner as the Buyer in its sole discretion sees fit.

(f) The Seller shall permit the Buyer, any Representatives of the Buyer or the Buyer's Affiliates and/or any third party providers engaged by the Buyer or the Buyer's Affiliates to re-merchandise any of the Buyer Allocated Space consistent with the requirements of paragraphs 2(b), 2(c), and 2(e), and the Seller and its Affiliates shall not in any way prevent or delay any such party from carrying out its re-merchandising activities.

(g) The Parties shall address any issues that arise in relation to the re-merchandising activities specified in paragraph 2(f) above in a commercially reasonable fashion.

3. General obligations and retail contracts

3.1 During the Standstill Period:

(a) The Parties acknowledge and agree that Retailers make many independent decisions with respect to tobacco products including the purchase of tobacco products, shelf space, and signage, and neither Party shall be liable to the other Party for any loss suffered by the other Party as a result of any independent action of a Retailer.

3.2 The obligations agreed to for the duration of the Standstill Period are temporary obligations to allow Buyer sufficient time to develop and present to Retailers its own Retail Cigarette Contracts. Accordingly, subject to clause 3.3 below, during the Standstill Period, Buyer and RJRT will independently be presenting new or revised Retail Cigarette Contracts to Retailers under the following agreed timetable:

(a) for a period of two months following Closing (the **Initial Period**), Buyer shall not and Seller shall ensure that RJRT shall not present or negotiate a new or modified Retail Cigarette Contract except that either Party may inform Retailers that presentations or negotiations will commence following expiration of the Initial Period; and

(b) for a period of three months following expiration of the Initial Period (the **Subsequent Period**), Buyer and RJRT may contact, communicate with, and engage with any Retailer independent of the other Party with a view to seeking to present or negotiate a new or modified Retail Cigarette Contract provided that, in each case, the implementation date for any such Retail Cigarette Contract (the **Implementation Date**) shall not occur prior to the expiration of the Subsequent Period.

3.3 The timing restrictions set out in paragraph 3.2 above shall not apply to any new retail outlets which open for business during the Standstill Period or any existing retail outlets which undergo a change of ownership during the Standstill Period.

PART 3

OTHER PROVISIONS

For a period of 12 months, commencing on day one after the expiration of the Standstill Period and ending twelve months later:

(a) RJRT's new or modified Retail Cigarette Contract will specify that RJRT requires shelf space equal to the greater of (i) RJRT's Outlet SOM, (ii) RJRT's Local SOM, and (iii) eight square feet.

(i) RJRT may merchandise V-Brand Products in its contracted space, but RJRT's share of market calculations will be based only on cigarettes (i.e., RJRT will not increase its SOM calculation by adding the share of market for V-Brand Products).

(ii) RJRT may choose to merchandise V-Brand Products on a free-standing merchandiser that is not part of the cigarette merchandiser, and any such free-standing merchandisers will not be a part of the calculation of RJRT's shelf space under this agreement.

(iii) Shelf space for Natural American Spirit is separate from, and not affected by any limitations contained in, the provisions of this agreement.

(b) The Buyer's new or modified Retail Cigarette Contract will specify that Buyer requires shelf space equal to the greater of (i) Buyer's Outlet SOM, (ii) Buyer's Local SOM, and (iii) if deemed appropriate by the Buyer in its sole discretion, a minimum square foot requirement to be determined by the Buyer at its sole discretion.

(c) The Parties acknowledge and agree that should any Retailer provide either Party with more cigarette shelf space than the amount required under a Retail Cigarette Contract, the other Party will not be permitted to restrict or prevent in any way the first Party from utilizing such additional cigarette shelf space.

(d) There shall be normalized vigorous competition at retail between the Parties, subject to any contrary provisions of this Part 3 of this agreement, and that competition shall include the following:

(i) each Party may enter into new or revised Retail Cigarette Contracts and programs on such terms as that Party wishes with any Retailer in relation to pricing, promotions, shelf space (including re-merchandising the cigarette fixture) and signage;

(ii) any Retailer may accept or reject a Party's Retail Cigarette Contract or other program for any reason including because that Party's contract or other program is less advantageous to the relevant Retailer than the other Party's contracts or programs or because that Party's contract or other program is inconsistent with the other Party's contracts or programs; and

(iii) either Party may, independent of the other Party, enforce the terms of any of its new or revised Retail Cigarette Contracts or programs referred to in paragraph (i) above;

(e) Seller and its Affiliates agree not to enter into any "exclusive" Retail Cigarette Contracts with Retailers. This agreement not to enter into an "exclusive" Retail Cigarette Contract means that the Retail Cigarette Contract will not contain the following (and only the following) requirements:

(i) that the Retailer only enter into a Retail Cigarette Contract with the Seller and/or its Affiliates;

(ii) that the Retailer only stock the cigarette brands of Seller and/or its Affiliates;

(iii) that the Retailer only allow promotions for the cigarette brands of Seller and/or its Affiliates;

(iv) that the Retailer only accept coupons for the cigarette brands of Seller and/or its Affiliates; and/or

(v) that the Retailer only allow signage for the cigarette brands of Seller and/or its Affiliates.

This agreement not to enter into "exclusive" Retail Cigarette Contracts (1) does not prevent or in any way limit the Seller or its Affiliates from enforcing against Buyer and its Affiliates any and all terms of Seller's or its Affiliates' Retail Cigarette Contracts and (2) does not limit or in any way modify any of the terms contained in the RJRT Retail Contracts including but not limited to the terms of the Every Day Low Price (EDLP) Program.

SCHEDULE 2

WHOLESALE CHANNEL OBLIGATIONS

PERIOD BETWEEN EFFECTIVE DATE AND CLOSING

1. Each Party shall and/or shall ensure that its respective Affiliates shall co-operate with each other in good faith with respect to any communications made to Wholesalers, beginning on and from the Effective Date and terminating on the date of Closing, to effectuate the terms of this agreement and shall consult with each other with respect to the content and timing of such communications. This paragraph does not govern in any fashion any communications concerning matters not specifically related to effectuating the terms of this agreement.

2. Beginning on and from the Effective Date and terminating on the date of Closing:

   (a) The Seller will and will ensure that RJRT will offer for sale the Seller Brand Products in accordance with historical practices.

   (b) The Seller and its Affiliates shall not instruct its or their respective Representatives to request that any customer cease or decrease its purchases of the Tobacco Brands.

3. The Parties acknowledge and agree that the Buyer will need to establish new terms and conditions with the Wholesalers between the Effective Date and Closing in order to allow orders to be processed immediately prior to Closing.

STANDSTILL PERIOD

1. During the Standstill Period, the Seller shall ensure that RJRT will operate its Wholesaler performance program in the ordinary course and in accordance with historical business practices in all material respects.

SIGNATORIES

SIGNED by Rob Wilkey
for and on behalf of Lignum-2, L.L.C.

SIGNED by Susan M. Cameron, President and Chief Executive Officer
for and on behalf of Reynolds American Inc.

EXHIBIT D

EMPLOYEE MATTERS

SECTION 1. Employment of Certain Business Employees.

(a) *Acquiror Offer of Employment*. No later than 60 days prior to the Closing Date, RAI and the Acquiror shall mutually agree which Lorillard Employees shall be retained by RAI or one of its Affiliates following the Closing (the "Retained Lorillard Employees"). No later than 30 days prior to the Closing Date, the Acquiror shall or shall cause one or more of its Affiliates to offer employment, effective as of the Closing, to all of the Lorillard Employees (other than the Retained Lorillard Employees) and to the RAI PR Employees (the "Proposed Transferred Employees"), and such Proposed Transferred Employees who accept such offers of employment with the Acquiror or one or more of its Affiliates will be referred to as the "Transferred Employees". Any Lorillard Employee (other than the Retained Lorillard Employees) who does not accept such offer of employment as of a date certain set no later than five days prior to the Closing and conveyed by the Acquiror to each such Lorillard Employee will be terminated by Lorillard immediately prior to the Closing. RAI shall, or shall cause Lorillard to, pay the amount of any severance or other similar benefit amounts owed to any such Lorillard Employee described in the preceding sentence. Any Proposed Transferred Employee who is a RAI PR Employee who does not accept such offer of employment as of a date certain set no later than five days prior to the Closing and conveyed by the Acquiror to each such RAI PR Employee at the time of the employment offer will be terminated by RAI immediately prior to the Closing.

(b) *Terms and Conditions of Employment*. For a period of at least one year following the Closing Date, the Acquiror shall, or shall cause its Affiliates to, provide the Transferred Employees, other than those Transferred Employees whose terms of employment are governed by an Assumed CBA, with salary, wages and bonus opportunities that are substantially comparable (collectively "Cash Compensation", which, for the avoidance of doubt, shall exclude in all cases all equity awards) to the Cash Compensation provided to such Transferred Employees immediately prior to the Closing Date, and employee benefits (excluding tax-qualified and nonqualified defined benefit pension and retiree health benefits) that are substantially comparable in the aggregate to the employee benefits provided to such Transferred Employees immediately prior to the Closing, which shall include severance benefits and protections that are at the levels set forth on Appendix A to this Exhibit D; provided that, for purposes of this covenant, all equity awards shall be disregarded. In the event that the Acquiror enters into an individual arrangement with a Transferred Employee who is in the executive band or above that specifies the Cash Compensation and benefits that the Acquiror will provide to such Transferred Employee, then such Transferred Employee shall not be covered by the preceding sentence.

(c) *Collective Bargaining Agreements*. The Acquiror shall recognize any certified labor representative of any Transferred Employees as the post-Closing labor representative for those employees and will, as of the closing of the transactions contemplated by the Lorillard Transfer Agreement, assume and abide by the collective bargaining agreements between Lorillard and the Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union (AFL-CIO-CLC)

and its local 317T representing employees of the Greensboro, North Carolina Branch of Lorillard and employees of the Danville, Virginia Branch of Lorillard, dated September 1, 2011 and April 5, 2012, respectively, setting forth the terms and conditions of employment for any Transferred Employee in effect immediately prior to the Closing (the "Assumed CBAs").

(d) *Severance Agreements*. With respect to the severance agreements entered into by Lorillard and the Specified Employees (as defined in the Merger Agreement) (the "Severance Agreements"), (i) effective as of the Closing, RAI shall cause Lorillard to assign to the Acquiror, and the Acquiror shall assume, the Severance Agreements covering the Specified Employees who are Transferred Employees provided that (A) to the extent required by the applicable Severance Agreement, each such Transferred Employee consents to such assumption, (B) RAI shall use reasonable best efforts to cause Lorillard to obtain the consent of such Transferred Employees for such assumption, if consent is required, and (C) the restrictive covenants contained in each of the assumed Severance Agreements shall apply in favor of the Acquiror and shall not prevent the Transferred Employee from being employed by the Acquiror, and (ii) RAI shall, or shall cause Lorillard to, (A) pay, at the time of the consummation of the Transactions, any and all amounts due to the Specified Employees as a result of the application of the provisions contained in Section 6.11(e) of the Merger Agreement, such that each such Specified Employee shall have received all amounts due thereunder and (B) satisfy all applicable requirements with respect to wage and similar withholding in connection with the payment of such amounts. In addition, effective as of the Closing, the Acquiror shall assume and abide by the Lorillard Tobacco Company 2014 Change in Control Redundancy Plan with respect to the Transferred Employees.

(e) *Vacation*. Effective as of the Closing Date, the Acquiror shall, or shall cause its Affiliates to, to the extent permitted by applicable law, assume or retain, as the case may be, all obligations of RAI, Lorillard, and their respective Affiliates for the accrued, unused vacation of the Transferred Employees; provided, however, that such vacation obligations have been reflected upon the books and financial records of the Business in accordance with applicable Law and generally accepted accounting principles. To the extent permitted by applicable law, RAI shall have no obligation or liability to pay or provide any vacation payments claimed by any Transferred Employee on or after the Closing Date. For the avoidance of doubt, to the extent that such vacation obligations have not been reflected upon the books and financial records of the Business in accordance with applicable Law and generally accepted accounting principles, RAI shall retain such obligation or liability to pay or provide such vacation payments to any Transferred Employee.

(f) *Credit for Service*. The Acquiror shall, or shall cause its Affiliates to, credit Transferred Employees for service earned on and prior to the Closing Date with RAI, Lorillard and their respective Affiliates, or any of their respective predecessors, in addition to service earned with the Acquiror and its Affiliates on or after the Closing Date, (i) to the extent that service is relevant for purposes of eligibility, vesting or the calculation of vacation, sick days, severance, layoff and similar benefits (but not for purposes of pension benefit accruals (except with respect to the Lorillard Pension Plan)) under any retirement or other employee benefit plan, program or arrangement of the Acquiror or any of its Affiliates for the benefit of the Transferred Employees on or after the Closing Date and (ii) for such additional purposes as may be required by applicable Law; provided, however, that Transferred Employees shall not receive any such

service credit (A) where it would result in duplication of benefits or (B) under new employee benefit plans or arrangements that are adopted after the Closing Date not in connection with the requirements of this Exhibit D where no service credit is given to other employees of the Acquiror and its Affiliates pursuant to such new employee benefit plans or arrangements.

(g) *Pre-existing Conditions; Coordination.* The Acquiror shall, and shall cause its Affiliates to, waive limitations on benefits relating to any pre-existing conditions of the Transferred Employees and their eligible dependents to the extent that such limitations were waived under the applicable Employee Plan. The Acquiror shall, and shall cause its Affiliates to, recognize for purposes of annual deductible and out-of-pocket limits under their group health plans applicable to Transferred Employees, deductible and out-of-pocket expenses paid by Transferred Employees and their respective dependents under RAI's, Lorillard's or any of their respective Affiliates' health plans in the calendar year in which the Closing Date occurs.

(h) *WARN Act.* RAI agrees to provide, and shall cause its Affiliates to provide, any required notice under and to otherwise comply with, and to retain all Liabilities relating to, the federal Worker Adjustment and Retraining Notification Act of 1988 (the "WARN Act") and any similar state laws with respect to any event affecting the employees of the Business prior to the Closing Date. The Acquiror agrees to provide any required notice under and to otherwise comply with, and to assume all Liabilities relating to, such Laws with respect to any event affecting Transferred Employees on or after the Closing Date. On or as soon as practicable following the Closing Date, RAI shall deliver to the Acquiror a true, complete and correct list of all Persons who suffered an "employment loss" (as defined in the WARN Act) during the 90-day period prior to the Closing Date.

SECTION 2. Pension Plans. Effective as of the Closing Date, the Acquiror shall assume from Lorillard, and RAI shall use reasonable best efforts to cause Lorillard to transfer to the Acquiror, sponsorship of and all right, title and interest of Lorillard in and to and all Liabilities of Lorillard under, the Lorillard Tobacco Company Retirement Allowance Plan for Hourly Rated and/or Piecework Employees (the "Lorillard Pension Plan"), and RAI shall use reasonable best efforts to cause Lorillard to cause the Acquiror to be substituted for Lorillard under all trust agreements under which any assets of the Lorillard Pension Plan are held (the "Lorillard Pension Trust"), such that the Acquiror succeeds to all of Lorillard's right, title and interest in and to the Lorillard Pension Trust and the assets thereof, subject to the terms thereof. Prior to the Closing Date, RAI shall use reasonable best efforts to cause Lorillard to adopt such amendments to the Lorillard Pension Plan and Lorillard Pension Trust as are required to implement the preceding sentence.

SECTION 3. Defined Contribution Plans. Effective as of the Closing Date, the Acquiror shall assume from Lorillard, and RAI shall use reasonable best efforts to cause Lorillard to transfer to the Acquiror, sponsorship of and all right, title and interest of Lorillard in and to and all Liabilities of Lorillard under, the Profit Sharing Plan for Lorillard Tobacco Company Hourly Paid Employees and the Lorillard Tobacco Company Employee Savings Plan (collectively, the "Lorillard Defined Contribution Plans"), and RAI shall use reasonable best efforts to cause Lorillard to cause the Acquiror to be substituted for Lorillard under all trust agreements under which any assets of the Lorillard Defined Contribution Plans are held (the "Lorillard Defined Contribution Trusts"), such that the Acquiror succeeds to all of Lorillard's right, title and interest in and to the Lorillard Defined Contribution Trusts and the assets thereof, subject to the terms

thereof. Prior to the Closing Date, RAI shall use reasonable best efforts to cause Lorillard to adopt such amendments to the Lorillard Defined Contribution Plans and Lorillard Defined Contribution Trusts as are required to implement the preceding sentence.

SECTION 4. Retiree Welfare Benefits. Effective as of the Closing, the Acquiror shall assume (or cause one or more of its Affiliates to assume) all post-employment and post-retirement welfare benefit obligations with respect to all Transferred Employees. The Acquiror shall establish a post-retirement welfare benefit plan (the "Acquiror's PRB Plan") for the benefit of the Transferred Employees described in the preceding sentence and their respective spouses and dependents that, subject to the requirements of the Assumed CBAs, provides benefits that are substantially comparable to the benefits provided under the Seller's post-retirement welfare plans for such employees. RAI and Lorillard, as applicable, shall retain any obligations as RAI or Lorillard, as applicable, may have to provide post-retirement welfare benefits to individuals who are not Transferred Employees.

SECTION 5. Miscellaneous Plan Provisions.

(a) *No Assumption or Transfer of Seller Plans.* Except as otherwise specifically provided in the Agreement, or as set forth on Appendix B of this Exhibit D, the Acquiror and its Affiliates shall not assume any obligations under or liabilities with respect to, and they shall not receive any right or interest in the assets of, any of the Employee Plans that are sponsored or maintained by RAI, Lorillard or their respective Affiliates ("Seller Plan").

(b) *Participation in Seller Plans.* Except as otherwise specifically provided in the Agreement, all Transferred Employees and their eligible dependents will cease, effective as of the Closing Date, any participation in and any benefit accrual under each of the Seller Plans. RAI and its Affiliates shall take all necessary actions to affect such cessation of Transferred Employees and their eligible dependents under the Seller Plans.

(c) *COBRA.* RAI shall remain responsible for all Liabilities in connection with the requirements of Section 4980B of the Code and Title I, Subtitle B, Part 6 of ERISA ("COBRA") with respect to any individual who is an "M&A qualified beneficiary" (as defined in the regulations under COBRA) as a result of the transactions contemplated by this Agreement, including any individual who is participating in any Employee Plan and who experiences a "qualifying event" (within the meaning of COBRA) as of or before the Closing Date and any individual who is receiving COBRA coverage as of the Closing Date. Following the Closing Date, the Acquiror shall, or shall cause its Affiliates to, (i) assume all obligations to provide continuation health care coverage in accordance with COBRA to all Transferred Employees and their qualified beneficiaries who incur or incurred a "qualifying event" following the Closing Date, including all obligations with respect to all health claims incurred on or after the Closing Date.

SECTION 6. Restrictive Covenants Relating to Employees.

(a) *Non-Solicitation by the Acquiror.* The Acquiror and its Affiliates shall not, directly or indirectly, induce or attempt to induce to leave the employ of RAI or its Affiliates any Person who is an employee of RAI or its Affiliates (including any Retained Lorillard Employee).

whether or not such employment is pursuant to written agreement. The foregoing covenant in the immediately preceding sentence shall apply for a period of 18 months following the Closing Date and, with respect to any such Person who provided services to the Acquiror pursuant to the TSA, the foregoing covenant shall apply for a period of one year from the date of termination of the TSA.

(b) *Non-Solicitation and Non-Hire by RAI.* RAI shall not, directly or indirectly, (i) induce or attempt to induce to leave the employ of the Acquiror or its Affiliates any Transferred Employee or (ii) hire or continue to employ (except where such failure to continue to employ would be a violation of applicable Law) any Transferred Employee who, in each case referenced in (i) and (ii) above, at the time of the Closing, occupied a position assigned to the officer, senior executive, executive, senior professional, lead professional or professional band position in RAI, Lorillard or their respective Affiliates, in each case, whether or not such employee is a full-time or a temporary Transferred Employee, and whether or not such employment is pursuant to written agreement. The foregoing covenants in the immediately preceding sentence shall apply for a period of 18 months from and following the Closing Date.

(c) *Exceptions.* Notwithstanding the limitations in Sections 6(a) and 6(b) hereof applicable to particular categories of RAI's and the Acquiror's employees (collectively, the "Restricted Employees"), such limitations will not prohibit RAI and its Affiliates, or the Acquiror and its Affiliates, from: (i) attempting to hire or hiring any Restricted Employee after the termination of such employee's employment at any time after the Closing by RAI and its Affiliates or the Acquiror and its Affiliates, as the case may be, (ii) with respect to any Transferred Employee who is not in an executive band position or above, placing public advertisements or conducting any other form of general solicitation that is not specifically targeted towards Restricted Employees, including the use of an independent employment agency or search firm whose efforts are not specifically directed at Restricted Employees, or (iii) soliciting specifically identified Restricted Employees with the prior agreement of the other party.

SECTION 7. Cooperation and Assistance.

(a) *Claims Assistance.* Subject to the Acquiror's consent, not to be unreasonably conditioned, delayed or withheld, the Acquiror shall, and shall cause its Affiliates to, permit Transferred Employees to provide such assistance to RAI as may be necessary in respect of claims against RAI or its Affiliates, whether asserted or threatened, to the extent that, (i) a Transferred Employee has knowledge of relevant facts or issues, or (ii) a Transferred Employee's assistance is reasonably necessary in respect of any such claim, provided that such assistance would not unreasonably interfere with the Transferred Employees ongoing services for the Acquiror. RAI shall indemnify the Acquiror and its Affiliates and each relevant Transferred Employee against, and reimburse the Acquiror and its Affiliates and each relevant Transferred Employee for, any Losses incurred by such Person in connection with any such rendering of assistance described in the immediately preceding sentence.

(b) *Consultation with Employee Representative Bodies.* The Parties shall, and shall cause their respective Affiliates to, mutually cooperate with reasonable requests for information from Lorillard regarding Lorillard's obligations to provide information to and negotiate with any

union or works council representing any Proposed Transferred Employees regarding the effects of the transactions contemplated by this Agreement and the Merger Agreement on any Proposed Transferred Employee covered by a collective bargaining agreement. For the avoidance of doubt, nothing in this Agreement, is intended to, or shall be interpreted to, require RAI to negotiate with or otherwise recognize any labor union or works council.

SECTION 8. No Third-Party Beneficiaries; No Guarantee of Employment or Amendment of Employee Plan.

Nothing in this Agreement or in this Exhibit D expressed or implied shall confer upon any current or former employee of the Business or upon any representative of any such person, or upon any collective bargaining agent, any rights or remedies, including any third party beneficiary rights or any right to employment or continued employment for any specified period, of any nature or kind whatsoever under or by reason of this Agreement or this Exhibit D. Nothing contained in the Agreement shall restrict the ability of the Acquiror to terminate the employment of any Transferred Employee for any reason at any time after the effective date of his or her employment with the Acquiror, consistent with the terms of any applicable collective bargaining, employment agreement or the provisions of this Exhibit D. Moreover, except as specifically provided in this Exhibit D, nothing contained in the Agreement shall require the Acquiror to maintain any specific employee plan or other compensation or employee benefit plan, program, policy or practice following the Closing Date or shall be deemed to amend any RAI PR Employee Plan or Lorillard Employee Plan or any employee benefit plan or arrangement of the Acquiror or its Affiliates.

EXHIBIT E

INTELLECTUAL PROPERTY LICENSE AGREEMENT

1. The following terms shall have the following meanings:

"AB Product" means any cigarette product sold under any Acquired Tobacco Cigarette Brands upon which a substantial equivalence filing has been made and for which there is a brand of the Sellers (other than any Acquired Brand) that was in the market prior to the Closing that relies on said substantial equivalence filing;

"Equivalent Products Business" means the business of the development, design, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing and promotion of SE Products;

"SE Product" means any cigarette product sold under any brand of the Sellers (other than any Acquired Brand) which benefits from a substantial equivalence filing based on any Acquired Tobacco Cigarette Brands.

2. A license, effective immediately following the Closing, whereby the Acquiror grants, and will cause its Affiliates to grant, to RAI, a perpetual, royalty-free, fully paid up, non-exclusive, non-transferable (except in the case of a corporate reorganization involving an intra-group corporate reorganization among Affiliates or a sale of all or substantially all of the business related to an SE Product or to an acquiror, including BAT, in the event of a merger or sale of all or substantially all of RAI) license, without the right to sub-license (except to (i) a RAI Affiliate or (ii) a third party providing services in relation to the Equivalent Products Business) to use all Business Intellectual Property (other than Trademarks) in all product specifications for any AB Product in connection with the development, design, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing and promotion of tobacco cigarettes marketed under brands other than RAI Brands. For the avoidance of doubt, the Parties regard the license granted herein to be a retention of property rights not being sold to the Acquiror for purposes of Section 197(f)(9) of the Code (relating the anti-churning rules).

3. Related to the license described in paragraph 2 above, RAI and the Acquiror covenant that:

- RAI and the Acquiror will work together in good faith to secure clearance of provisional substantial equivalence applications for the AB Products. In connection therewith, the Acquiror will provide RAI with all correspondence and documentation between the Acquiror and FDA regarding such substantial equivalence applications.
- Under no circumstance will the Acquiror or RAI fail to provide documentation in response to an agency information request regarding any applicable substantial equivalence application for any AB Product or otherwise abandon or seek to withdraw such substantial equivalence application for any AB Product without first obtaining written approval from the other Party provided, however, that the Acquiror shall have no

obligation whatsoever to amend, or support an amendment of, a substantial equivalence application for any AB Product for the purpose of allowing RAI to continue to manufacture and sell that SE Product unless RAI promptly reimburses the Acquiror, upon the Acquiror's request, in full for all out-of-pocket costs and expenses associated with the preparation, filing and support of such amendment.
- So long as the substantial equivalence applications for any AB Product remain pending and/or FDA authorizes a marketing order in conjunction with any of said substantial equivalence applications, RAI shall have a non-exclusive right to rely, utilize and refer to the applicable AB Products and their respective product specifications, with said substantial equivalence applications' authorized marketing orders as a predicate product for new launches/product modifications to which RAI will independently seek FDA authorization, as appropriate.
- RAI shall indemnify, defend and hold harmless the Acquiror Indemnified Parties against all Losses that such Acquiror Indemnified Party may suffer or incur, or become subject to, arising from, as a result of, in connection with or otherwise with respect to RAI's development, design, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing and promotion of SE Products.

4. The rights licensed by the Acquiror pursuant to the Intellectual Property License Agreement will be furnished "as is", with all faults and without representation or warranty of any kind, express, implied, statutory or otherwise, including any warranty of merchantability, fitness for any particular purpose, title, non-infringement, quality, usefulness, commercial utility, adequacy, compliance with any law, domestic or foreign, and implied warranties arising from course of dealing or course of performance.

5. None of the terms of the Intellectual Property License Agreement will restrict the Acquiror or any of its Affiliates from altering any AB Products.

6. A license, effective immediately following the Closing, whereby the Acquiror grants and will cause its Affiliates to grant, to RAI, a perpetual, royalty-free, fully paid up, non-exclusive, non-transferable (except in the case of a corporate reorganization involving the sale of the assets of RAI) license, without the right to sub-license (except to (i) a RAI Affiliate or (ii) to a third party providing services to RAI or a RAI Affiliate in relation to e-cigarette or e-vapor products or services) under all Acquired E-Cig Patents for use of those Acquired E-Cig Patents in RAI's business after Closing, provided that such license is limited to the use of claimed inventions the use of which by RAI or any Affiliate of RAI (i) commenced prior to the date of this Agreement; or (ii) commenced before the publication date of the relevant Acquired E-Cig Patents; such license having a term equal to the life of the foregoing patents, patent applications and patents issuing from those applications. The foregoing would also include a release for past infringement. For the purposes of this license, "Acquired E-Cig Patents" means (i) all patents and patent applications that were acquired by the Acquiror or its Affiliates pursuant to this Agreement to the extent relating to e-cigarette or e-vapor products or services (including all progeny thereof).

7. To the extent any inventory acquired pursuant to Section 2.01(a)(ii) of this Agreement contains any Trademark of any Seller or any Affiliate of any Seller, a limited transitional license, effective immediately following the Closing, whereby the Sellers and their Affiliates grant to the Acquiror a royalty-free, fully paid up, non-exclusive license to use those Trademarks solely to the extent necessary to sell such inventory, such license to include appropriate quality control provisions.

EXHIBIT F

AGREED ASSUMPTION TERMS

ARTICLE I
DEFINITIONS

Section 1.1 Capitalized terms used in this Exhibit that are defined in the Asset Purchase Agreement ("APA") shall have the meanings specified in the APA, except as otherwise specified in this Exhibit.

Section 1.2 Capitalized terms used in this Exhibit that are defined in the MSA shall have the meanings specified in the MSA.

Section 1.3 In addition, the following definitions apply in this Exhibit:

(a) "Acquiror" means the Acquiror and/or its Affiliates, as applicable. In this Exhibit, "Acquiror" includes Affiliates unless the context indicates otherwise.

(b) "Acquiror's Existing Brands" means the tobacco cigarette brands owned by the Acquiror and the Acquiror's Affiliates immediately prior to the Closing in respect of which the Acquiror and the Acquiror's affiliates are parties to the MSA as SPMs.

(c) "Growers Trust" means the National Tobacco Growers Settlement Trust, dated July 19, 1999, among Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and R.J. Reynolds Tobacco Company, as settlors, The Chase Manhattan Bank, as trustee, and the Grower States listed therein, as amended, supplemented or replaced.

(d) "PSS Agreements" means the State Settlements other than the MSA and the Growers Trust.

(e) "Previously Settled States" means the States of Florida, Minnesota, Mississippi, and Texas.

(f) "Settling Defendants" means the Persons other than the Previously Settled States that are parties to the PSS Agreements.

(g) "Stipulated Award" means the Stipulated Partial Settlement and Award entered on March 12, 2013, by the arbitration Panel in connection with the Term Sheet.

(h) "Term Sheet" means the binding term sheet, dated November 14, 2012, entered into by certain Participating Manufacturers, settling certain NPM Adjustment disputes under the MSA with 22 of the Settling States.

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ARTICLE II
AGREEMENTS BY ACQUIROR

Section 2.1 As required by MSA § XVIII(c), the Acquiror shall assume, as of the Closing, the obligations of an OPM with respect to all of the Acquired Tobacco Cigarette Brands.

Section 2.2 The Acquiror, with the assistance and cooperation of RAI and Lorillard in communications and negotiations as required by the Agreement, shall use its reasonable best efforts to reach agreements with each of the Previously Settled States, by which the Acquiror will assume, as of the Closing, the obligations of a Settling Defendant under the PSS Agreement with each such State, with respect to the Acquired Tobacco Cigarette Brands, on the same basis as the Settling Defendants prior to the Closing. Provided, however, that such agreements shall include terms providing either that any direct-pay statute (also known as an equity-fee law or NPM-fee law) of a Previously Settled State does not apply to the Acquired Tobacco Cigarette Brands or that, if the Acquiror is required to make payments with respect to Acquired Tobacco Cigarette Brands under a direct-pay statute (or any distributor or other party is required to make such payments with respect to the Acquired Tobacco Cigarette Brands), the Acquiror will receive a credit against otherwise due payments under the PSS settlement equal to the full payments made.

Section 2.3 With respect to the Acquired Brands, the Acquiror shall honor the agreement between certain Participating Manufacturers (including RAI, Lorillard and the Acquiror) and certain States who are signatory to the Term Sheet, memorialized by letter dated March 10, 2014, regarding tolling of the deadline (if any) for seeking confirmation of the Stipulated Award.

ARTICLE III
AGREEMENTS BY RAI AND LORILLARD

Section 3.1 RAI and Lorillard each will, at least 20 days before Closing, respectively provide notice to each Settling State, as required by the MSA, of the contemplated sale, to Acquiror, of the RAI Brands and of Lorillard's Maverick Brand.

Section 3.2 RAI and Lorillard agree that Acquiror shall not be liable to pay the OPMs' larger share of fees, costs, payments and/or expenses in respect of the Acquired Tobacco Cigarette Brands that relate to NPM Adjustment disputes, with respect to the period ending on the Closing Date, whether such fees, costs, payments, and/or expenses are incurred before, on, or after the Closing Date. Acquiror shall continue to pay the share of fees and expenses for such disputes attributable to the Acquiror's Existing Brands.

Section 3.3 RAI and Lorillard agree that, following the Closing Date, Acquiror shall not be liable to pay or contribute to any share of the Seller Plaintiff Fees, except for the Assumed Plaintiff Fees, and further has agreed to indemnify the Acquiror to the extent the Acquiror is required to pay any such Seller Plaintiff Fees. This section shall not apply, however, to any plaintiffs' attorneys' fees or other legal costs in relation to the State Settlements resulting from any post-Closing increase in the volume of sales (determined in accordance with § 11.08 of the APA) of any of the Acquired Tobacco Cigarette Brands.

Section 3.4 If the Independent Auditor under the MSA, for the year of the Closing, issues calculations that are not later modified or rescinded prior to the date payment is due that require Acquiror to make MSA payments with respect to the Acquired Tobacco Cigarette Brands as if Acquiror owned those brands for any period of that year prior to the Closing Date, then RAI agrees to indemnify Acquiror (and to make any relevant payments to Acquiror pursuant to such indemnity on or before the date on which payment of such amount is due), such that Acquiror's costs for MSA payments with respect to the Acquired Tobacco Cigarette Brands for that year do not exceed the amount that would be due from Acquiror if it had owned those brands only from the Closing Date.

ARTICLE IV
MUTUAL AGREEMENTS

Section 4.1 The Acquiror's assumption of the obligations of an OPM with respect to the Acquired Tobacco Cigarette Brands includes receiving the benefit of the credits and reductions and other calculations applied to brands owned by an OPM under the MSA with respect to the period after the Closing. This includes, without limitation, receiving the benefit of the Previously Settled States Reduction.

Section 4.2 As of and after the Closing Date, RAI and Lorillard are not to be OPMs with respect to any of the Acquired Tobacco Cigarette Brands.

Section 4.3 As of and after the Closing Date, the Acquiror and its affiliates are not to be treated as OPMs with respect to any of the Acquiror's Existing Brands.

Section 4.4 All amounts payable after the Closing Date by the Acquiror under the State Settlements with respect to the Acquired Tobacco Cigarette Brands are to be calculated solely on the basis of Acquiror's results with respect to the Acquired Tobacco Cigarette Brands and not on the basis of any other results of the Acquiror. This includes, without limitation, calculations of Relative Market Share; number of Cigarettes shipped; revenue from sales of Cigarettes; and operating income from sales of Cigarettes. In calculating the "Profit Adjustment" under the MSA and PSS, Acquiror's base-year operating income, net operating profit, and any similar measurement shall be an amount to be determined by the Acquiror and RAI with respect to the Acquired Tobacco Cigarette Brands.

Section 4.5 Acquiror's NPM Adjustments under the MSA with respect to the Acquired Tobacco Cigarette Brands are to be calculated on a going-forward basis and thus to be based on (i) Acquiror's Relative Market Share in the Acquired Tobacco Cigarette Brands in the base year, and (ii) Acquiror's Relative Market Share in the Acquired Tobacco Cigarette Brands in the year with respect to which Acquiror is to make an MSA payment. The Parties agree for purposes of this transaction that Acquiror will have a Relative Market Share in those brands of zero in the base year.

Section 4.6 The Acquiror's acquisition of the Acquired Tobacco Cigarette Brands is not to affect the "Grandfathered" Market Share under MSA § IX(i) in respect of the Acquiror's Existing Brands.

Section 4.7 Acquiror's assumption of the obligations of a Settling Defendant, in accordance with Article II herein, is not to cause any of Acquiror's Existing Brands to be treated as brands owned by a Settling Defendant under any of the PSS Agreements.

Section 4.8 Settlements Under the MSA

(a) RAI and Lorillard, among other Participating Manufacturers, have entered into the Term Sheet, which was addressed in the Stipulated Award. The Acquiror has also entered into the Term Sheet and is bound by the Stipulated Award with respect to the Acquiror's Existing Brands.

(b) RAI and Lorillard, among other Participating Manufacturers, have entered into a binding term sheet with the Commonwealth of Kentucky, settling certain NPM Adjustment disputes under the MSA on the terms set forth in the Term Sheet and addressed by the Stipulated Award, with modifications, as stated in a joinder letter from the Attorney General of Kentucky to RAI, Lorillard, and other Participating Manufacturers dated June 10, 2014. The Acquiror has also entered into the Term Sheet with Kentucky with respect to Existing Brands.

(c) RAI and Lorillard, among other Participating Manufacturers, have entered into a binding term sheet with the State of Indiana, settling NPM Adjustment disputes on the terms set forth in the Term Sheet and addressed by the Stipulated Award, with modifications, as stated in a joinder letter from the Attorney General of Indiana to RAI, Lorillard, and other Participating Manufacturers dated June 26, 2014. In connection with this settlement, the Participating Manufacturers sent an assurance letter to the Attorney General of Indiana, also dated June 26, 2014, with respect to the 2015 NPM Adjustment. The Acquiror has also entered into the Term Sheet with Indiana with respect to Existing Brands.

(d) Acquiror acknowledges having received copies of the Term Sheet, the Stipulated Award, and the letters dated June 10, 2014, and June 26, 2014, described above in this section, and further was aware of those documents as it is already a party to them.

(e) With respect to the Acquired Tobacco Cigarette Brands, Acquiror is to assume the rights and obligations of an OPM under the agreements listed above in this section, as to NPM Adjustment claims for years after the Closing and for a proportionate share of the calendar year of the Closing. The Acquiror will retain the rights and obligations of an SPM with respect to Existing Brands under the agreements listed above in this section, as to all NPM Adjustment claims addressed in the agreements.

Section 4.9 Agreements existing as of the Closing Date among the OPMs with respect to the MSA, or among the Settling Defendants with respect to any of the PSS Agreements, will apply to the Acquiror with respect to the Acquired Tobacco Cigarette Brands, and the Acquiror will receive all benefits under such agreements as well as assuming the obligations thereunder with respect to the Acquired Tobacco Cigarette Brands. RAI and Lorillard represent that there are no such agreements that affect the Acquired Tobacco Cigarette Brands other than the following:

(a) The Agreement Regarding Allocation, entered into by the OPMs in September 2010; and the Addendum to the Agreement Regarding Allocation, entered into by the OPMs in December 2012. Acquiror acknowledges having received copies of the agreement and the addendum. Acquiror also acknowledges that it is aware of a dispute between RAI and the OPM Philip Morris USA Inc. regarding the allocation among the OPMs of interest and earnings, including a dispute over the meaning and applicability of the Agreement Regarding Allocation and the Addendum to the Agreement Regarding Allocation with respect to that dispute.

(b) The agreement between RAI and Lorillard regarding allocation of any "Profit Adjustment" under Exhibit E (Paragraph 8) of the MSA, as memorialized in an email from counsel for Lorillard to counsel for RAI dated August 28, 2013, and the response of counsel for RAI dated August 29, 2013. Acquiror acknowledges having received a copy of this agreement.

(c) An agreement among the Settling Defendants regarding allocation among themselves, in certain circumstances, of the "Profit Adjustment" under the PSS Agreements, embodied in Exhibit B of an Engagement Letter, dated December 2, 2002, from Pricewaterhouse Coopers LLP to the Settling Defendants and the Previously Settled States. Acquiror acknowledges having received a copy of this agreement.

Section 4.10 As soon as practicable after the date of the APA, and both before and after the Closing Date, each of the Parties shall (and shall cause each of its respective Affiliates and each of its and their respective Representatives to) make all such communications with and provide all such information to NAAG, the States, the Independent MSA/PSS Auditor, and any other relevant Persons and take all such other steps (including filing dispute letters with the Independent MSA/PSS Auditor and engaging in or cooperating in any dispute, litigation, or arbitration) as are necessary and/or expedient for any of the following purposes:

(a) Causing NAAG to change the brands listing with respect to the Acquired Tobacco Cigarette Brands on or as soon as practicable after the Closing Date;

(b) Ensuring that the Acquired Tobacco Cigarette Brands remain certified and/or are not de-listed in any of the States at any time before, on, or after the Closing Date or are re-certified in each of the States either before, on, or as soon as practicable after the Closing Date (as applicable); and

(c) Obtaining the agreement (if necessary) of the States, the Independent MSA/PSS Auditor, NAAG, and any other relevant Persons to the agreements in this Article IV.

ARTICLE V
COMPLIANCE

Section 5.1 Each of the Parties agrees to the terms of this Exhibit on its own behalf (and on behalf of its Affiliates) and undertakes, from and after the date of the APA, both before and after the Closing Date, to (and to cause each of its Affiliates and each of its and their respective Representatives to) adhere fully to and not deviate in any respect from the terms of this Exhibit, including in any communications with any of the States, OPMs, SPMs, Settling Defendants,

Independent MSA/PSS Auditor, NAAG, other signatories to or litigants in respect of the State Settlements and/or other relevant Persons and/or in connection with any litigation, arbitration, proceeding, dispute, challenge, objection, or similar Action under or related to any State Settlement or otherwise relating to the terms of this Exhibit

Section 5.2 Each of the Acquiror and RAI further undertakes, from and after the Closing, to take (and to cause each of its Affiliates and each of its and their respective Representatives to take) all such steps as are necessary or expedient (including giving any relevant waivers and/or consents and/or engaging in or cooperating in any disputes, litigation, or arbitration) to cause the terms of Article IV herein to become and remain fully effective.

Section 5.3 If, notwithstanding the best efforts of the Parties under § 4.10(c) herein and each Party's compliance with § 5.1 herein, the Independent Auditor under the MSA, in calculating an NPM Adjustment for a year, incorrectly (and whether or not in response to an arbitration award or court order) determines Acquiror's Relative Market Share in the base year to be any amount other than zero (as provided in § 4.5 herein), then Acquiror and RAI will reallocate among themselves the aggregate amount of the NPM Adjustment that the Independent Auditor has allocated to each of them for that year, such that each of Acquiror and RAI receives the proportion of such aggregate amount that it would have received under this Exhibit if the Independent Auditor had determined Acquiror's Relative Market Share in the base year to be zero.

Section 5.4 Each of the Parties shall (and shall cause each of its respective Affiliates and each of its and their respective Representatives to) keep each other fully informed and fully support each other in relation to all material communications made, information provided, positions maintained, and other steps taken under this Article V and § 4.10 herein.

Section 5.5 This Exhibit is subject to and entered into in connection with execution of the APA, including, without limitation, the indemnification provisions in APA §§ 11.01(a) and 11.02(a), and the provisions regarding liabilities in APA §§ 2.01(c) and 2.01(d).

EXHIBIT G

RECIPROCAL MANUFACTURING AGREEMENT

[see attached]

Decision and Order

EXHIBIT G

RECIPROCAL MANUFACTURING AGREEMENT

This RECIPROCAL MANUFACTURING AGREEMENT (this "***Agreement***") is entered into as of , 201 (the "***Effective Date***"), by and among R.J. Reynolds Tobacco Co., a North Carolina corporation ("***RAI***"), and Ligmun-2, L.L.C., a Texas limited liability company ("***Imperial***"). RAI and Imperial are sometimes referred to in this Agreement collectively as the "***Parties***" and each, individually, as a "***Party***"; depending on the capacity in which a Party is acting under this Agreement, it may also be referred to as a Manufacturer or a Customer, as the context requires. Initially capitalized terms used throughout this Agreement have the meanings given to them in ARTICLE I below.

BACKGROUND

A. This Agreement is being entered into concurrently with the consummation of the transactions contemplated by that certain Asset Purchase Agreement, dated as of July , 2014 (the "***APA***"), by and among (1) RAI's corporate parent company, Reynolds American Inc., a North Carolina corporation; (2) Imperial; and (3) Imperial's corporate parent company, Imperial Tobacco Group, PLC, a public limited company incorporated under the laws the England and Wales.

B. Immediately prior to the Effective Date, (1) RAI acquired Lorillard, Inc., a Delaware corporation ("***Lorillard***"), pursuant to the terms and conditions of the Merger Agreement (as defined in the APA), and (2) RAI manufactured the RAI Products at a facility in Tobaccoville, North Carolina (the "***Tobaccoville Facility***"), and Lorillard manufactured the Lorillard Products at a facility in Greensboro, North Carolina (the "***Greensboro Facility***").

C. As of the Effective Date, pursuant to the APA: (1) the rights to manufacture, distribute, market and sell the RAI Products (but not ownership of the Tobaccoville Facility) have been transferred to Imperial, and (2) ownership of the Greensboro Facility (but not the rights to manufacture, distribute, market and sell the Lorillard Products) has been transferred to Imperial. Consequently, RAI has the facilities for, and expertise relating to, the manufacture of the RAI Products, but Imperial has the right to manufacture, distribute, market and sell those Products, and Imperial has the facilities for, and expertise relating to, the manufacture of the Lorillard Products, but RAI (acting through Lorillard) has the right to manufacture, distribute, market and sell those Products.

D. The Parties desire to enter into this Agreement to cover a transitional period during which, in addition to fulfilling their respective obligations under this Agreement, (1) Imperial will, directly or indirectly through one or more Affiliates, prepare to manufacture the RAI Products on its own, without the need for the Tobaccoville Facility, and (2) RAI will, directly or indirectly through one or more Affiliates, prepare to manufacture the Lorillard Products on its own, without the need for the Greensboro Facility.

E. Based on the foregoing, and subject to the terms and conditions of this Agreement, during the Term, RAI is willing to manufacture the RAI Products at the Tobaccoville Facility on behalf of Imperial, and Imperial is willing to manufacture the Lorillard Products at the Greensboro Facility on behalf of RAI.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties and covenants set forth in this Agreement, and for other good and valuable consideration, the mutuality, receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I
DEFINED TERMS

As used in this Agreement, the following terms will have the meanings assigned to them below:

"***Accounting Firm***" has the meaning set forth in Section 4.3(c).

"***Actual Costs***" has the meaning set forth in Section 4.3(a).

"***Additional Tobacco Raw Materials***" means virgin tobacco stems, virgin tobacco scrap and Recon (except for Recon which is part of the Initial Tobacco Leaf inventory of either Party) used as raw materials for manufacturing the applicable Product and meeting the Specifications for that Product.

"***Adjustment Notice***" has the meaning set forth in Section 4.3(c).

"***Affiliate***" has the meaning given to such term in the APA.

"***Agreement***" has the meaning set forth in the Preamble.

"***APA***" has the meaning set forth in Background Paragraph A.

"***Certifications/Listings***" has the meaning given to such term in the APA.

"***Confidential Information***" means: (a) information or data (whether of a technical or business nature), including that relating to research, development, know-how, inventions, Trade Secrets (including the Specifications and Sensitive Information), engineering, manufacturing, proposals and business plans, marketing plans and materials, sales, suppliers or customers, in each case, of, or in respect of, a Party or any of its Affiliates; (b) proprietary information or data of a Party or of a third Person with whom such Party has an obligation of confidence (including all such information owned by any Affiliate of such Party), whether created by a Party or its Affiliates individually or through the efforts contemplated by this Agreement; and (c) any other information, data or Intellectual Property, not publicly known, of a Party or of a third Person with whom such Party has an obligation of confidence (including all such information owned by any Affiliate of such Party); regardless of whether any of the foregoing set forth in clauses (a) - (c) above is observed or in oral, written, graphic or electronic form, and whether or not marked or otherwise identified as "confidential."

"***Contingency Equipment***" has the meaning set forth in Section 2.4.

"***Cost Cap***" has the meaning set forth in Section 4.3(d)(ii).

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"***Costs***" means, without duplication, the costs and expenses incurred by a Manufacturer in connection with the manufacture and packaging of a Customer's Products, including costs and expenses in the following categories: (a) costs of direct labor and allocated costs of indirect labor (including hourly wages, overtime, standard bonuses and allocated non-retirement benefits); (b) costs of raw materials and product components, including Additional Tobacco Raw Materials (but only to the extent purchased or supplied by the Manufacturer pursuant to Section 2.6(a)) and the allocated costs to manage inventory levels; (c) the allocated costs of handling and storing raw materials and product components (including with respect to the Customer's Tobacco Leaf (including its Initial Tobacco Leaf Inventory) in the Manufacturer's possession or control) in accordance with Section 2.6(d); (d) allocated utility costs, including electricity, gas, water, sewer, fire sprinkler charges, refuse collection, steam, heat, cooling and any other similar services exclusively serving the Tobaccoville Facility or Greensboro Facility, as applicable; (e) allocated costs for maintenance and repair of facilities and equipment in the ordinary course of business consistent with this Agreement; (f) allocated costs for waste and disposal of raw materials, product components and other items in a manner consistent with the Specifications; (g) allocated costs for complying with applicable Laws and regulations affecting the manufacture of the Products; (h) allocated costs of insurance maintained in accordance with Section 2.7; (i) allocated costs for handling regulatory matters in accordance with Section 2.8; (j) direct costs for quality control measures taken in accordance with Sections 2.3(b) and 2.6(c); (k) allocated fees for obtaining and maintaining necessary Governmental Approvals to manufacture, package and ship the Products; (l) depreciation and amortization expenses over the useful life of applicable facilities and equipment; (m) preparation and transportation of Contingency Equipment to the extent necessary to alleviate an event of Force Majeure; (n) allocated property taxes; (o) Transfer Taxes (but only to the extent paid by the Manufacturer pursuant to Section 9.1(a)); (p) federal and State excise taxes (if any) as set forth in Sections 9.1(b) and 9.1(c); (q) direct costs for preparing Products for loading and shipping; (r) allocated costs for the use of computers, other electronic equipment and software; (s) allocated overhead and administrative costs; (t) costs incurred in obtaining Certifications/Listings in any State that requires the Manufacturer rather than the Customer to obtain such Certifications/Listings in respect of the Customer's Products; and (u) any amount equal to a write-off of raw materials or product components based on instructions of the Customer or for reasons directly attributable to the Customer. All Costs will be calculated on the basis of U.S. generally accepted accounting principles applied on a consistent basis with historical practices for each Cost category. All labor, administrative and overhead Costs, and other allocated Costs that are not directly and exclusively attributable to the manufacture of the Products, will be allocated on an equitable basis in accordance with the principles and methodologies set forth on Exhibits B-1 (with respect to the RAI Products) and B-2 (with respect to the Lorillard Products). Notwithstanding the foregoing, Costs will not include any of the following: (i) costs incurred by the Manufacturer as the result of any breach of its representations, warranties or covenants in this Agreement; (ii) costs incurred by a Party in its capacity as a Customer, including for the purchase of Tobacco Leaf (including the Initial Tobacco Leaf Inventory purchased (Imperial) or retained (RAI) pursuant to the APA or otherwise); (iii) costs for extraordinary or discretionary bonuses, equity-based or equity indexed compensation or other similar compensation; (iv) employee severance costs; (v) costs associated with pensions or other post-retirement benefits; (vi) costs not incurred in the ordinary course of business or not otherwise authorized by this Agreement; (vii) capital expenditures (except as provided in clause (l) above or as otherwise agreed in advance in writing by the Parties);

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(viii) interest expense and other carrying costs related to borrowed funds; (ix) costs or expenses subject to reimbursement to the Manufacturer by a Person other than its Customer; (x) costs or expenses payable to any Affiliate of the Manufacturer, unless on arms-length terms; (xi) any late fees, penalties or similar charges, except to the extent incurred as a result of the Customer's actions or at the Customer's request; (xii) legal fees related to regulatory compliance matters; or (xiii) any tax levied or imposed (or measured by reference to) the net income of the Manufacturer.

"***Customer***" means (a) with respect to the RAI Products, Imperial, and (b) with respect to the Lorillard Products, RAI.

"***Damages***" has the meaning set forth in Section 6.7(a).

"***Direct Claim***" has the meaning set forth in Section 6.7(c).

"***Disclosing Party***" has the meaning set forth in Section 7.1(b).

"***Effective Date***" has the meaning set forth in the Preamble.

"***Force Majeure***" means one or more of the events described in Section 9.6.

"***Governmental Approval***" means any permit, license, approval, qualification, consent or authorization issued by a Governmental Authority.

"***Governmental Authority***" has the meaning given to such term in the APA.

"***Greensboro Facility***" has the meaning set forth in Background Paragraph B.

"***Indemnified Party***" has the meaning set forth in Section 6.7(a).

"***Indemnifying Party***" has the meaning set forth in Section 6.7(a).

"***Initial Tobacco Leaf Inventory***" means (a) with respect to the RAI Products, the RAI Leaf that was acquired by Imperial or its Affiliates pursuant to the APA, and (b) with respect to the Lorillard Products, the Lorillard Leaf that was retained by RAI or its Affiliates pursuant to the APA.

"***Initial Term***" has the meaning set forth in Section 8.1.

"***Intellectual Property***" has the meaning given to such term in the APA.

"***Imperial***" has the meaning set forth in the Preamble.

"***Imperial Migration Plan***" means the plans and timelines for the Manufacturing Migration in respect of the RAI Products as set forth on Exhibit F, which will be reasonably coordinated with the RAI Migration Plan and be designed to minimize, to the extent reasonably possible, inefficiencies and excess capacities at the affected facilities.

"***Law***" means any law, statute, code, ordinance, rule, regulation or other requirement of any Governmental Authority.

"***Lorillard***" has the meaning set forth in Background Paragraph B.

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"***Lorillard Leaf***" has the meaning given to such term in the APA.

"***Lorillard Products***" means, collectively, those products relating to the brands and brand styles identified under the heading "Lorillard Products" on Exhibit A.

"***Long-Term Forecast***" has the meaning set forth in Section 3.1.

"***Manufacturer***" means (a) with respect to the RAI Products, RAI, and (b) with respect to the Lorillard Products, Imperial.

"***Manufacturing Fee***" has the meaning set forth in Section 4.1.

"***Manufacturing Migration***" has the meaning set forth in Section 2.11.

"***Merger Agreement***" has the meaning given to such term in the APA.

"***Migration Machinery***" means such machinery and equipment used by a Manufacturer for the manufacturing or packaging of the Customer's Products, which in connection with the Manufacturing Migration of such Products, is reasonably required for production at the Customer's production facilities, and which (a) with respect to the RAI Products, are set out in the Imperial Migration Plan, and (b) with respect to the Lorillard Products, are set out in the RAI Migration Plan.

"***NAAG***" has the meaning given to such term in the APA.

"***Non-Conforming Products***" means Products that do not conform or comply with the Specifications or that otherwise are manufactured, packaged, stored or packed in breach of the Manufacturer's representations, warranties or obligations in this Agreement.

"***Objection Period***" has the meaning set forth in Section 4.3(c).

"***Packaging***" means containment materials of Products (including containment materials that provide enclosure features of Products) for the purpose of distribution and sale to end consumers (including materials for packages, cartons and cases, as applicable and as the case may be), and including component materials referred to as paper, paper-board, foil, formed metal, molded plastic, closures, labels, films, tear tapes, optional pack inserts and onserts, including all graphics, holographics and printed matter on such materials.

"***Party***" or "***Parties***" has the meaning set forth in the Preamble.

"***Person***" has the meaning given to such term in the APA.

"***Product***" or "***Products***" means any one or more of the RAI Products or the Lorillard Products, as the context requires.

"***Purchase Order***" means a purchase order containing the information specified in Section 3.2(a), as well as the following information about an order for Products in accordance with this Agreement: (a) identity of Products ordered (by SKU); (b) quantity of Products ordered; (c) delivery instructions and required delivery date(s) for the Products; (d) shipping instructions; (e) consignee identification, if any; (f) contact personnel; (g) marking requirements for packing; (h) matters including "bill to" and "sold to", and (i) such other requirements or information as the Customer or the Manufacturer may reasonably specify or require.

"***Recall***" has the meaning set forth in Section 2.8(e).

"***Receiving Party***" has the meaning set forth in Section 7.1(b).

"***Recon***" means reconstituted tobacco sheets used as a raw material for manufacturing the applicable Product and meeting the Specifications for that Product.

"***Renewal Term***" has the meaning set forth in Section 8.1.

"***RAI***" has the meaning set forth in the Preamble.

"***RAI Leaf***" has the meaning given to such term in the APA.

"***RAI Migration Plan***" means the plans and timelines for the Manufacturing Migration in respect of the Lorillard Products as set forth on Exhibit F, which will be reasonably coordinated with the Imperial Migration Plan and be designed to minimize, to the extent reasonably possible, inefficiencies and excess capacities at the affected facilities.

"***RAI Products***" means, collectively, those products relating to the brands and brand styles identified under the heading "RAI Products" on Exhibit A.

"***Sensitive Information***" has the meaning set forth in Section 4.3(a).

"***Short-Term Forecast***" has the meaning set forth in Section 3.2.

"***Specifications***" means (a) with respect to the RAI Products, the specifications and standards historically used by RAI to manufacture the RAI Products at the Tobaccoville Facility immediately prior to the Effective Date (as submitted by RAI to the U.S. Food and Drug Administration), including with respect to the Packaging of the RAI Products, and (b) with respect to the Lorillard Products, the specifications and standards historically used by Lorillard to manufacture the Lorillard Products at the Greensboro Facility immediately prior to the Effective Date (as submitted by Lorillard to the U.S. Food and Drug Administration), including with respect to the Packaging of the Lorillard Products; in each case, including information, specifications and standards for any of the following: (i) ingredients; (ii) compositions or materials; (iii) formulations; (iv) recipes; (v) process conditions; (vi) physical properties, including weight; (vii) chemical properties, including shelf life; (viii) appearance, including size, shape and color; (ix) quality standards or indices; (x) graphics or indicia; (xi) Packaging materials and requirements; (xii) packing processes and materials for shipment; (xiii) storage requirements and guidelines; and (xiv) tolerances relating to any of the foregoing; all as may be amended from time to time by written agreement between the Parties.

"***Standard Costs***" means (a) with respect to the RAI Products, the estimated Costs for each such Product as set forth on Exhibit B-1, and (b) with respect to the Lorillard Products, the estimated Costs for each such Product as set forth on Exhibit B-2; in each case (i) adjusted to account for the fact that the Customer intends to provide (and therefore the Manufacturer will not need to acquire) the Tobacco Leaf for the manufacture of its Products (either as part of the Customer's Initial Tobacco Leaf Inventory or through subsequent procurement) pursuant to Section 2.6(b), and (ii) subject to adjustment pursuant to Section 4.2(b).

"***States***" has the meaning given to such term in the APA.

"***State Settlements***" has the meaning given to such term in the APA.

"***Term***" has the meaning set forth in Section 8.1.

"***Third Party Claim***" has the meaning set forth in Section 6.7(b).

"***Tobacco Leaf***" means tobacco leaf (and resulting tobacco by-products), reconstituted tobacco sheets and tobacco work-in-process (as of the Effective Date) used as raw materials for manufacturing the applicable Product and meeting the Specifications for that Product, excluding any Additional Tobacco Raw Materials.

"***Tobaccoville Facility***" has the meaning set forth in Background Paragraph B.

"***Trade Secret***" means information and data, including Specifications and Sensitive Information, that: (a) derive independent economic value, actual or potential, from not being generally known to the public or other Persons who can obtain economic value from their disclosure and use, and (b) are the subject of efforts that are reasonable under the circumstances to maintain their secrecy.

"***Transfer Taxes***" has the meaning set forth in Section 9.1(a).

"***True-Up Statement***" has the meaning set forth in Section 4.3(a).

ARTICLE 2
MANUFACTURING AND RELATED RESPONSIBILITIES

2.1 Reciprocal Appointments. Imperial hereby appoints RAI as Imperial's exclusive manufacturer of Imperial's requirements for the RAI Products for sale in the States, and RAI hereby appoints Imperial as RAI's exclusive manufacturer of RAI's requirements for the Lorillard Products for sale in the States; provided that, either such Customer may manufacture its own requirements (or any portion thereof) of its Products while implementing its Manufacturing Migration in accordance with Section 2.1(). RAI will not be required to manufacture any product for Imperial other than the RAI Products, and Imperial will not be required to manufacture any product for RAI other than the Lorillard Products.

2.2 Manufacturing Facilities; Workforce; Inspections.

(a) During the Term, (i) RAI agrees to manufacture the RAI Products exclusively at the Tobaccoville Facility in accordance with the Specifications, and (ii) Imperial agrees to manufacture the Lorillard Products exclusively at the Greensboro Facility in accordance with the Specifications. RAI agrees to maintain the Tobaccoville Facility and all equipment used or useful in the manufacture of the RAI Products (and all components thereof) in good, clean, safe and hygienic condition and repair (subject only to normal wear and tear and casualty events), in each case, as is necessary to continue to manufacture the RAI Products in accordance with the Specifications throughout the Term. Imperial agrees to maintain the Greensboro Facility and all equipment used or useful in the manufacture of the Lorillard Products (and all components thereof) in good, clean, safe and hygienic condition and repair (subject only to normal wear and tear and casualty events), in each case, as is necessary to continue to manufacture the Lorillard Products in accordance with the Specifications throughout the Term. Subject to Section 2.3(d), each Manufacturer agrees to maintain production capacity at the Tobaccoville Facility or Greensboro Facility, as applicable, to manufacture the applicable Products in the volumes projected in the most-recently provided Short-Term Forecast for such Products, subject to the limitations set forth in Section 2.2(a).

(b) During the Term, each Manufacturer agrees to employ a sufficient workforce with the requisite ability, experience, expertise and licensure to manufacture the Products in accordance with the Specifications and other requirements of this Agreement.

(c) Representatives of each Customer may, upon reasonable notice and at times and frequencies reasonably acceptable to the applicable Manufacturer, visit and inspect the Tobaccoville Facility or Greensboro Facility, as the case may be, where the Products are being manufactured, packaged and stored. Each Customer will bear its own expenses with regard to any such visits, unless otherwise agreed by the Parties. If requested by any Customer, the relevant Manufacturer will cause appropriate individuals working on the activities relating to this Agreement to be available for meetings during any such visit and inspection. The visitation and inspection rights covered by this Section 2.2(c) include the right to inspect all inventory of the Products, the manufacturing, packaging and storage facilities and processes relating to the manufacture, packaging and storage of the Products (including quality control measures) and the machinery, equipment and materials used in all such processes (including the storage and handling of the Customer's Initial Tobacco Leaf Inventory or subsequently procured Tobacco Leaf for Additional Tobacco Raw Materials). Each Customer will be responsible for ensuring that its representatives abide by all of the Manufacturer's standard rules and procedures with regard to safety, regulatory compliance, security, personnel matters, confidentiality, computer use and computer network use while at the Manufacturer's facilities. In addition, each Customer will be responsible for ensuring that its representatives refrain from actions and conduct that materially interferes with the Manufacturer's business and operations, and will instruct such representatives not to conduct unauthorized activities at the Manufacturer's facilities or otherwise. Notwithstanding the foregoing, however, if a Manufacturer is then in breach of any of its representations, warranties or covenants in this Agreement (or the Customer has a reasonable basis to assert any such breach), then the Customer may visit and inspect the Manufacturer's facility on 24 hours' notice and, in the event of such breach, the costs and expenses of such visit and inspection will be the responsibility of the Manufacturer.

Decision and Order

2.3 **Specifications**.

(a) The Specifications for the RAI Products are set forth on Exhibit C-1, and the Specifications for the Lorillard Products are set forth on Exhibit C-2.

(b) During the Term, the Manufacturer will use the same quality control measures as were used in connection with the manufacture of the Products immediately before the Effective Date, or such other quality control standards as the Manufacturer may elect to apply, subject to the approval of the Customer, which approval may not be unreasonably withheld or delayed.

(c) If a Customer desires to modify the Specifications for one or more of its Products, then such Customer will inform the Manufacturer in writing of such desired modifications. The Manufacturer will reasonably cooperate with all such desired modifications; provided that the Manufacturer will not be required to make any modifications (i) if, in the good faith judgment of the Manufacturer, such modifications would unreasonably interfere with the manufacture of its own products, (ii) that require capital expenditures or other costs that would not be fully reimbursed by the Customer to the reasonable satisfaction of the Manufacturer, or (iii) if a Governmental Approval is required for such modifications, if such Governmental Approval has not yet been obtained.

(d) The Parties acknowledge that, in order for a Manufacturer to meet its obligations under this Agreement, the Manufacturer will, from time to time, carry out customary maintenance activities on the Tobaccoville Facility and its equipment or Greensboro Facility and its equipment, as applicable, to ensure that manufactured Products and the manufacturing process in respect thereof continue to conform to their Specifications. The Manufacturer agrees to schedule such maintenance activities in a manner that does not unreasonably disrupt manufacturing or delivery schedules.

(e) The Parties will cooperate with one another (and relevant third Persons) to ensure that each Party is provided with relevant information regarding the physical and chemical properties (including toxicological information) of raw materials, equipment, manufacturing processes and conditions and other processes that a Manufacturer may employ when producing Products. If requested by a Customer, the Manufacturer will provide samples of Products or raw materials, at the times and in the amounts reasonably requested, to the Customer or its designee for testing and evaluation against the Specifications, whether in connection with a Manufacturing Migration or otherwise. Any change to raw material, equipment (routine/preventive maintenance and ordinary wear and tear excepted), manufacturing processes or conditions or other matters that may affect the Products (or the Specifications for the Products) must be approved in writing by the Customer before implementation by the Manufacturer.

2.4 **Contingency Equipment**. Each Party agrees to retain throughout the Term all equipment designated by that Party for "contingency requirements" and in such Party's possession as of the Effective Date (collectively, "***Contingency Equipment***"). Each Party will maintain its Contingency Equipment in good condition and repair. The Parties acknowledge that Contingency Equipment must be used, to the greatest extent possible, to alleviate an event of Force Majeure or to otherwise assist the Parties in achieving a successful Manufacturing Migration. Each Party's inventory of Contingency Equipment is identified (specifically or by category) under such Party's name on Exhibit D.

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2.5 **Packaging**. Each Customer will be responsible for ensuring that the Specifications for the Packaging used on its Products are such that the Packaging bears markings as required by applicable Laws and Governmental Approvals.

2.6 **Raw Materials; Tobacco Leaf Inventory**.

(a) Subject to Section 2.6(b), and unless otherwise agreed between a Manufacturer and its Customer, the Manufacturer will purchase and be responsible for supplying the raw materials and product components that are to be used by it in manufacturing and packaging the Customer's Products in accordance with the Specifications, including any Additional Tobacco Raw Materials.

(b) Notwithstanding anything to the contrary in Section 2.6(a), and unless otherwise agreed between a Manufacturer and its Customer, the Customer will be responsible for procuring the Tobacco Leaf to be used in the manufacture of its Products, which will initially be comprised of that Customer's Initial Tobacco Leaf Inventory. Throughout the Term, the Customer will retain exclusive title to any raw materials or product components that it procures and provides to the Manufacturer for the manufacture of such Customer's Products, including all of such Customer's Tobacco Leaf (including its Initial Tobacco Leaf Inventory), and at no time will title thereto transfer to the Manufacturer even though the Manufacturer will possess or control such materials at its facilities and will be responsible for insuring such materials in accordance with Section 2.7 and have the risk of loss with respect to such materials in accordance with Section 5.2. In addition, in the event that a Customer procures any raw materials or product components (in addition to its Tobacco Leaf) necessary for the manufacture of its Products by the Manufacturer, the Manufacturer and the Customer will cooperate in good faith to equitably adjust the Standard Costs for the Products into which those raw materials or product components are incorporated for the purpose of the Manufacturer's relevant invoice or invoices prepared pursuant to Section 4.2. Unless otherwise agreed between the Manufacturer and the Customer, the Manufacturer will be solely responsible for purchasing, receiving, storing, maintaining, using and disposing of all raw materials and product components, in each case, in accordance with the Specifications or, if not addressed by the Specifications, as set forth in this Agreement or as otherwise reasonably instructed by the Customer.

(c) The Manufacturer will inspect raw materials and product components to be used in manufacturing its Customer's Products using the same inspection measures that were used in connection with the manufacture of the Products immediately before the Effective Date or such other inspection measures as are mutually agreed upon by the Manufacturer and its Customer. The Manufacturer will promptly notify the Customer in the event that the Manufacturer's inspections of raw materials or product components identify any quality or quantity issues and, to the extent practicable, consult with the Customer in addressing those issues with the supplier.

(d) The Manufacturer agrees to receive, care for and store all raw materials and product components, including its Customer's Tobacco Leaf (including its Initial Tobacco Leaf Inventory) and any other raw materials or product components procured by such Customer for use in the manufacture of its Products by the Manufacturer, in accordance with the Specifications and, if not addressed in the Specifications, then in accordance with the same standards used to receive, care for and store its own raw materials and product components and, in any event, in a commercially reasonable manner.

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(e) Each Manufacturer will (i) maintain a sufficient supply of raw materials and product components to meet each Customer's Short-Term Forecast in a timely manner (but will not be responsible for the level of supply of any such raw materials or product components that the Customer has elected to source directly pursuant to Section 2.6(a) or 2.6(b)), and (ii) use commercially reasonable efforts to avoid holding raw materials or product components materially in excess of the levels called for by such Short-Term Forecast; provided that, the foregoing requirements will not apply to Tobacco Leaf procured by a Customer for use in the manufacture of its Products by the Manufacturer (including the Customer's Initial Tobacco Leaf Inventory), it being understood that if such Customer's Initial Tobacco Leaf Inventory is insufficient to complete production of the applicable Products during the entire Term, that Customer will procure additional Tobacco Leaf meeting the Specifications for such Products and in accordance with Section 2.6(b). Each Customer and its Manufacturer will communicate to ensure that the Manufacturer has enough inventory and that both Parties have accurate information regarding inventory levels and requirements.

2.7 Insurance. Each Manufacturer will maintain throughout the Term with financially sound and reputable carriers insurance in such amounts and against such risks (including loss or damage by fire and loss in transit; theft, burglary, larceny and other criminal activities; business interruption; and general liability) and such other hazards as is customarily maintained by companies engaged in the same or similar businesses operating in the States. Upon request, each Manufacturer will furnish to the requesting Party information in reasonable detail as to the insurance so maintained. In addition to the foregoing, each Manufacturer will insure its Customer's Tobacco Leaf (including its Initial Tobacco Leaf Inventory) in such Manufacturer's possession or control as it customarily maintains on its own raw materials inventory.

2.8 Cooperation on Regulatory Matters.

(a) Each Party agrees to cooperate with any reasonable requests for assistance from the other Party with respect to (i) obtaining and maintaining any and all Governmental Approvals (including taking the actions described on Exhibit E), (ii) responding to requests for information from any and all Governmental Authorities, and (iii) complying with any and all applicable Laws required in connection with the relevant Product or this Agreement, including at each such Party's own cost, the following: (I) making its employees, consultants and other staff available upon reasonable notice during normal business hours to attend meetings with Governmental Authorities concerning the manufacturing process, equipment and machinery, raw materials and product components and Products; and (II) disclosing and making available to the other Party, in whatever form such Party may reasonably request, all information relating to the relevant Product, in each case, as is reasonably necessary or desirable to prepare, file, obtain and maintain any such Governmental Approval of the Product in the States. 1

1 Note: Notices / applications for Governmental Approvals to be filed in advance of Effective Date after execution of APA.

(b) Each Manufacturer agrees, to the extent that any State requires the Manufacturer rather than the Customer to obtain a Certification/Listing in the State, to obtain and maintain such Certification/Listing during the Term, including taking any actions in connection therewith as set forth in the APA.

(c) Each Manufacturer will promptly notify its Customer in writing of, and will provide such Customer with copies of, any correspondence and other documentation received by the Manufacturer from a third Person in connection with any of the following events: (i) any inspection or audit of such Manufacturer's facility by or on behalf of any Governmental Authority; (ii) receipt of a communication (oral or written), regulatory letter, warning, inquiry, request for information or similar item from or on behalf of any Governmental Authority in connection with, or related to, the Customer's Products, any such inspection or audit of the manufacture of the Customer's Products or any other activity conducted as part of the manufacturing process for such Products; (iii) receipt of any regulatory comments relating to the manufacture of the Customer's Products requiring a response or action by any Party or notice of any safety or toxicity issue regarding the Customer's Products; (iv) test results that indicate failure of any of the Customer's Products to meet the Specifications; (v) receipt of any communication (oral or written) regarding a Certification/Listing related to the Customer's Products; or (vi) receipt of any communication (oral or written), regulatory letter, warning, inquiry, request for information or similar item from NAAG, a State, or any other party to the State Settlements related to the Customer's Products that concerns any alleged violation or potential violation with respect to such Products.

(d) Each Manufacturer will (i) notify its Customer by telephone of any notice that the Manufacturer receives, or any knowledge that the Manufacturer otherwise acquires, of an event or complaint that asserts any material environmental or human health and safety concerns or risks (excluding inherent risks associated with the Products themselves) in respect of the Customer's Products no later than the second business day following the Manufacturer's receipt of such notice or its acquisition of such knowledge, as the case may be, and (ii) provide its Customer with copies of any written materials received in connection with or as part of any such report not later than the second business day following the Manufacturer's receipt thereof.

(e) Each Party will promptly notify the other Party in writing if such first Party believes that a recall, field alert, Product withdrawal or field correction (each, a "***Recall***") of a Customer's Product may be necessary or advisable. With respect to implementing any Recall, or otherwise dealing with any Recall in any respect, the Customer will make all contacts with the applicable Governmental Authorities and will be responsible for coordinating, managing and controlling all of the necessary activities in connection with any such Recall; provided that, the Manufacturer may take any action it deems reasonably necessary in order to comply with applicable Law. The Manufacturer will cooperate with any reasonable requests for assistance

from its Customer with respect to considering or implementing a Recall. The Manufacturer will not, and will ensure that its Affiliates do not, issue any press release or make any public statement regarding any Recall in respect of its Customer's Products without the prior written consent of that Customer. The Customer will review and investigate with the Manufacturer the relevant facts underlying any issues related to the Manufacturer that may result in a Recall prior to implementing it (to the extent reasonably practicable). The Customer will bear the costs and expenses of each Recall, unless the Manufacturer is obligated to indemnify the Customer for such costs and expenses pursuant to Section 6.7, in which case, in addition to and not in limitation of, any rights the Customer may have under this Agreement (including Section 6.7) or applicable Laws: (i) the Customer will continue to manage, coordinate and control the Recall and any and all of the necessary activities in connection with such Recall; and (ii) the Manufacturer will promptly reimburse the Customer for any and all documented costs reasonably incurred by the Customer with respect to such Recall, including associated retrieval of Product, returns of Product, destruction of Product, replacement of Product, and fees and penalties owed to third Persons (but excluding personnel and overhead costs incurred by the Customer internally).

2.9 **Limited License for Intellectual Property**.

(a) Each Customer hereby grants (or will cause its Affiliates holding any applicable Intellectual Property to grant) to its Manufacturer a fully paid-up, non-exclusive, non-transferrable, non-sublicensable license to use such of the Customer's (or its Affiliate's) Intellectual Property in respect of the Products solely as is necessary to enable the Manufacturer to perform its obligations under this Agreement with respect to the manufacture and packaging of the Products on behalf of the Customer. Each Manufacturer will treat, use and apply that Intellectual Property in respect of the Products only in strict compliance with any limitations, restrictions and instructions that may be prescribed by the Customer, through the Specifications or otherwise. The Manufacturer is not entitled to use the Intellectual Property in respect of the Products in any other manner without the prior written consent of the Customer.

(b) The Parties acknowledge and agree that any Intellectual Property relating exclusively to each Customer's Products which arises from the manufacture of such Customer's Products, or the performance of any other obligations in relation to such manufacture, under this Agreement or otherwise, will vest in the respective Customer (or any of its designated Affiliates). Each Party acknowledges and agrees that if and to the extent that any Intellectual Property relating exclusively to a Customer's Product unintentionally vests in the Manufacturer (or any of its Affiliates), the Manufacturer will, and will cause any such Affiliates to, at no cost to the Customer, transfer the full, right, title and interest in such Intellectual Property to the Customer (or its Affiliates).

2.10 **Project Teams**. Promptly after the Effective Date, each Party will designate a project team of its primary contact individuals for purposes of this Agreement, each of which must include representatives reasonably acceptable to the other Party and which may include different team members when the Party is acting as a Customer and when it is acting as a Manufacturer. Each Party will be entitled to change the members of its project team, and will notify the other Party of any such changes. Each Party's project team will serve as the primary point of contact between the Parties for purposes of the transactions covered by this Agreement,

and will be primarily responsible for facilitating the flow of information and otherwise promoting communication, coordination and collaboration between the Parties. The project teams will conduct regular telephone, video conference or in-person meetings as deemed necessary or appropriate to exchange information regarding the transactions covered by this Agreement, and at a minimum, the project teams will conduct monthly meetings to discuss general operations under this Agreement, including matters concerning the Products, the status of each Customer's Manufacturing Migration, Long-Term Forecasts, Short-Term Forecasts, inventory levels (including the levels of applicable Tobacco Leaf and Additional Tobacco Raw Materials), materials sourcing, quality control, Cost mitigation and any disputes or controversies affecting a Party's rights or obligations under this Agreement. All disputes and controversies, or other issues, identified by the project teams during any such meetings will be promptly evaluated, addressed and remedied as soon as commercially reasonable.

2.11 **Transition to Customer Manufacturing**. The Parties acknowledge that the arrangements contemplated by this Agreement are intended to be temporary in nature and last (a) with respect to the appointment of RAI as the manufacturer of Imperial's requirements for the RAI Products, for such time as anticipated in the Imperial Migration Plan, or if later, until such time as Imperial, in its reasonable judgment, has determined that it is prepared and capable of manufacturing (or having manufactured) the RAI Products on its own, and (b) with respect to the appointment of Imperial as the manufacturer of RAI's requirements for the Lorillard Products, for such time as anticipated in the RAI Migration Plan, or if later, until such time as RAI, in its reasonable judgment, has determined that it is prepared and capable of manufacturing (or having manufactured) the Lorillard Products on its own (each, a "***Manufacturing Migration***"). Each Customer will use its commercially reasonable efforts to effect a Manufacturing Migration, and each Manufacturer agrees to reasonably cooperate with its Customer to facilitate such Customer's Manufacturing Migration, in each case, in accordance with the RAI Migration Plan or the Imperial Migration Plan, as the case may be, unless otherwise agreed in writing between the Parties. In connection with a Manufacturing Migration, the Manufacturer will, on the reasonable request of the Customer, allow for the reasonable use of the Manufacturer's Migration Machinery, and provide reasonable manufacturing assistance, for purposes of ensuring, to the reasonable satisfaction of the Customer, that its products are identical to the Customer Products as produced by the Manufacturer. Each Customer will use its commercially reasonable efforts, but will not be required, to achieve a Manufacturing Migration as soon as practicable after the Effective Date and, in any event, will endeavor to achieve a Manufacturing Migration before the expiration of the Initial Term.

ARTICLE 3
FORECASTS AND PURCHASING

3.1 **Long-Term Forecasts**. Commencing on the Effective Date, each Customer will begin providing each Manufacturer on a monthly basis with rolling 12-month forecasts for projected volumes of Products (by SKU) for which such Customer expects to place Purchase Orders during the covered period (each, a "***Long-Term Forecast***"). The initial Long-Term Forecasts for RAI and Imperial are attached as Exhibits G-1 and G-2, respectively. Each subsequent Long-Term Forecast must be delivered at least five days before the first day of the first month of the covered 12-month period. Each Long-Term Forecast must be prepared for the relevant Products in a manner consistent with the practices used to forecast consumer demand for

such Products for the 12-month period (approximated as necessary) ending immediately prior to the Effective Date, after giving effect to any production by the Customer in progressing towards a Manufacturing Migration or otherwise, provided that, a Customer may modify its practices for forecasting consumer demand for purposes of preparing its Long-Term Forecasts, subject to the approval of its Manufacturer, which approval may not be unreasonably withheld or delayed. Each Long-Term Forecast will be non-binding and will be used solely for general planning and inventory control purposes.

3.2 Purchase Orders; Short-Term Forecasts and Related Matters.

(a) From time to time during the Term, each Customer, in its sole discretion, may issue (or have issued on its behalf) one or more Purchase Orders to the Manufacturer. Unless the Parties otherwise agree, each Customer will place one Purchase Order per four-week period, which will set forth (i) a binding order for Products for a four-week period, and (ii) a non-binding forecast of orders for the succeeding three-month period (each such three-month forecast, a "***Short-Term Forecast***"), which will supersede any inconsistent portion of the Customer's Long-Term Forecast and any prior Short-Term Forecast covering the same period, provided that, each Customer will issue its initial Purchase Order hereunder as of or in anticipation of the Effective Date. Each Purchase Order may designate multiple delivery dates for Products, and (except for each Customer's initial Purchase Order) must be received by the Manufacturer at least 28 days before the first delivery date stated therein. Each Manufacturer will schedule the production of Products based on the Short-Term Forecasts, as long as such Short-Term Forecasts are not materially inconsistent with the corresponding Long-Term Forecast or the immediately preceding Short-Term Forecast covering the same period. Any terms of a Purchase Order, sales order, invoice or other similar transaction document that are inconsistent with the terms of this Agreement will have no force or effect.

(b) Notwithstanding anything to the contrary in Section 3.2(a), a Manufacturer will be entitled (but not obligated) to reject, in whole or in part, any Purchase Order if, and only if: (i) the Purchase Order would require the Manufacturer to use raw materials or product components (A) at levels materially in excess of the levels required for the production reflected for the four-week order period in the most-recently delivered Short-Term Forecast, or (B) that the Customer agreed to procure pursuant to Section 2.6(a) or 2.6(b), but which have not yet been provided (it being understood that such right of rejection will apply only to that portion of the Purchase Order for which raw materials or product components are unavailable and, to the extent applicable, Section 3.2(c) will apply); (ii) the Products cannot be timely delivered due to modifications to be made to the manufacturing process in respect of a Product as a result of a change in Specifications requested by the Customer; (iii) the production in accordance with the Purchase Order would, in the Manufacturer's good faith belief based on credible evidence, violate any applicable Law; or (iv) an event of Force Majeure with respect to the Manufacturer has occurred (it being understood that such right of rejection will apply only until such time as the event of Force Majeure has been alleviated). To reject a Purchase Order, in whole or in part, the Manufacturer must promptly (and, in any event, within two business days after receiving the Purchase Order) notify the Customer in writing, which notice must include (A) a statement regarding what portion of the Purchase Order (if any) will be filled, (B) if applicable, any alternative delivery date(s) proposed in accordance with Section 3.2(c), and (C) a reasonably detailed description of the circumstances giving rise to one or more of the events described

above entitling the Manufacturer to so reject, in whole or in part, the Purchase Order. If the Manufacturer fails to timely notify the Customer of the Manufacturer's rejection of a Purchase Order (or any portion thereof), such Purchase Order (or the portion that has not been timely rejected) will be deemed to have been accepted by the Manufacturer.

(c) The Parties acknowledge that there may be occasions when a Purchase Order deviates materially from the forecasted purchase volumes for the four-week order period in the immediately preceding Short-Term Forecast and, as a result, the Manufacturer may be required to make adjustments to its production schedule to meet the requested delivery date(s). In any such circumstance, the following will apply:

(i) If the Purchase Order exceeds the forecasted purchase volumes for that four-week order period from the immediately preceding Short-Term Forecast, then the Manufacturer determines that it cannot fill any portion of a Purchase Order by the specified delivery date(s), then the Manufacturer will promptly (and, in any event, within two business days after receiving the Purchase Order) notify the Customer in writing and propose alternative delivery date(s) for the Products (or any portion thereof). In any such case, the Parties will negotiate in good faith towards revised delivery date(s), and will confirm any new delivery date(s) in writing. If the Manufacturer does not object to the original delivery date(s) stated in the Purchase Order, then such date(s) will become firm delivery date(s), and the Manufacturer will be responsible for delivering the Products on time in accordance with the Purchase Order, even though the Purchase Order may have deviated materially from forecasted purchase volumes for that four-week period in the Long-Term Forecast or Short-Term Forecast.

(ii) The Manufacturer will be entitled to quantify the Cost impact of any such positive or negative adjustments in its production schedule, and the Parties will work together in good faith to mitigate any such Costs. Subject to the foregoing obligation to mitigate Costs, the Manufacturer will be entitled to reimbursement for any Cost impact that results from any such adjustments in its production schedule, which Costs will be deemed Actual Costs hereunder.

ARTICLE 4
PRICING, INVOICING AND INSPECTION OF PRODUCTS

4.1 Cost Plus Pricing. Unless otherwise agreed between the Manufacturer and the Customer in writing, the price for Products will equal the sum of (x) the Costs of such Products, plus (y) ten percent (such percentage, the "***Manufacturing Fee***").

4.2 Invoicing Procedures; Standard Costs.

(a) Each Manufacturer will invoice its Customer on a monthly basis for all Products shipped under Purchase Orders during the preceding month and, because the Parties recognize that it may be impracticable for the Manufacturer to calculate its Actual Costs on a monthly basis, each such invoice will reflect the Manufacturer's Standard Costs (instead of its Actual Costs) for the covered Products. Each invoice will be delivered by the tenth calendar day of the month immediately following the month it covers and will be due and payable by the Customer within five days of receipt.

(b) Each Manufacturer may propose to modify its Standard Costs for any calendar year during the Term to reflect its good faith estimate of Actual Costs for that calendar year by providing written notice of such modifications to its Customer by no later than October 1st of the preceding calendar year. Any such proposal will require the approval of the Customer, which will not be unreasonably withheld or delayed. As soon as practicable after the Parties agree to modify a Manufacturer's Standard Costs as set forth in this Section 4.2(b), the Parties will update Exhibits B-1 and/or B-2, as applicable, to reflect the same.

4.3 Invoice Adjustments.

(a) As soon as practicable (and, in any event, within 90 days) after every sixth invoice delivered by a Manufacturer hereunder (i.e., approximately every six months during the Term), and as soon as practicable (and, in any event, within 90 days) after the expiration or termination of a Manufacturer-Customer relationship hereunder in accordance with ARTICLE 8, the Manufacturer will deliver to its Customer a statement (a "***True-Up Statement***") reflecting the Manufacturer's calculation of Costs actually incurred by it ("***Actual Costs***") with respect to the Products for which previous invoices were delivered pursuant to Section 4.2 and which had not yet been subjected to adjustment pursuant to this Section 4.3(a). In delivering its calculation of Actual Costs, the Manufacturer will provide reasonable substantiation of its calculations, but will only share itemized calculations or provide detailed substantiation with respect to Actual Costs that it deems to be competitively sensitive, including Actual Costs for Tobacco Leaf, Additional Tobacco Raw Materials, other tobacco components, paper and wrapping materials, filter tow and other filter materials and direct labor (collectively, "***Sensitive Information***") with a group of individuals designated by the Customer for the purpose of receiving such Sensitive Information, and who are reasonably acceptable to the Manufacturer and who agree to maintain the confidentiality of such Sensitive Information and not to disclose it to any third Person or to the Customer outside of such designated group.

(b) The Manufacturer must calculate its Actual Costs in accordance with the principles and methodologies (including any assumptions and limitations, as well as rules for the allocation of indirect Costs) described on Exhibits B-1 (with respect to the RAI Products) and B-2 (with respect to the Lorillard Products). The Parties will discuss in good faith any required changes in the principles and methodologies for determining Actual Costs (and, to the extent applicable, Standard Costs) at least 60 days before such changes are implemented.

(c) The Customer will have 30 days from the date it receives a True-Up Statement in which to review it (the "***Objection Period***"). If, in the Customer's good faith judgment, the True-Up Statement does not fairly present the Manufacturer's Actual Costs for the covered invoices, then the Customer will have the right to propose an adjustment to those Actual Costs (or any component thereof) within such Objection Period. Any such proposed adjustment must be in writing (an "***Adjustment Notice***") and must specify (i) the amount of the proposed adjustment, (ii) the item to which such proposed adjustment relates, and (iii) the facts and circumstances supporting the reasonableness of such adjustment. Upon the submission of any Adjustment Notice, the Manufacturer and the Customer will work together in good faith in an attempt to agree on the disputed values, but without disclosing any Sensitive Information outside of the group of individuals designated to receive such information pursuant to Section 4.3(a). If any such dispute is not resolved within 30 days after the Manufacturer's receipt of an

Adjustment Notice, then either Party may submit the dispute for resolution by an independent, nationally recognized firm of certified public accountants (an "***Accounting Firm***"). The decision of the Accounting Firm as to the resolution of the dispute will be conclusive and binding on the Parties. The fees and expenses of the Accounting Firm will be divided equally between the Manufacturer and the Customer. The Accounting Firm will at all times (A) give the Parties a reasonable opportunity to make written representations and to require that copies of any written representations are supplied to the other Party without delay, (B) make its determination as soon as reasonably practicable, and (C) make its determination available in writing to both Parties. If the Customer fails to submit an Adjustment Notice within the Objection Period, then the Customer will be deemed to have accepted the True-Up Statement and the Manufacturer's calculation of Actual Costs therein.

(d) Based on the Manufacturer's Actual Costs for the covered invoices (as finally determined in accordance with this Section 4.3), the following adjustments will be made:

(i) If the Manufacturer's Actual Costs are less than the Standard Costs (adjusted to account for any agreements between the Parties pursuant to Section 2.6(a) or 2.6(b)) for the same invoices, then the Manufacturer will pay the Customer the amount of such difference, plus an amount equal to the Manufacturing Fee thereon.

(ii) If the Manufacturer's Actual Costs are greater than the Standard Costs (adjusted to account for any agreements between the Parties pursuant to Section 2.6(a) or 2.6(b)) for the same invoices by no more than ten percent of such Actual Costs (the "***Cost Cap***"), then the Customer will pay the Manufacturer an amount equal to the difference between such Actual Costs and such Standard Costs, plus an amount equal to the Manufacturing Fee thereon.

(iii) If the Manufacturer's Actual Costs are greater than the Standard Costs (adjusted to account for any agreements between the Parties pursuant to Section 2.6(a) or 2.6(b)) for the same invoices by more than the Cost Cap, then such invoices will be automatically adjusted downward such that the Manufacturer's Actual Costs do not exceed such Standard Costs by more than the Cost Cap, and the Customer will pay the Manufacturer an amount equal to the difference between such Actual Costs (as adjusted to reflect the Cost Cap) and such Standard Costs, plus an amount equal to the Manufacturing Fee thereon.

(e) Any payments required to be made under Section 4.3(d) will be made within five business days of the later of: (i) the expiration of the Objection Period, (ii) the date on which the Manufacturer and the Customer agree on the Actual Costs for the covered invoices, and (iii) the date of which the decision of the Accounting Firm is rendered.

4.4 Payments. Unless otherwise agreed between the Parties, all payments made under this ARTICLE 4 will be made, without set off, by wire transfer of immediately available funds to the account designated by the payee. All payments will be made in U.S. dollars. All payments made by a Customer for Products will be deemed made without prejudice to any rights that the Customer may have under this Agreement, and will not constitute acceptance of Products or otherwise affect the Customer's rights with respect to Non-Conforming Products.

4.5 Inspection and Approval of Products; Rejection of Non-Conforming Products. Upon receipt of the Products at the destination point, the Customer will have the right to inspect and approve for acceptance those Products. Such inspection and approval must be made within 30 days of delivery. If the Customer fails to timely notify the Manufacturer of the Customer's rejection of the Products, the Customer will be deemed to have accepted those Products as conforming. The Customer may reject and refuse acceptance of any Non-Conforming Products. Upon discovery of any Non-Conforming Products, the Customer will promptly (and, in any event, before expiration of the 30-day inspection period) inform the Manufacturer in writing, setting forth in reasonable detail the reasons why the Products should be characterized as Non-Conforming Products. Within ten days after receiving such a notice, the Manufacturer may contest the rejection and provide documentation and other evidence relating to the quality of the applicable Products. The Manufacturer may also inspect the Products and collect a representative sample thereof for testing and analysis. Thereafter, the Parties will confer in good faith to resolve the controversy. If any Products are finally deemed to be Non-Conforming Products, they will be destroyed or otherwise handled pursuant to the Customer's instructions, at no cost to the Customer. The Customer will not be responsible for any payment for Non-Conforming Products (and in the event that the Customer has paid for those Non-Conforming Products, the Customer will be entitled, at the Customer's election, to a credit for or refund of that payment). If the Customer requests that the Manufacturer replace or correct any Non-Conforming Products, the Manufacturer will be responsible for promptly remanufacturing, substituting or otherwise correcting those Non-Conforming Products, and for supplying remanufactured or corrected Products at no cost to the Customer.

4.6 Audit Rights. Each Party agrees to maintain accurate and complete books and records regarding its activities under this Agreement, including correspondence, instructions, invoices, receipts, quality assurance records, Specifications, Purchase Orders, raw materials and component procurement records, warehousing records and cost data, transportation records and cost data, other manufacturing cost records and data (including calculations and supporting documentation for Actual Costs, whether or not deemed to be Sensitive Information), and similar documents and data relating to the manufacture, purchase and sale of Products from a Manufacturer to a Customer hereunder. Each Party agrees to keep such records in sufficient detail to enable the other Party to determine or verify such Party's compliance with this Agreement. Each Party will keep such records for a period of time as determined by its normal document retention policies, but in any event not less than three years after the date of the transaction to which those records relate, or longer if required by Law. Notwithstanding the foregoing, before a Manufacturer destroys any records relating to the Products it has manufactured for its Customer, it must notify that Customer in writing and allow that Customer a reasonable opportunity to make copies of those records (other than records containing Sensitive Information) before they are destroyed. In addition to the visitation and inspection rights set forth in Section 2.2(b), during regular business hours and upon not less than five business days written notice, each Party will permit each other Party (and its representatives), at such other Party's cost and expense, to examine and audit all of the first Party's books and records relating to its activities under this Agreement, in each case, to the extent necessary for the Party(ies) to make the foregoing determination and verification and subject to restrictions implemented in good faith to (a) ensure compliance with applicable Law, (b) preserve any applicable privilege (including the attorney-client privilege), or (c) comply with any applicable contractual confidentiality obligations; provided that, if any Party is then in breach of any of its

representations, warranties or covenants in this Agreement (or one or more of the other Party has a reasonable basis to assert any such breach), then any such audit will be permitted upon 24 hours' notice and if a breach is confirmed, the costs and expenses of the audit will be the responsibility of the breaching Party; and, provided, further that, with respect to any audit that would involve the disclosure of a Party's Sensitive Information, the other Party may only conduct such audit through (i) the group of individuals designated as permitted to receive such information pursuant to Section 4.3(a), or (ii) a legal representative or independent accountant who has agreed to (A) analyze such information solely for the purpose of advising the Parties with respect to compliance with this Agreement and (B) maintain the confidentiality of such information and not disclose it to any of the Parties.

ARTICLE 5
SHIPPING TERMS

5.1 Shipping Terms.

(a) Unless otherwise agreed in writing between the Parties, (i) RAI will make available for collection all RAI Products, as specified in Purchase Orders submitted by Imperial, F.O.B. (shipping point), the Tobaccoville Facility, and (ii) Imperial will make available for collection all Lorillard Products, as specified in Purchase Orders submitted by RAI, F.O.B. (shipping point), the Greensboro Facility. Each Manufacturer will ship Products (A) on a first in / first out basis as determined by the date of manufacture, (B) using a commercial common carrier selected by the Customer, and (C) unless otherwise agreed in writing with its Customer, to the Customer's central distribution center. The Manufacturer will be responsible for all necessary shipping documentation relating to the Products and for arranging loading.

(b) For information purposes only, Exhibit H sets forth a description of the flow of finished Products from the Manufacturer to the Customer.

5.2 Title and Risk of Loss. Title to, and risk of loss for, the Products (and all components thereof) will transfer to the Customer once the Products are loaded by the Manufacturer on the common carrier's conveyance at the shipping point; provided that, title to raw materials, product components and other items procured by the Customer for the manufacture of such Customer's Products pursuant to Section 2.6(a) or 2.6(b), including such Customer's Tobacco Leaf (including its Initial Tobacco Leaf Inventory), will remain with that Customer, while the risk of loss with respect to those items will remain with the Manufacturer while they are in the Manufacturer's possession or control until such time as they are delivered F.O.B. (shipping point) to the Customer as part of finished Products or otherwise. The Manufacturer will transfer title to the Products (and all components thereof) to the Customer free and clear of any and all liens, security interests, claims and other encumbrances.

5.3 Packing for Transport. Each Manufacturer will be responsible for proper packing of the Products for delivery to the Customer's specified destination within the States. All such packing and packing materials must (a) comply with handling, weight and safety requirements, in each case, in accordance with the Specifications or, if not addressed by the Specifications, as reasonably instructed by the Customer, and (b) be adequate to withstand the normal rigors of shipping, storage and distribution, and prevent damage and/or deterioration of Products prior to arrival at the specified destination.

Decision and Order

ARTICLE 6
REPRESENTATIONS, WARRANTIES, COVENANTS AND INDEMNITY

6.1 Warranties and Disclaimer of Warranties. EACH MANUFACTURER REPRESENTS AND WARRANTS THAT PRODUCTS MANUFACTURED AND PACKAGED BY IT PURSUANT TO THIS AGREEMENT WILL BE MANUFACTURED, PACKAGED AND SHIPPED IN CONFORMITY WITH THE APPLICABLE SPECIFICATIONS AND THE PACKING AND SHIPPING REQUIREMENTS OF THIS AGREEMENT. ANY MEASURES TAKEN TO REMEDY NON-CONFORMANCE WITH THIS REPRESENTATION AND WARRANTY WILL BE AT THE MANUFACTURER'S SOLE COST AND EXPENSE. SUBJECT TO THE FOREGOING, PRODUCTS SUPPLIED BY THE MANUFACTURER ARE PROVIDED "AS IS" AND WITHOUT ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR ANY PARTICULAR PURPOSE.

6.2 Limitation of Remedies, Liability and Damages. NO PARTY WILL BE ENTITLED TO RECOVER FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR BY CONTRACT, EXCEPT (A) TO THE EXTENT AN INDEMNIFIED PARTY IS LIABLE TO A THIRD PARTY FOR ANY SUCH DAMAGES BASED ON A BREACH FOR WHICH THE INDEMNIFIED PARTY IS INDEMNIFIED IN ACCORDANCE WITH SECTION 6.7, OR (B) WHERE BASED UPON A BREACH OF ARTICLE 7.

6.3 Compliance with Laws

(a) In performance of their respective obligations under this Agreement, each Party will comply with, and will ensure that its employees and Affiliates comply with, all Laws, Governmental Approvals, agreements, licenses and consents applicable to or otherwise relating to the subject matter of this Agreement.[2]

(b) Without limiting the generality of Section 6.3(a), each Party further represents, warrants and covenants as follows:

(i) Neither it nor any of its Affiliates will manufacture, transfer, provide, resell, facilitate or promote the resale of, export, re-export, distribute, or dispose of any Product or component thereof or any related technology or technical data, directly or indirectly, without first obtaining the written consent of the other Party, and all necessary written consents, permits and authorizations and completing such formalities as may be required by any applicable Laws.

[2] Note: Both Manufacturers will be required to obtain necessary Governmental Approvals (including TTB consents) prior to Effective Date.

(ii) Neither it nor any of its Affiliates will sell or otherwise provide Products to any Person that it knows, believes or has reason to believe will take any action which, if done by it, would constitute a violation of any of the terms and conditions of this Agreement or would otherwise violate applicable Law.

(iii) As applicable, in its performance of activities associated with this Agreement, such Party and its Affiliates will comply with: United States of America regulation of tobacco products by the US FDA pursuant to 111 P.L. 31; 123 Stat. 1776; 2009 Enacted H.R. 1256; 111 Enacted H.R. 1256 (the so-called "Family Smoking Prevention and Tobacco Control Act") and regulations promulgated thereunder.

(iv) It and its Affiliates will perform the obligations imposed upon it by this Agreement: (A) in strict compliance with all applicable Laws pertaining to employment discrimination; and (B) without harassment, retaliation or discrimination by reason of race, sex, creed, religion, color, national origin, citizenship status, age, disability, veteran status, or any factor protected by Law.

(v) It and its Affiliates will comply with all requirements of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under Section 14 thereof, as well as all applicable state and local Laws and regulations regarding wages and hours.

(vi) To the extent required by Law, it and its Affiliates will comply with, and furnish any required certifications of compliance with, the following federal Laws and all rules and regulations promulgated thereunder: (A) Executive Order 11246, as amended; (B) The Americans with Disabilities Act of 1990 as implemented at 41 C.F.R. Part 60-741; (C) The Vietnam Era Veterans Readjustment Assistance Act of 1974 as implemented at 41 C.F.R. Part 60-250; and (D) any amendments or supplements to 29 C.F.R. Part 60-1.4(a). **Each Manufacturer and its subcontractors shall abide by the requirements of 41 C.F.R. §§ 60-741.5(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.**

(vii) If a Customer notifies its Manufacturer that the Products manufactured by it hereunder will be used by the Customer in the performance of a government contract, then such Manufacturer will, to the extent required by applicable Law, comply with Executive Order 13496, including the requirement of such order to post the employee notice set forth in 29 C.F.R. part 471, appendix A to subpart A.

(viii) Neither it nor any of its Affiliates will undertake any act that may cause the other Party or its Affiliates to be in violation of (i) the United States Foreign Corrupt Practices Act, the United Kingdom Bribery Act 2010 or equivalent legislation in any other jurisdiction; (ii) the principles contained in the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials or any existing or future applicable legislation in any jurisdiction (including, for the avoidance of doubt, United Kingdom legislation) which has similar provisions to the OECD Convention.

6.4 Right to Intellectual Property. RAI represents and warrants to Imperial that RAI (directly or through its Affiliates) has the right to use all Intellectual Property required for Imperial to manufacture the Lorillard Products in accordance with the Specifications, subject to any limitations or qualifications with respect to such Intellectual Property set forth in the Merger Agreement.

6.5 Product for States Only. Except for limited quantities of Product manufactured for testing purposes only, each Party represents and warrants that Products produced or sold by it in accordance with this Agreement are intended to be manufactured solely in the Tobaccoville Facility and the Greensboro Facility, as applicable, solely for lawful shipment therefrom and for sale only within the States in accordance with all applicable Laws. No Manufacturer will provide Product manufactured by it to any Person other than to its Customer under this Agreement, except with such Customer's prior written consent. No Party will transport, or cause to be transported, any Products outside of the States for use, distribution or sale, without the consent of the other Party.

6.6 Customer Specifications and Instructions. Subject to Section 2.8, each Customer will be solely responsible for (a) establishing all Specifications for the Products to be purchased by it hereunder in order to ensure that each such Products comply with all applicable Laws, and (b) giving the Manufacturer full and complete instructions to ensure that all Packaging is appropriately marked with relevant health warnings (if applicable) and other relevant markings mandated by any relevant Governmental Authority.

6.7 Mutual Indemnification; Indemnification Procedures.

(a) Subject to Section 6.2, each Party (the "***Indemnifying Party***"), severally, and not jointly with any other Party, agrees to indemnify, defend and hold harmless the other Party, its Affiliates and its and their respective current and former officers, directors, employees, representatives and agents (each, an "***Indemnified Party***") from and against any and all losses, damages, claims, liabilities, demands, assessments, judgments, settlements, compromises and related costs and expenses (including reasonable attorneys' fees and costs) (collectively, "***Damages***") an Indemnified Party may suffer in connection with, or arising out of (i) a breach of the Indemnifying Party's representations, warranties, covenants or confidentiality obligations set forth in this Agreement, or (ii) the marketing, advertising, distribution or sale by the Indemnifying Party, in its capacity as a Customer (or its Affiliates) of any Products manufactured by the Indemnified Party (or its Affiliates), including any Damages that relate to any claimed adverse health effects or health risks relating to the use of such Products, provided, however, that to the extent that clause (ii) of this Section 6.7(a) would be inconsistent with the indemnification provisions set out in the APA (to the extent that such provisions would be

applicable to such claim), the terms of the APA shall prevail. Notwithstanding the foregoing, no Indemnified Party will be entitled to indemnification for Damages to the extent (but only to the extent) they relate to, result from or arise out of (A) the failure of such Indemnified Party to comply with its obligations under this Agreement, or (B) the negligence or willful misconduct of such Indemnified Party.

(b) An Indemnified Party must promptly notify the Indemnifying Party in writing of any pending or threatened claim or demand that the Indemnified Party has determined has given or would reasonably be expected to give rise to a right of indemnification (including a pending or threatened claim or demand asserted by a third party against the Indemnified Party, such claim being a "***Third Party Claim***"), describing in reasonable detail the facts and circumstances with respect to the subject matter of such claim or demand; provided that, the failure to provide such notice will not release the Indemnifying Party from any of its obligations under this Section 6.7 except to the extent the Indemnifying Party is materially prejudiced by such failure.

(c) Upon receipt of a notice of a claim for indemnity from an Indemnified Party pursuant to Section 6.7(b), the Indemnifying Party will be entitled to assume the defense and control of any Third Party Claim and will be responsible for all costs and attorney fees of such defense, but must, if it determines to assume such defense, allow the Indemnified Party a reasonable opportunity to participate in the defense of such Third Party Claim with its own counsel and at its own expense; provided that, the Indemnifying Party will not be entitled to assume such defense (and will bear the reasonable fees, costs and expenses of separate counsel for the Indemnified Party) (i) unless it first acknowledges in writing its obligation hereunder to indemnify the Indemnified Party with respect to all material elements of such Third Party Claim and (ii) in case of a Third Party Claim where the defendants in, or targets of, such Third Party Claim include both an Indemnified Party and Indemnifying Party, and the Indemnified Party has reasonably concluded, based on the advice of counsel, that there is a material conflict of interest between the Indemnifying Party and the Indemnified Party with respect to such Third Party Claim. Notwithstanding the foregoing, the Indemnifying Party is not entitled to assume the defense of any Third Party Claim if the Third Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnified Party that the Indemnified Party reasonably determines (upon advice of its outside counsel) cannot be separated from any related claim for money damages. If such equitable or other relief portion of the Third Party Claim can be so separated from that for money damages, the Indemnifying Party will (subject as aforesaid) be entitled to assume the defense of the portion relating to money damages and, in such event, the Indemnifying Party will continue to be liable for the reasonable fees and expenses of counsel employed by the Indemnified Party with respect to the portion of the defense of such Third Party Claim that the Indemnifying Party has not assumed. Each Party, will, and will cause each of its Affiliates and representatives to, cooperate fully with the Indemnifying Party in the defense of any Third Party Claim and the Indemnifying Party agrees to keep the Indemnified Party reasonably informed of developments in connection with the defense or prosecution of such Third Party Claim. The Indemnifying Party is authorized to consent to a settlement of, or the entry of any judgment arising from, any Third Party Claim, without the consent of any Indemnified Party; provided that, (A) the Indemnifying Party pays or causes to be paid all amounts arising out of such settlement or judgment concurrently with the effectiveness of such settlement or resolution, (B) such settlement or judgment does not encumber any of the

assets of any Indemnified Party or provide for injunctive or other nonmonetary relief affecting the Indemnified Party, or otherwise provide for any restriction or condition that would apply to or adversely affect any Indemnified Party or the conduct of any Indemnified Party's business, (C) to the extent that the Indemnified Party may have any liability with respect to such Third Party Claim, the complete and unconditional release of any Indemnified Party potentially affected by such Third Party Claim must be made a condition of any such settlement or other resolution, and (D) such settlement does not include any admission of wrongdoing or misconduct by the Indemnified Party.

(d) Following an assumption by the Indemnifying Party of a Third Party Claim pursuant to Section 6.7(c), the Indemnified Party may reassume control of any defense of a Third Party Claim if the Indemnifying Party fails to prosecute the defense of such Third Party Claim within a period of 20 days after receipt of written notice of such failure to prosecute by the Indemnified Party. The Indemnifying Party will be liable for the reasonable fees, costs and expenses of counsel employed by the Indemnified Party (i) for any period during which the Indemnifying Party has not assumed the defense thereof, or (ii) following re-assumption of control pursuant to the first sentence of this Section 6.7(c).

(e) In the event any Indemnifying Party receives a notice of a claim for indemnity from an Indemnified Party pursuant to Section 6.7(b) that does not involve a Third Party Claim (such claim being a "***Direct Claim***"), the Indemnifying Party must notify the Indemnified Party within 45 days following its receipt of such notice if the Indemnifying Party disputes its liability to the Indemnified Party under this Section 6.7. If the Indemnifying Party does not so notify the Indemnified Party, the Direct Claim specified by the Indemnified Party in such notice will be conclusively deemed to be a liability of the Indemnifying Party under this Section 6.7, and the Indemnifying Party will pay, the amount of such Damages to the Indemnified Party on demand or, in the case of any notice in which the amount of Damages in respect of the Direct Claim (or any portion thereof) is estimated, on such later date when the amount of such Damages in respect of Direct Claim (or any portion thereof) becomes finally determined.

ARTICLE 7
CONFIDENTIALITY

7.1 Confidentiality Obligations

(a) Notwithstanding anything to the contrary in this Agreement, each Party agrees not to disclose its Confidential Information to any other Party hereunder, except to the extent required to enable such other Party to perform its obligations under this Agreement. In addition, no Party will share its Sensitive Information with any other Party, except (i) in a format that restricts its use to ensure compliance with applicable Law, (ii) to the group of individuals designated as permitted to receive such information pursuant to Section 4.3(a), or (iii) to a legal representative for purposes of conducting an audit pursuant to Section 4.6.

(b) During the Term and for a period of five years thereafter, each Party receiving Confidential Information (a "***Receiving Party***") will maintain in confidence all Confidential Information disclosed to it by any other Party (a "***Disclosing Party***").

Notwithstanding the foregoing, but subject to Section 7.2, each of the Party's respective obligations of confidentiality with respect to another Party's Trade Secrets, including the Specifications, will be perpetual. No Party will use, disclose or grant the use of such Confidential Information except as expressly authorized by this Agreement. To the extent that disclosure is authorized by this Agreement, the Receiving Party must inform its employees, representatives and contracting parties to whom disclosure is to be made of this ARTICLE 7, and instruct such Persons to hold in confidence and not make use of such information for any purpose other than those purposes permitted by this Agreement. Each Receiving Party will use at least the same standard of care (but not less than a reasonable standard of care) as it uses to protect its own proprietary and Trade Secret information to ensure that such employees, representatives and contracting parties do not disclose or make any unauthorized use of such Confidential Information. Each Receiving Party will promptly notify the other upon discovery of any unauthorized use or disclosure of Confidential Information. The Receiving Party will be responsible to the Disclosing Party for any loss of Confidential Information of the Disclosing Party or breach of the provisions of this Section 7.1 by any employee, representative or contracting party of the Receiving Party.

7.2 Exceptions. The obligations of confidentiality contained in Section 7.1 will not apply to the extent that it can be established by the Receiving Party by competent proof that such Confidential Information: (a) was generally available to the public or otherwise part of the public domain at the time of its receipt from the Disclosing Party; (b) becomes generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the Receiving Party in breach of this Agreement; or (c) was received by the Receiving Party, other than under an obligation of confidentiality, by a third Person lawfully in possession of the information.

7.3 Authorized Disclosure. Notwithstanding the foregoing, no Party (nor third Persons, as applicable) will be precluded from disclosing Confidential Information to the extent it is required to do so in response to a valid order by a Governmental Authority, or to the extent it reasonably believes, on the basis of advice from outside counsel, that it is required to disclose such Confidential Information by Law, or to the extent necessary to establish its rights under this Agreement; provided that, in the event a Party believes it is so required to disclose another Party's Confidential Information, it will promptly provide notice of such requirement so that the Disclosing Party may seek an appropriate order or other action as it deems appropriate to prevent or limit such disclosure, and the Party required to make the disclosure will use its reasonable efforts to preserve the confidentiality of the other Party's Confidential Information, including by cooperating with the other Party to obtain an appropriate order or other reliable assurance of confidential treatment. In any event, the Party required to make the disclosure may disclose only that portion of another Party's Confidential Information that is legally required to be disclosed. Notwithstanding the foregoing, if any Party (or an Affiliate of such Party) is required to include a copy of this Agreement as an exhibit to any current or periodic report filed with the U.S. Securities and Exchange Commission, such Party (or its Affiliate) may make such filing without the prior written consent of any other Party as long as it seeks (or causes its Affiliate to seek) confidential treatment of any portions of this Agreement that, in the opinion of such filing Party, contain confidential or competitively sensitive information, regardless of whether such treatment is obtained.

ARTICLE 8
TERM AND TERMINATION

8.1 Term of Agreement. The term of this Agreement will commence on the Effective Date and this Agreement and the Manufacturer-Customer relationships hereunder will remain in effect until the day before the two-year anniversary of the Effective Date (the "***Initial Term***"), after which this Agreement and such Manufacturer-Customer relationships will automatically renew for successive one-year periods (each, a "***Renewal Term***"), unless terminated or not renewed as provided in this ARTICLE 8. The Initial Term and all Renewal Terms, if any, are referred to in this Agreement collectively as the "***Term***".

8.2 General Termination Provisions. Notwithstanding anything to the contrary in this Agreement, this Agreement may be terminated as follows:

(a) by mutual consent of the Parties; and

(b) by a Party, by giving written notice to the other Party at any time upon the occurrence of any of the following events:

(i) the voluntary bankruptcy of the other Party, or the filing of an involuntary petition in bankruptcy against the other Party that is not dismissed within 60 days of filing, in which case, the termination will become effective immediately upon the non-terminating Party's receipt of notice of termination or at such later date as may be specified in that notice;

(ii) the other Party ceases to pay its debts as they mature in the ordinary course of business, or makes an assignment for the benefit of its creditors, in which case, the termination will become effective immediately upon the non-terminating Party's receipt of notice of termination or at such later date as may be specified in that notice; or

(iii) a receiver is appointed for the other Party or its property, in which case, the termination will become effective immediately upon the non-terminating Party's receipt of notice of termination or at such later date as may be specified in that notice.

8.3 Termination of a Manufacturer-Customer Relationship. Notwithstanding anything to the contrary in this Agreement:

(a) a Customer may terminate or elect to not renew, as applicable, its Manufacturer-Customer relationship with its Manufacturer:

(i) at the end of the Initial Term or then-effective Renewal Term, by giving written notice of its desire not to so renew such relationship to the Manufacturer at least 90 days before the end of such Initial Term or then-effective Renewal Term, as applicable;

(ii) if the Manufacturer suffers an event of Force Majeure, and such event is not alleviated to the reasonable satisfaction of the Customer within 90 days of the Manufacturer's receipt of notice of the Customer's intent to terminate;

(iii) immediately upon written notice to the Manufacturer in the event the Manufacturer suffers one or more of the events described in Section 8.2(b), subject to any cure or grace periods set forth therein;

(iv) in accordance with Section 8.4, 8.5 or 8.6; and

(b) a Manufacturer may terminate or elect to not renew, as applicable, its Manufacturer-Customer relationship with its Customer immediately upon written notice to the Customer in the event the Customer suffers one or more of the events described in Section 8.2(b), subject to any cure or grace periods set forth therein.

8.4 Termination of Manufacturer-Customer Relationship in Connection with a Material Breach. Notwithstanding anything to the contrary in this Agreement, a Party may terminate the affected Manufacturer-Customer relationship with the other Party, in the event that the other Party is in breach of any material term of this Agreement and the breaching Party fails to cure such breach within 30 days of receipt of notice of breach from the terminating Party, or if such breach is not reasonably capable of cure within such 30-day period, such breaching Party fails to cure the breach within 60 days of receipt of notice of breach from the terminating Party; provided that, the foregoing right to cure (a) will not apply to any breach by any Party involving violation of any applicable Law, Governmental Approval or any breach that is not capable of being cured, and (b) is conditioned upon the breaching Party promptly commencing and thereafter diligently pursuing the cure to the reasonable satisfaction of the non-breaching Party.

8.5 Termination in Connection with a Manufacturing Migration. In recognition of a Manufacturing Migration in accordance with Section 2.11, (a) if, in Imperial's good faith judgment, it believes that it can complete a Manufacturing Migration in accordance with the Imperial Migration Plan, or if later, as determined by it in accordance with Section 2.11, it may terminate its Manufacturer-Customer relationship under this Agreement with respect to RAI as the Manufacturer of the RAI Products by giving RAI written notice of termination at least 90 days before the effective date of termination (it being understood that, in such event, this Agreement would continue in accordance with its terms with respect to the other Manufacturer-Customer relationship), provided that, the effective date of termination will not be earlier than the actual completion date of the Imperial Migration Plan, and (b) if, in RAI's good faith judgment, it believes that it can complete a Manufacturing Migration in accordance with the RAI Migration Plan, or if later, as determined by it in accordance with Section 2.11, it may terminate its Manufacturer-Customer relationship under this Agreement with respect to Imperial as the Manufacturer of the Lorillard Products by giving Imperial written notice of termination at least 90 days before the effective date of termination (it being understood that, in such event, this Agreement would continue in accordance with its terms with respect to the other Manufacturer-Customer relationship), provided that, the effective date of termination will not be earlier than the actual completion date of the RAI Migration Plan.

8.6 Termination for Interference or Frustration of Purpose. If both (a) the action of any Governmental Authority prohibits or declares unlawful or otherwise impairs, inhibits or frustrates in any material respect (i) the Customer's intended use of the Products being manufactured for it under this Agreement, (ii) the Manufacturer's ability to manufacture or package Products as required under this Agreement, or (iii) any other material obligation of a

Party as contemplated by this Agreement, and (b) the Parties are unable to propose a feasible way of either avoiding such interference or of reorganizing the Parties' arrangements under this Agreement so as to eliminate the effect of such interference or to minimize, or minimize the effect of, such interference to the point where it is no longer material within a period of 60 days of a Party notifying the other Party of such interference (including by taking legal action in respect of such interference), then the affected Customer may terminate the affected Manufacturer-Customer relationship hereunder, effective upon the earlier of (A) 30 days following receipt by the Manufacturer of notice of termination from the Customer, and (B) the date on which such action of the Governmental Authority becomes effective. Any notice by a Party to the other Party of such interference pursuant to this Section 8.6 must include a reasonably detailed description of the action of the Governmental Authority and the resulting prohibition, declaration of unlawfulness or material impairment, inhibition or frustration of purpose.

8.7 Effects of Non-Renewal or Termination; Cooperation.

(a) Upon one Party's delivery of a notice of non-renewal or termination hereunder (or where the Parties otherwise reasonably anticipate a non-renewal or termination), the Parties agree to work together in good faith with a view to achieving an orderly transition of the manufacturing arrangements subject to such non-renewal or termination, in connection with a Manufacturing Migration or otherwise, including with respect to the transfer of any Migration Machinery.

(b) Upon a non-renewal or termination in accordance with its terms, this Agreement will terminate and become void and of no further force and effect, and there will be no further liability or obligation on the part of any Party hereto; provided that, if only one of the Manufacturer-Customer relationships is not renewed or terminated under Section 8.3, 8.4, 8.5 or 8.6, then the remaining Manufacturer-Customer relationship will continue unaffected by such non-renewal or termination and the terms and conditions of this Agreement will survive (and remain unaffected) as they relate to that continuing relationship. Each Party's right of non-renewal and termination under Sections 8.3, 8.4, 8.5 and 8.6 is in addition to any other rights it may have under this Agreement or otherwise, and the exercise of a right of non-renewal or termination will not constitute an election of remedies and will not relieve any Party of liability for any breach of this Agreement. The non-renewal or termination of this Agreement or any Manufacturer-Customer relationship hereunder will not affect any other projects, activities, collaborations, commercial arrangements or service arrangements that the Parties (or any of them) may have with one another.

(c) Upon a non-renewal or termination of this Agreement, or the non-renewal or termination of one of the Manufacturer-Customer relationships hereunder,

(i) the Manufacturer agrees to: (A) deliver to the Customer or its designee all raw materials and product components inventory that were supplied by or sourced on behalf of the Customer, including the Customer's Tobacco Leaf (including any remaining Initial Tobacco Leaf Inventory of the Customer); (B) return all of the Customer's Confidential Information; (C) deliver all finished Products to the Customer or its designee, together with a final invoice therefor; (D) deliver a final True-Up Statement in accordance with Section 4.3;

(E) cooperate with the Customer in the preparation of a final accounting of activities under this Agreement or the applicable Manufacturer-Customer relationship; and (F) stop producing Products, except as the Customer may approve at the time in writing;

(ii) the Customer agrees to: (A) promptly pay the Manufacturer for open invoices (including the final invoice delivered pursuant to Section 3.7(c)(i)(C)) in accordance with Sections 4.2 and 4.4 and any other amounts owed; (B) purchase, at Actual Cost, all raw materials and product components inventory (including any Additional Tobacco Raw Materials) that were purchased by the Manufacturer pursuant to Section 2.6(a) and that (I) are not yet incorporated into the Customer's Products and (II) the Manufacturer does not elect to use in its other activities; (C) return all of the Manufacturer's Confidential Information; and (D) cooperate with the Manufacturer in the preparation of a final accounting of activities under this Agreement or the applicable Manufacturer-Customer relationship; and

(iii) the Manufacturer and the Customer agree to follow through with any required adjustments in accordance with Section 4.3.

8.8 Survival. The provisions of Sections 2.6(b) (with respect to ownership of any raw materials or product components procured by a Customer, including its Tobacco Leaf (including its Initial Tobacco Leaf Inventory)), 2.8 (for one year following non-renewal or termination), 5.2, 9.1, 8.7, and this Section 8.8, as well as ARTICLE 4, ARTICLE 6, ARTICLE 7 and ARTICLE 9 will continue in full force and effect and survive any non-renewal or termination of this Agreement or any particular Manufacturer-Customer relationship hereunder.

ARTICLE 9
MISCELLANEOUS

9.1 Tax Matters.

(a) Notwithstanding anything to the contrary in this Agreement, all transfer, documentary, sales, use, stamp, registration, value added and other such taxes and fees (including any penalties and interest (other than incurred as a result of the Manufacturer's breach of any of its representations, warranties or covenants in this Agreement)) (collectively, "***Transfer Taxes***") imposed in connection with the purchase of (a) Products from a Manufacturer will be borne and paid by the Customer when due, and (b) raw materials or product components from a supplier will be borne and paid when due by the Party that purchases such raw materials or product components pursuant to Section 2.6(a) or 2.6(b). To the extent applicable, the Parties will cooperate with one another in good faith to obtain any tax exemption certificates that would eliminate or mitigate any obligations to pay Transfer Taxes in connection with the transactions contemplated by this Agreement.

(b) As long as the applicable Products are shipped F.O.B. (shipping point) in accordance with Section 5.1(a), the Parties intend that no federal excise taxes (if any) levied pursuant to 26 U.S.C. §§ 5701 et seq. will be payable until such Products are removed from the Customer's Alcohol and Tobacco Tax and Trade Bureau bonded facility. The Customer will be responsible for the payment of any such federal excise taxes in accordance with 26 U.S.C. § 5703, and in the event that any such taxes are levied against the Manufacturer, such taxes will constitute Actual Costs hereunder or otherwise be reimbursable by the Customer.

(c) The Parties intend that neither the Manufacturer nor the Customer will be liable for any state excise taxes pursuant to the Tobacco Products Tax Act, N.C.G.S., §§ 105-113.2 et seq., in connection with the transaction contemplated hereunder. In the event, however, that it is finally determined otherwise, the Parties agree to further cooperate with one another in good faith to mitigate any such state excise taxes to the greatest extent practicable and, in any event, such taxes will constitute Actual Costs hereunder or otherwise be reimbursable by the Customer.

9.2 **State Settlements**. The Parties agree that the Customer will be responsible for performance of all obligations under any State Settlements with respect to the Customer's Products, including all reporting, payment and conduct obligations. The Customer agrees that in the event it does not perform these obligations and the compliance is sought or compelled from the Manufacturer, the Customer will indemnify the Manufacturer for all costs of compliance.

9.3 **Further Assurances**. Each Party agrees to enter into or execute, or procure the entering into or execution, of such agreements, assignments or further assurances, or do such other acts as any other Party may reasonably request to carry out the terms and conditions of this Agreement.

9.4 **Integration, Modification and Waiver**. This Agreement, together with the APA, constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and supersedes all prior understandings of the Parties with respect thereto. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by each Party. No waiver of any of the provisions of this Agreement will be deemed to be or will constitute a continuing waiver. No waiver will be binding unless executed in writing by the Party making the waiver. No consent will be required from any Indemnified Party (other than the Parties themselves) to supplement, modify, amend, or grant a waiver under, this Agreement. All rights and remedies of a Party under, arising out of, in connection with or related to this Agreement are cumulative of, and not exclusive of, any rights or remedies otherwise available.

9.5 **Relationship of the Parties**. For purposes of this Agreement, the Parties will be and remain independent contractors (and, in certain respects, active competitors), and this Agreement will not be construed as establishing a general agency, employment, partnership, joint venture, coalition, alliance or any other similar relationship between the Parties with regards to the relationship created by this Agreement. In accordance with this Agreement, no Party will have the authority to make any statements, representations or commitments of any kind (whether express or implied) regarding the subject matter of this Agreement, or to take any action, which would be binding on any other Party or create any liability or obligation on behalf of any other Party regarding the subject matter of this Agreement, without the prior written authorization of such other Party to do so. No Party will have the right to direct or control the employees of any other Party. No Party will be liable for the debts, obligations or other liabilities of any other Party or of any of its agents, employees or contractors, including any costs for salaries, benefits or taxes.

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9.6 **Force Majeure**. Notwithstanding anything to the contrary in this Agreement, no Party will be liable for any loss, injury, delay, damage or other casualty suffered by any other Party due to any inability to perform any obligation hereunder, and no Party will be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any term or provision of this Agreement (other than payment of monies due), when such failure or delay is caused by or results from causes beyond the control of the affected Party, including acts of God, fire, flood, storm, earthquake, explosion, epidemic, delays in transportation, shortages of trucks or vessels, shortages of fuel, shortages of raw materials, environmental catastrophe, embargo, war, acts of war (whether war be declared or not), acts of terrorism, insurrection, riot, civil commotion, labor dispute, or acts, omissions or delays in acting by any Governmental Authority (including legislative, administative, judicial, police or any other official governmental acts). In the case of any delay or failure that a Party anticipates will cause an excusable delay hereunder, such Party will inform the other Party by written notice of the anticipated effect of such delay within ten days of becoming aware of it, the written notice to include a reasonably detailed description of the steps that the notifying Party is taking to alleviate the problem, including any use of Contingency Equipment.

9.7 **Construction**. The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement must be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. The word "including" means including without limitation. Any reference to the singular in this Agreement also includes the plural and *vice versa*.

9.8 **Governing Law**. The validity, construction and performance of this Agreement will be governed and interpreted in accordance with the substantive laws of the State of Delaware, without giving effect to principles of conflicts of laws thereof.

9.9 **Jurisdiction**. The Parties agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby may be brought only in the Chancery Court of the State of Delaware or, if such court does not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court.

9.10 **Waiver of Jury Trial**. Each Party hereby waives to the fullest extent permitted by applicable Law, any right it may have to a trial by jury in respect to any litigation directly or indirectly arising out of, under, or in connection with, this Agreement, or any transaction contemplated hereby. Each Party certifies (a) that no representative, agent or attorney of any other Party has represented, expressly or otherwise, that such other Party would not, in the event of litigation, seek to enforce the foregoing waiver, and (b) acknowledges that it and the other Party hereto have been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 9.10.

9.11 **No Third Party Beneficiaries**. This Agreement is not intended to and may not be construed to give any Person (other than the Parties signatory hereto and to the extent provided herein, their respective Indemnified Parties), including any employee or former employee, any interest or rights (including any third-party beneficiary rights) with respect to or in connection with any agreement or provision contained herein or contemplated hereby.

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9.12 Severability. If any provision of this Agreement is held to be invalid or unlawful, such provisions will be deemed to be deleted from this Agreement, but this Agreement will remain in full force and effect as if the deleted provision had never been contained in it. The Parties agree to negotiate in good faith as to the terms of a mutually acceptable and satisfactory provision in place of any deleted provision (which reflects, as closely as possible, the commercial intention of such deleted provision), and if such terms are agreed upon, this Agreement will be amended accordingly.

9.13 Notices. Unless otherwise provided in this Agreement, day-to-day commercial communications, such as Purchase Orders, may be exchanged by any reasonable means. All notices must be in writing, and will be deemed effective upon receipt, if personally delivered; on the third business day after deposited with the U.S. Postal Service, if mailed by certified mail, return receipt requested, postage prepaid; on the first business day after sent if sent prepaid by nationally recognized overnight courier service with next day delivery specified; or when sent if sent by facsimile transmission or electronic mail (if fax numbers or email addresses have been provided) with confirmation of receipt.

If to RAI, to:

If to Imperial, to:

9.14 Assignment. This Agreement will be binding upon and inure to the benefit of the Parties and their respective legal successors and assigns. This Agreement may not be assigned or otherwise transferred, nor, except as expressly provided hereunder, may any right or obligation hereunder be assigned, subcontracted, licensed or transferred by any Party without the prior written consent of the other Parties, which consent may not be unreasonably withheld, delayed or conditioned; provided that, any Party may, without the prior consent of any other Party, assign this Agreement and its rights and obligations hereunder to an Affiliate of such Party; provided, further, that, (a) the assignor Party remains secondarily liable for the obligations of its assignee Affiliate, and (b) if such assignee ceases to be an Affiliate of such Party, the assignee must immediately re-assign its remaining rights and obligations hereunder back to the assignor. Any permitted assignee must expressly assume all the rights and obligations of its assignor under this Agreement. Any assignment in violation of the foregoing is null and void.

9.15 Counterparts. This Agreement may be executed in one or more counterparts, and by the different Parties in separate counterparts, each of which when executed will be deemed to be an original but all of which taken together will constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by facsimile or electronic means will be as effective as delivery of a manually executed counterpart of this Agreement.

9.16 Exhibits. The Exhibits to this Agreement, including any Appendices to those Exhibits, form part of and are incorporated into this Agreement, and the Parties will act in accordance with their terms at all times during the Term. The following Exhibits are attached hereto:

Exhibit	Description
A	Products (RAI Products and Lorillard Products)
B-1	Standard Costs and Relevant Principles and Methodologies – RAI Products
B-2	Standard Costs and Relevant Principles and Methodologies – Lorillard Products
C-1	Specifications – RAI Products
C-2	Specifications – Lorillard Products
D	Contingency Equipment
E	Actions to Obtain Governmental Approvals
F	Plans and Timelines for Manufacturing Migrations
G-1	Initial Forecast – RAI Products
G-2	Initial Forecast – Lorillard Products
H	Flow of Finished Products

[this space left blank intentionally – signature page follows]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives to be effective as of the Effective Date.

R.J. REYNOLDS TOBACCO CO.

_____

By: _____
Name: _____
Title: _____

LIGNUM-2, L.L.C.

_____

By: _____
Name: _____
Title: _____

EXHIBIT A

Products

RAI Products

[TBD]

Lorillard Products

[TBD]

EXHIBIT B-1

Standard Costs / Principles and Methodologies for Determining Costs (RAI Products)

[TBD]

EXHIBIT B-2

Standard Costs / Principles and Methodologies for Determining Costs (Lorillard Products)

[TBD]

EXHIBIT C-1

Specifications for RAI Products

[see attached]

EXHIBIT C-2

Specifications for Lorillard Products

[see attached]

EXHIBIT D

Contingency Equipment

RAI

[TBD]

Lorillard

[TBD]

Imperial

[TBD]

EXHIBIT E

Actions to Obtain Governmental Approvals

[see attached] [3]

[3] Exhibit to include matters concerning obtaining and maintaining Governmental Approvals that may be required for each of the Products from the Federal Food and Drug Administration by virtue of the requirements of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq., as amended by the Family Smoking Prevention and Tobacco Control Act, and all regulations promulgated pursuant to the same, or any successor or related legislation; in each case, to the extent contemplated by the Transition Services Agreement described in the APA.

EXHIBIT F

Plans and Timelines for Manufacturing Migrations

RAI

[TBD]

Imperial

[TBD]

EXHIBIT G-1

Initial Rolling Forecast of RAI

[see attached]

EXHIBIT G-2

Initial Rolling Forecast of Lorillard

[see attached]

EXHIBIT H

Flow of Finished Products

[see attached]

EXHIBIT H

MSA ASSUMPTION AGREEMENT

ASSUMPTION AGREEMENT (this "Agreement"), dated as of , 201 , is executed and delivered by the undersigned in favor of and for the benefit of the parties to the Master Settlement Agreement, by and among the Participating Manufacturers as identified in the master agreement and amendments, the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, the Virgin Islands and American Samoa, dated as of November 23, 1998, as amended (the "MSA").

The undersigned is currently a party to the MSA and is and has been, for at least 180 days prior to the Closing (as defined below), a Subsequent Participating Manufacturer (as such term is defined in the MSA). The undersigned hereby agrees, effective as of the closing of the acquisition, which is intended to take place immediately after consummation of the proposed merger between RAI and Lorillard, by the undersigned of the Winston, Kool, Salem and Maverick Cigarette brands, Brand names, Cigarette product formulas and Cigarette businesses from RAI and/or its affiliates (the "Closing") and solely to the extent related to such brands, to assume, from and after the Closing, the obligations of an Original Participating Manufacturer (as such term is defined in the MSA) under the MSA with respect to such Cigarette brands, Brand Names, Cigarette product formulas and businesses. Execution of this Agreement is contemplated by Article XVIII, Section (c) of the MSA.

The provisions of Article XVIII of the MSA are incorporated by reference herein as if made herein. Each party to the MSA is deemed to be an intended third party beneficiary of this Agreement.

IN WITNESS WHEREOF, the undersigned has caused its duly authorized representative to execute this Agreement as of the date first written above.

[ACQUIROR]

By: _____
Name:
Title:

EXHIBIT 1

LORILLARD TRANSFER AGREEMENT

[see attached]

1-1

EXECUTION COPY

TRANSFER AGREEMENT

dated as of July 15, 2014

between

LORILLARD, INC.

and

LIGNUM-2, L.L.C.

This TRANSFER AGREEMENT (this "Agreement"), dated July 15, 2014, is made between LIGNUM-2, L.L.C., a Texas limited liability company (the "Acquiror"), and LORILLARD, INC., a Delaware corporation ("Lorillard"). The Acquiror and Lorillard are each referred to herein as a "Party" and collectively as the "Parties".

PRELIMINARY STATEMENTS

A. Pursuant to the Agreement and Plan of Merger, dated as of July 15, 2014, among Reynolds American Inc., a North Carolina corporation ("RAI"), Lorillard and Eastern Acquisition Co., a Delaware corporation ("Merger Sub") (such agreement, the "Merger Agreement"), Merger Sub has agreed, upon the terms and subject to the conditions set forth in the Merger Agreement, to merge with and into Lorillard, with Lorillard as the surviving corporation, such that RAI would, following the Effective Time of the Merger, own 100% of the outstanding capital stock of Lorillard and, through Lorillard, the other Lorillard Asset Owners (such transaction, the "Merger").

B. Pursuant to an Asset Purchase Agreement dated July 15, 2014 (the "Asset Purchase Agreement"), among RAI, the Acquiror and, for certain limited purposes, Imperial Tobacco Group PLC, a public limited company incorporated under the laws of England and Wales ("Imperial"), the Sellers wish to sell to the Acquiror, and the Acquiror wishes to purchase from the Sellers, (a) certain of the assets of the RAI Asset Owners and the Lorillard Asset Owners relating to the Acquired Tobacco Cigarette Brands, (b) all of the assets of the Lorillard Asset Owners used exclusively in, or arising, directly or indirectly, exclusively out of the operation or conduct of, the Lorillard Business (other than the Retained Lorillard Brands), (c) certain of the assets of the RAI Asset Owners used exclusively in, or arising, directly or indirectly, exclusively out of the operation or conduct of, the PR Business, and (d) certain other specified assets of the RAI Asset Owners and Lorillard Asset Owners, in each case, upon the terms and subject to conditions set forth in this Agreement and the Asset Purchase Agreement. In addition, the Acquiror wishes to assume, and RAI wishes to have the Acquiror assume, certain liabilities of the RAI Asset Owners and Lorillard Asset Owners relating to the Acquired Tobacco Cigarette Brands, the B Brand Business, the PR Business and the other Transferred Assets, in each case, upon the terms and subject to the conditions set forth in the Asset Purchase Agreement.

C. The Acquiror wishes to have Lorillard transfer directly to the Acquiror certain assets, and Lorillard wishes to have the Acquiror assume directly from Lorillard certain liabilities, in each case immediately prior to the Effective Time of the Merger. Accordingly, the Acquiror and Lorillard are entering into this Agreement pursuant to which certain Lorillard Asset Owners will transfer and assign to the Acquiror or one or more designated Affiliates, and the Acquiror or one or more of its designated Affiliates will acquire and assume from the relevant Lorillard Asset Owners, certain assets including the Greensboro Facility, the Danville Facility, the collective bargaining agreements that Lorillard is party to and the related pension plan; in each case at the Lorillard Transfer Closing, which shall occur, subject to the satisfaction of the applicable conditions set forth in the Asset Purchase Agreement, immediately prior to the Effective Time of the Merger.

NOW, THEREFORE, in consideration of the premises and mutual covenants, warranties and agreements herein set forth, the Parties agree as follows:

Decision and Order

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. Capitalized terms used in this Agreement and not defined herein shall have the meanings specified in the Asset Purchase Agreement.

ARTICLE II

TRANSFER AND ASSUMPTION

Section 2.01 Transfer and Assumption of the Assets.

(a) Transferred Assets. Upon the terms and subject to the conditions set forth herein and in the Asset Purchase Agreement, immediately prior to the Effective Time of the Merger Lorillard shall sell, convey, assign, transfer and deliver to the Acquiror (or one or more of its designated Affiliates), free and clear of all Liens, except for Permitted Liens, and the Acquiror (or one or more of its designated Affiliates) shall, acquire and accept from Lorillard immediately prior to the Effective Time of the Merger, all of Lorillard's right, title and interest in and to:

(i) (A) the owned real property listed in Section 2.01(a)(i)(A) of the Disclosure Schedule (the "Transferred Owned Property"), together with all improvements and fixtures and all appurtenances thereto and rights in respect thereof, and (B) all interests, rights and benefits under the leases and other agreements relating to the leased real property listed in Section 2.01(a)(i)(B) of the Disclosure Schedule (collectively, the "Transferred Leased Property");

(ii) the Contracts listed in Section 2.01(a)(ii)(C) of the Disclosure Schedule; and

(iii) the Lorillard employee benefit plans, programs, arrangements and agreements and policies, and any trusts and other assets related thereto, expressly provided to be transferred to the Acquiror pursuant to Exhibit D to the Asset Purchase Agreement.

(b) Assumed Liabilities. Upon the terms and subject to the conditions set forth herein and in the Asset Purchase Agreement, the Acquiror hereby agrees, effective immediately prior to the Effective Time of the Merger, to assume and thereafter to pay, discharge and perform in accordance with their terms only the following Liabilities of Lorillard, and no other Liabilities of Lorillard or any other Person or any other Liabilities whatsoever:

(i) all Liabilities arising under any of the Contracts assigned pursuant to Section 2.01(a)(ii) above to the extent such Liabilities relate to the period from and after the Closing;

(ii) all Liabilities (other than Excluded Liabilities) to the extent arising, directly or indirectly, out of the use of the Transferred Assets identified in Section 2.01 herein, in each case from and after the Lorillard Transfer Closing; and

(iii) any Liability arising out of, or related to, the Transferred Employees (including Liabilities arising prior to the Lorillard Transfer Closing) and any Liability relating to the employee benefit plans, programs, arrangements and agreements and policies and any trusts or assets related thereto, in each case that is expressly assumed by the Acquiror pursuant to Exhibit D of the Asset Purchase Agreement.

(c) Purchase Price. A portion of the Purchase Price paid by the Acquiror will be allocated to the purchase of the Transferred Assets and the Assumed Liabilities acquired at the Lorillard Transfer Closing.

Section 2.02 Closing. As soon as practicable (but in any event, on the same date that the Effective Time of the Merger occurs) following the satisfaction or waiver of the conditions precedent set forth in Section 5.01 of this Agreement (other than those conditions that by their nature are to be satisfied at the Lorillard Transfer Closing, but subject to the satisfaction or (to the extent permitted by applicable Law) waiver of such conditions) the transfer of the Transferred Assets and the assumption of the Assumed Liabilities contemplated by this Agreement shall take place at a closing (the "Lorillard Transfer Closing") that will be held at the offices of Jones Day, 222 East 41st Street, New York, NY 10017. Notwithstanding anything contained in this Agreement to the contrary, the Parties agree that if the Effective Time of the Merger does not occur promptly (and in any event before 11:59 p.m. New York City time on the date of the Lorillard Transfer Closing) after the Lorillard Transfer Closing, Lorillard and the Acquiror will, without any discretion to act otherwise, rescind the transfer and assumption contemplated by Article II of this Agreement at 11:59 p.m. New York City time on the date of the Lorillard Transfer Closing, which rescission shall be complete in all respects with the result that all Parties are restored to the same position as they were in before the Lorillard Transfer Closing and this Agreement shall forthwith become void and of no further force or effect.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

Section 3.01 Representations and Warranties of the Acquiror. The Acquiror hereby represents and warrants to Lorillard that:

(a) The Acquiror is a limited liability company duly organized, validly existing and in good standing under the Laws of Texas and has all necessary limited liability company power and authority and possesses all Permits necessary to enable it to own, lease, or otherwise hold its properties and assets and to conduct its business as currently conducted.

(b) The Acquiror has full power and authority to execute and deliver this Agreement and, subject to receiving the Imperial Shareholder Approval, to consummate the transactions contemplated to be consummated by it by, and carry out its obligations under, this Agreement.

(c) The execution and delivery by the Acquiror of this Agreement, and the consummation by the Acquiror of the transactions contemplated by, and the performance by the Acquiror of its obligations under, this Agreement have been duly authorized by all requisite corporate action on the part of the Acquiror.

(d) This Agreement has been duly executed and delivered by the Acquiror, and (assuming due authorization, execution and delivery by Lorillard) this Agreement constitutes legal, valid and binding obligations of the Acquiror, enforceable against the Acquiror in accordance with its terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

Section 3.02 Representations and Warranties by Lorillard. Lorillard hereby represents and warrants to the Acquiror that:

(a) Lorillard is a corporation duly incorporated, validly existing and in good standing under the Laws of Delaware and has all necessary corporate power and authority and possesses all Permits necessary to enable it to own, lease, or otherwise hold the Transferred Assets, except where the failure to possess such Permits, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect.

(b) Lorillard has full power and authority to execute and deliver this Agreement and, subject to receiving requisite approval by the stockholders of Lorillard, to consummate the transactions contemplated to be consummated by it by, and carry out its obligations under, this Agreement.

(c) The execution and delivery by Lorillard of this Agreement, and the consummation by Lorillard of the transactions contemplated by, and the performance by Lorillard of its obligations under, this Agreement have been duly authorized by all requisite corporate action on the part of Lorillard.

(d) This Agreement has been duly executed and delivered by Lorillard, and (assuming due authorization, execution and delivery by the Acquiror) this Agreement constitutes legal, valid and binding obligations of Lorillard, enforceable against Lorillard in accordance with its terms, subject to the effect of any applicable Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors' rights generally and to the effect of general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

ARTICLE IV

OFFER OF EMPLOYMENT

Section 4.01 Lorillard Employees. Not later than 30 days prior to the anticipated Lorillard Transfer Closing the Acquiror will make offers of employment to the Lorillard Employees in accordance with the terms and conditions set forth in Exhibit D to the Asset Purchase Agreement. The Acquiror will comply with its other obligations under Exhibit D to the Asset Purchase Agreement.

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ARTICLE V

CONDITIONS TO CLOSING

Section 5.01 Lorillard Closing Condition. The obligation of Lorillard to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment at or prior to the Lorillard Transfer Closing, or waiver by Lorillard, in its sole discretion, of each of the following conditions:

(a) (i) All of the conditions set forth in Article VII of the Merger Agreement (other than those conditions that by their nature are to be satisfied at the closing of the transactions contemplated by the Merger Agreement, but each of which shall be capable of being satisfied upon the closing of the transactions contemplated by the Merger Agreement) shall have been satisfied or waived by the party entitled to the benefit of the same under the Merger Agreement and (ii) Lorillard shall have received a written certificate signed by a duly authorized officer of RAI, certifying that (A) the condition in clause (i) of this Section 5.01(a) has been satisfied, (B) RAI stands ready and willing to consummate the Merger immediately following the consummation of the Lorillard Transfer Closing and (C) RAI irrevocably confirms that, if the Lorillard Transfer Closing occurs, then the closing of the Merger under the Merger Agreement will occur immediately thereafter.

(b) (i) All of the conditions set forth in Article IX of the Asset Purchase Agreement (other than those conditions that by their nature are to be satisfied at the closing of the transactions contemplated by the Asset Purchase Agreement, but each of which shall be capable of being satisfied upon the closing of the transactions contemplated by the Asset Purchase Agreement) shall have been satisfied or waived by the party entitled to the benefit of the same under the Asset Purchase Agreement and (ii) Lorillard shall have received a written certificate signed by a duly authorized officer of RAI and the Acquiror, certifying that (A) the condition in clause (i) of this Section 5.01(b) has been satisfied, (B) the Acquiror and RAI stand ready and willing to consummate the transactions contemplated by the Asset Purchase Agreement immediately following the Effective Time of the Merger and (C) the Acquiror and RAI irrevocably confirm that, if the Lorillard Transfer Closing and the Effective Time of the Merger occur, then the closing of the transactions contemplated by the Asset Purchase Agreement will occur immediately after the Effective Time of the Merger.

Section 5.02 Acquiror Closing Condition. The obligation of the Acquiror to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment at or prior to the Lorillard Transfer Closing, or waiver by the Acquiror, of the conditions set forth in Section 9.01 and Section 9.03 of the Asset Purchase Agreement.

ARTICLE VI

TERMINATION

Section 6.01 Termination. This Agreement shall automatically terminate, without any action on the part of any Party, upon the termination of the Merger Agreement or the Asset Purchase Agreement in accordance with its terms.

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ARTICLE VII

MISCELLANEOUS

Section 7.01 Asset Purchase Agreement. The assets transferred and liabilities assumed under this Agreement shall be deemed to have been transferred under the Asset Purchase Agreement for purposes of the representations and warranties and indemnification provisions contained therein. In the event of a conflict between this Agreement and the Asset Purchase Agreement, the Asset Purchase Agreement shall control.

Section 7.02 Notices. All notices, requests, claims, demands and other communications under this Agreement shall be in writing and shall be given or made (and shall be deemed to have been duly given or made upon receipt) by delivery in person, by overnight courier service, by facsimile with receipt confirmed (followed by delivery of an original via overnight courier service) or by registered or certified mail (postage prepaid, return receipt requested) to the respective Parties at the following addresses (or at such other address for a Party as shall be specified in a notice given in accordance with this Section 7.02):

(a) if to the Acquiror:

Lignum-2, L.L.C.
5900 North Andrews Avenue
Suite 1100
Fort Lauderdale, FL 33309
Attention: Rob Wilkey
General Counsel
Facsimile: (954) 958-7907

with a copy to:

Imperial Tobacco Group PLC
121 Winterstoke Road
Bristol BS3 2LL
United Kingdom
Attention: John Downing
Company Secretary
Facsimile: +44 (0) 117 963 7201

and a copy to:

Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
Attention: Eric S. Shube, Esq.
Jeremy Parr, Esq.
Facsimile: (212) 610-6399

(b) if to Lorillard:

Lorillard, Inc.
714 Green Valley Road
Greensboro, NC 27408
Attention: Ronald S. Milstein
Executive Vice President, Legal and External Affairs
General Counsel and Secretary
Facsimile: (336) 335-7307

with a copy to:

Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
Attention: Robert B. Spatt
Eric M. Swedenburg
Facsimile: (917) 777-2587

Section 7.03 Public Announcements. No Party or any Affiliate or Representative of such Party shall issue or cause the publication of any press release or public announcement or otherwise communicate with any news media in respect of this Agreement or the transactions contemplated by this Agreement without the prior written consent of the other Party (which consent shall not be unreasonably withheld or delayed), except as may be required by Law or stock exchange rules, in which case the Party required to publish such press release or public announcement shall allow the other Party a reasonable opportunity to comment on such press release or public announcement in advance of such publication; provided, however, that Lorillard shall not be required to obtain the Acquiror's or its Affiliates' prior written consent in order to issue or cause the publication of any press release or public announcement or otherwise communicate with any news media, if such press release, public announcement or other communication refers to the Merger Agreement or the Merger without including a reference to this Agreement or the transactions contemplated by this Agreement.

Section 7.04 Severability. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced under any Law or as a matter of public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated by this Agreement is not affected in any manner materially adverse to any Party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated by this Agreement be consummated as originally contemplated to the greatest extent possible.

Section 7.05 Assignment. This Agreement shall not be assigned by operation of Law or otherwise without the prior written consent of Lorillard and the Acquiror; provided that (a) both Lorillard and the Acquiror may assign any or all of their respective rights and obligations under this Agreement to any of their respective Affiliates, and (b) following the Lorillard Transfer Closing, the Acquiror may assign its rights under this Agreement to its sources of Debt Financing, Bond Financing

or other sources of financing available to it as collateral security; provided, further, however, that no such assignment shall release Lorillard or the Acquiror from any liability or obligation under this Agreement. Any attempted assignment in violation of this Section 7.04 shall be void. This Agreement shall be binding upon, shall inure to the benefit of, and shall be enforceable by the Parties and their respective permitted successors and assigns.

Section 7.06 No Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their permitted successors and assigns and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person, including any union or any employee or former employee of any Seller or the Business, or entity any legal or equitable right, benefit or remedy of any nature whatsoever, including any rights of employment for any specified period, under or by reason of this Agreement.

Section 7.06 Amendment. No provision of this Agreement may be amended, supplemented or modified except by a written instrument making specific reference hereto signed by the Parties.

Section 7.07 Governing Law; Submission to Jurisdiction; Waivers.

(a) This Agreement (and any claims or disputes arising out of or related hereto or to the transactions contemplated hereby or to the inducement of any Party to enter herein, whether for breach of contract, tortious conduct or otherwise and whether predicated on common law, statute or otherwise) shall in all respects be governed by, and construed in accordance with, the Laws of the State of Delaware, including all matters of construction, validity and performance, in each case without reference to any conflict of Law rules that might lead to the application of the Laws of any other jurisdiction. The Parties hereby declare that it is their intention that this Agreement shall be regarded as made under the laws of the State of Delaware and that the laws of said State shall be applied interpreting its own provisions in all cases where legal interpretation shall be required. Each Party agrees (i) that this Agreement involves at least $100,000.00, and (ii) that this Agreement has been entered into by the Parties in express reliance upon 6 Del. C. § 2708.

(b) Each of the Parties agrees that any Dispute shall be resolved only in the Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court, in that context, and without limiting the generality of the foregoing, each Party by this Agreement irrevocably and unconditionally:

(i) submits for itself and its property in any Action relating to this Agreement, or for recognition and enforcement of any judgment in respect thereof, to the exclusive jurisdiction of Chancery Court of the State of Delaware or, if such court shall not have jurisdiction, any federal court located in the State of Delaware or other Delaware State Court, and appellate courts having jurisdiction of appeals from any of the foregoing, and agrees that all claims in respect of any such Action shall be heard and determined in such Delaware court or, to the extent permitted by Law, in such federal court;

(ii) consents that any such Action may and shall be brought in such courts and waives any objection that it may now or hereafter have to the venue or jurisdiction of any such Action in any such court or that such Action was brought in an inconvenient court and agrees not to plead or claim the same;

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(iii) agrees (A) to the extent such Party is not otherwise subject to service of process in the State of Delaware, to appoint and maintain an agent in the State of Delaware as such Party's agent for acceptance of legal process, and (B) that, to the fullest extent permitted by applicable law, service of process may also be made on such Party by prepaid certified mail with a proof of mailing receipt validated by the United States Postal Service constituting the evidence of valid service, and that service made pursuant to (A) or (B) above shall, to the fullest extent permitted by applicable Law, have the same legal force and effect as if served upon such Party personally within the State of Delaware; and

(iv) agrees that nothing in this Agreement shall affect the right to effect service of process in any other manner permitted by the Laws of the State of Delaware.

Section 7.08 Specific Performance. The Parties hereby acknowledge and agree that the failure of any Party to perform its agreements and covenants hereunder, including its failure to take all actions as are necessary on its part to consummate the transactions contemplated hereby, will cause irreparable injury to the other Parties, for which money damages, even if available, will not be an adequate remedy. Accordingly, each Party hereby consents to the issuance of injunctive relief by any court of competent jurisdiction referenced in Section 7.07(b) to compel performance of such Party's obligations and to the granting by any court of the remedy of specific performance of its obligations hereunder, in addition to any other rights or remedies available hereunder or at law or in equity. Each Party hereby waives any requirements for the securing or posting of any bond with such remedy. Without limiting the foregoing, with respect to the failure of any Party to cause the Lorillard Transfer Closing to occur when it is otherwise intended to occur pursuant to the terms of this Agreement, each Party agrees, on its behalf and on behalf of its Affiliates, that the preferred, intended and mutually agreed sole and exclusive remedy for such breach is specific performance by (and related injunctive relief against) the breaching Party of its obligation to consummate the transactions contemplated hereby, and such parties further agree in such circumstances not to assert that a remedy of specific performance is unenforceable, invalid, contrary to law or inequitable for any reason nor to assert that money damages would provide an adequate remedy for such breach.

Section 7.9 Bulk Sales Laws. The Acquiror hereby waives compliance by Lorillard and the Lorillard Asset Owners with the provisions of the "bulk sales", "bulk transfer" or similar Laws of any state or any jurisdiction outside the United States that may otherwise be applicable with respect to the sale of any of the Transferred Assets.

Section 7.10 Rules of Construction. Interpretation of this Agreement shall be governed by the following rules of construction: (a) words in the singular shall be held to include the plural and vice versa, and words of one gender shall be held to include the other gender as the context requires; (b) references to the terms Article and Section are references to the Articles and Sections of this Agreement unless otherwise specified; (c) the terms "hereof", "herein", "hereby", "hereto", and derivative or similar words refer to this entire Agreement; (d) references to "$" shall mean US dollars; (e) the word "including" and words of similar import shall mean "including without limitation," unless otherwise specified; (f) the word "or" shall not be exclusive; (g) references to "written" or "in writing" include in electronic form; (h) provisions shall apply, when appropriate, to successive events and

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transactions; (i) the headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement; (j) the Parties have each participated in the negotiation and drafting of this Agreement and if an ambiguity or question of interpretation should arise, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or burdening any Party by virtue of the authorship of any of the provisions in this Agreement; (k) a reference to any Person includes such Person's successors and permitted assigns; (l) any reference to "days" means calendar days unless Business Days are expressly specified; and (m) when calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded and, if the last day of such period is not a Business Day, the period shall end on the next succeeding Business Day.

Section 7.11 Counterparts. This Agreement may be executed in one or more counterparts, and by the different parties to each such agreement in separate counterparts, each of which when executed shall be deemed to be an original but all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page by facsimile shall be as effective as delivery of a manually executed counterpart of this Agreement.

Section 7.12 Waiver of Jury Trial. EACH PARTY HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT, OR ANY TRANSACTION CONTEMPLATED HEREBY. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 7.12.

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed on the date first written above by their respective duly authorized officers.

LIGNUM-2, L.L.C.

By /s/ Rob Wilkey
Name: Rob Wilkey
Title:

LORILLARD, INC.

By /s/ Murray S. Kessler
Name: Murray S. Kessler
Title: President and Chief Executive Officer

[Signature page to Transfer Agreement]

NON-PUBLIC APPENDIX C

EXCEPTED LORILLARD EMPLOYEES

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

Decision and Order

APPENDIX D

APPENDIX D

MONITOR AGREEMENT

MONITOR AGREEMENT (this "Agreement") entered into this __ day of May 2015 by and between Dennis Hatchell (the "Monitor") and Reynolds American Inc. ("Reynolds") provides as follows:

PRELIMINARY STATEMENT

WHEREAS, the Federal Trade Commission (the "Commission") is considering for public comment an Agreement Containing Consent Order with Reynolds and Lorillard, Inc. ("Lorillard") (together with Reynolds, "Respondents") which provides, among other things, that Respondents divest the Combined Cigarette Business and Reynolds engage a monitor to monitor Respondents' compliance with their obligations under the Decision and Order;

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

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

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

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

DEFINITIONS

A. "Reynolds" means Reynolds American Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Reynolds American Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "Imperial" means Imperial Tobacco Group PLC, a public limited company incorporated under the laws of England and Wales with its headquarters and principal place of business located at 121 Winterstoke Road Bristol BS3 2LL, United Kingdom. Imperial Tobacco Group PLC's U.S. subsidiaries are ITG Brands, LLC, a Texas limited liability company (f/k/a Lignum-2, L.L.C.), and Commonwealth – Altadis, Inc., with its principal place of business located in Fort Lauderdale, Florida.

D. "Acquirer" means Imperial or any Person that receives the prior approval of the Commission to acquire the Combined Cigarette Business pursuant to this Decision and Order.

E. "Remedial Agreement" means:

1. the Imperial Divestiture Agreement if such agreement has not been rejected by the Commission; or

2. any agreement between Reynolds 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 Reynolds to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order.

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

ARTICLE I

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

1.2 Exercise of Monitor's Power. The 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 Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

1.3 Monitor's Duties. The Monitor shall act in a fiduciary capacity for the benefit of the Commission, notwithstanding the fact that Reynolds is the party to this Agreement and responsible for compensating the Monitor hereunder.

1.4 Duration of Monitor's Authority. Subject to Paragraph 3.7 of this Agreement, the Monitor shall have all powers and duties described above and consistent with the Order for the term set forth in the Order.

1.5 Confidential and Proprietary Information. The Monitor shall maintain the confidentiality of all information provided by Respondents, all Confidential Business Information of the Combined Cigarette Business and all confidential aspects of the performance of his duties under this Agreement (collectively, "Confidential Materials"). Except as provided in this Agreement, such information may be disclosed only to (i) Persons employed by or working with the Monitor under this Monitor Agreement, (ii) any other Person to whom disclosure is reasonably necessary for the Monitor to fulfill his duties (provided that such Person shall execute a confidentiality agreement prior to receiving Confidential Materials), or (iii) persons employed at the Commission, or any other government entity. The Monitor shall provide Reynolds with at least five (5) business days notice before disclosing any Confidential Materials to any governmental entity other than the Commission. When providing Confidential Materials to a third party pursuant to this Paragraph, the Monitor shall label such information "Confidential." The Monitor shall request confidential treatment by the Commission and staff of any Confidential Materials turned over to the Commission, including any information labeled "Confidential" by Respondents. The Monitor shall also request confidential treatment by any other government entity of any Confidential Materials turned over to the government entity, including any information labeled "Confidential" by Respondents. The Monitor shall use the Confidential Materials provided by Reynolds pursuant to this Agreement or learned in connection with performing his obligations under this Agreement only in performance of the duties set forth herein or in connection with any decision by a government entity. At no time shall the Monitor use such information for any other purpose or for the benefit of any other Person. For the avoidance of doubt, it shall not be a breach hereof for the Monitor, or any of the persons permitted to be used or employed under Section 2.1 below, to disclose Confidential Materials to the extent that it is otherwise required to be disclosed pursuant to a statutory or regulatory provision or court or administrative order, or, subject to appropriate conditions of confidentiality, to fulfill professional obligations and standards (including quality and peer review) or to submit and process an insurance claim. The confidentiality obligations of this Paragraph shall survive the termination of this Agreement.

1.6 Confidentiality Agreement. Reynolds may require the Monitor and each of the 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 Monitor from providing any information to the Commission.

1.7 Confidentiality of Commission Materials. The Commission may 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.

1.8 Restrictions. The Monitor shall not be involved in any way in the management, production, supply and trading, sales, marketing, and financial operations of any products of Respondents that compete with the products sold by the Combined Cigarette Business except serving on a supermarket chain board of directors, to the extent permitted by the Order, or as otherwise agreed between the Monitor, Reynolds and the Commission.

1.9 Reports. Reynolds shall report to the Monitor in accordance with the requirements of the Order. The Monitor shall report to the Commission pursuant to the terms of the Order and as otherwise requested by the Commission staff.

1.10 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor and any of the persons permitted to be used or employed under Section 2.1 below shall have full and complete access to Reynolds' personnel, to include those employees designated to be transferred to an acquirer, books, documents, records kept in the normal course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Reynolds shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Order.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and Other Assistants. The Monitor shall have the authority to use or employ, at the cost and expense of Reynolds, such other attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Order, provided that the Monitor consults with Reynolds before retaining any such individuals. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. Each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants must sign a confidentiality agreement in a form agreed upon by the Monitor and Reynolds.

2.2 Compensation of the Monitor. The Monitor shall serve, without bond or other security, at the expense of Reynolds on such reasonable and customary terms and conditions as the Commission may set.

a. Reynolds shall pay the Monitor in accordance with the terms provided in the attached Confidential Appendix, for all reasonable time spent in the performance of the Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.

b. In addition, Reynolds will pay (i) all out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties and responsibilities, including any telephone calls and auto, train or air travel, and (ii) all 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.

c. The Monitor shall provide Reynolds with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitor submits invoices. At their own expense, Reynolds may retain an independent auditor to verify such invoices.

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

2.3 Independent Contractor. The Monitor will be serving under this Agreement as an independent contractor such that no employer-employee relationship shall exist between the Monitor and Reynolds. The Monitor will not be entitled to participate in any employee benefit plans or accrue any employee benefits as a result of providing services under this Agreement.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Reynolds shall indemnify the Monitor and any other persons employed under Section 2.1 (collectively, the "Monitor Indemnified Persons") and hold the Monitor Indemnified Persons harmless against any losses, claims, damages, liabilities, or expenses asserted by any third party arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by any of the Monitor Indemnified Persons.

3.2 Standard of Care. 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 his or her own business affairs. The Monitor warrants that he will perform his obligations hereunder in good faith. The Monitor disclaims other warranties, express or implied, other than those expressly agreed to in writing between the Parties.

3.3 Conflicts of Interest. 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 performance by the Monitor of any of his duties under this Agreement, the Monitor shall promptly inform Reynolds and the Commission.

3.4 Dispute Resolution. In the event of a disagreement or dispute between Reynolds and the Monitor concerning Respondents' obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.

3.5 Monitor's Removal. If the Commission determines that the Monitor fails or ceases to act diligently and consistent with the purpose of the Order, Reynolds shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Order.

3.6 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission.

3.7 Termination of the Agreement. This Agreement shall terminate the earlier of: (a) the termination date as set forth in the Order; (b) Reynolds' receipt of written notice from the Commission that the Commission has determined that the 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 the Monitor to Reynolds and the Commission, upon resignation of the Monitor; or (d) when Respondents' last obligation under the Order that pertains to the Monitor's service has been fully performed. Monitor may resign at any time during the term of this Agreement for any reason by providing such 30 days written notice to Reynolds and the Commission and he shall have no liability as a result of his resignation. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

3.8 Governing Law. This Agreement shall be subject to the substantive law of the State of North Carolina (regardless of any other jurisdiction's choice of law principles). 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.

3.9 Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.

3.10 Notices. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail or reputable overnight courier, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If the Monitor, to:

Mr. Dennis Hatchell
420 4th Street. Suite 202H
Winston Salem, NC 27101

If Reynolds, to:

Martin L. Holton III, Esq.
Reynolds American Inc.
401 Main Street,
Winston-Salem, NC 27101
holtonm@rjrt.com

With a copy to:

Craig A. Waldman, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104
cawaldman@jonesday.com

If the Commission, to:

Compliance Division
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

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

MONITOR:

_____

Dennis Hatchell
HatchellCo LLC

REYNOLDS:

Reynolds American Inc.

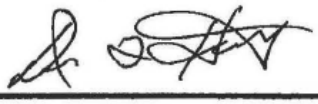
By: _____

Martin L. Holton III
Executive Vice President, General Counsel, and Assistant Secretary

From: Hatchell Dennis G. dennishatchell@gmail.com
Subject: No Subject
Date: May 14, 2015 at 10:48 AM
To: Hatchell Dennis G. dghwake@gmail.com

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

MONITOR:



Dennis Hatchell
HatchellCo LLC

REYNOLDS:

Reynolds American Inc.

NON-PUBLIC APPENDIX E

MONITOR COMPENSATION

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

STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission has voted to accept for public comment a settlement with Reynolds American, Inc. ("Reynolds") to resolve the likely anticompetitive effects of Reynolds' proposed acquisition of Lorillard Inc. ("Lorillard").[1] The settlement will allow the acquisition to move forward, subject to large divestitures by the parties to another major competitor in the tobacco industry.

The merging parties chose to present this acquisition to the Commission with a proposed divestiture aimed solely at securing our approval of the acquisition.[2] As proposed, Reynolds will purchase Lorillard for $27.4 billion and then immediately divest certain assets from both Reynolds and Lorillard to Imperial Tobacco Group plc ("Imperial") in a second $7.1 billion transaction. At the end of both transactions, Reynolds will own Lorillard's Newport brand and Imperial will own three former Reynolds' brands, Winston, Kool and Salem, as well as Lorillard's Maverick and e-cigarette Blu brands, and Lorillard's corporate infrastructure and manufacturing facility.

As we explain below, we have reason to believe that Reynolds' proposed acquisition of Lorillard is likely to

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[1] This statement reflects the views of Chairwoman Ramirez, Commissioner Ohlhausen, and Commissioner McSweeny.

[2] The only transaction before the Commission for purposes of Hart-Scott-Rodino review was the Reynolds-Lorillard transaction.

substantially lessen competition in the market for combustible cigarettes in the United States. We conclude, however, that the parties' proposed post-merger divestitures to Imperial would be effective in restoring competition in this market, and we therefore approve the divestitures as part of a consent order.

I. *Reynolds' Acquisition of Lorillard Is Likely to Substantially Lessen Competition in the Combustible Cigarette Market*

Today, the market for combustible cigarettes in the United States contains three major players and several additional smaller competitors. Philip Morris USA, a division of Altria Group, Inc. ("Altria"), is the largest, with a share of about 51%, roughly twice the size of its nearest competitor. Reynolds and Lorillard are the second- and third-largest firms, with shares of approximately 26% and 15%, respectively. Other players in the market include Liggett and Imperial, each with about 3% of the market, and roughly 50 other small players focused mainly on discount or regional business.

In light of their size and relative positions in the market, if Reynolds and Lorillard were attempting their transaction without any divestitures, the acquisition would likely substantially lessen competition, with the post-acquisition Reynolds controlling 41% of the market and Reynolds and Altria together holding 92% of the market. In particular, we have reason to believe that the transaction would eliminate competition between Reynolds' Camel brand and Lorillard's Newport brand. For example, we found evidence that Camel has been seeking to gain market share from Newport. There is also evidence of discounting by Newport in response to Camel. In addition, our econometric analysis showed likely price effects resulting from the combination of Camel and Newport.[3]

[3] While our main concern is with the transaction's likely unilateral effects, there is also evidence that the transaction would increase the likelihood of coordination by creating greater symmetry between Reynolds and Altria in terms of their market shares, portfolio of brands, and geographic strength in the United States. When the Commission last publicly evaluated this market in the context of the 2004 R.J. Reynolds Tobacco Holdings, Inc. ("RJR")/British American Tobacco p.l.c. ("BAT") transaction, we noted in our statement that conditions in the cigarette market at the time would make coordination

Having concluded that Reynolds' acquisition of Lorillard is likely to result in anticompetitive effects, we explain next why we believe the parties' proposed divestitures to Imperial are sufficient to restore competition.

II. *The Divestitures to Imperial Will Offset the Competition Lost from the Reynolds-Lorillard Merger*

Imperial is an international tobacco company with operations in 160 countries and global revenues of roughly $11.8 billion. Today, Imperial is a relatively small player in the United States with a 3% share of the market.[4] Through the divestitures, Imperial is purchasing a collection of assets from both Reynolds and Lorillard. In addition to buying several prominent brands from both companies, Imperial is receiving an intact American manufacturing and sales operation from Lorillard, including Lorillard's offices, production facilities, and 2,900 employees. Lorillard's national sales force, which will be moving to Imperial, is an experienced team with knowledge of brands and customers.

We believe that these divestitures to Imperial will address the competitive concerns arising out of the Reynolds-Lorillard combination. Following the divestitures, Imperial will immediately become the third-largest cigarette maker in the country, with a 10% market share.[5] Imperial has a clearly defined strategy for the United States, and it will have both the capability and incentives to become an effective U.S. competitor.

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difficult. The market has changed considerably over the last decade, perhaps most importantly in that the RJR/BAT transaction left the market with three major players relying on complex, differentiated product placement and pricing strategies. Unlike the combination of Reynolds/Lorillard, which would leave only two symmetric players with major national brands competing directly, the RJR/BAT transaction and market environment in 2004 presented a less pronounced coordination issue.

[4] Imperial entered the United States market through its acquisition of Commonwealth's cigarette brands in April 2007.

[5] After the divestitures to Imperial, Reynolds will have a 34% market share in the United States.

Winston is the number two cigarette brand in the world and will be the main focus of Imperial's strategy in the United States. Imperial's consumer research strongly indicates that Winston could see increased brand recognition and acceptance in the United States. Imperial plans to reposition Winston as a premium-value brand and invest in the growth of the brand through added visibility and significant discounting. Imperial also plans to refocus and invest in Kool through discounting on a state-by-state basis. The evidence shows that Imperial can grow the market share of these brands through discounting and other promotional activity.

In her dissent, Commissioner Brill questions Imperial's ability to restore the competition lost due to the Reynolds-Lorillard transaction, noting that the Winston and Kool brands have been declining for years.[6] In our view, however, Reynolds' track record with these two brands is not indicative of their potential with Imperial. As Commissioner Brill acknowledges, Reynolds made a conscious decision to promote Camel and Pall Mall aggressively as growth brands, and to put limited marketing support behind Winston and Kool. Going forward, Imperial will have greater incentives to promote Winston and Kool than Reynolds did because, unlike Reynolds, Imperial does not risk cannibalizing other brands in its portfolio. Moreover, Imperial is also acquiring Lorillard's Maverick, a value brand that competes well with Reynolds' Pall Mall.

Imperial has a successful record of repositioning cigarette brands in other jurisdictions and growing the market share of those brands. Although it has had a relatively small presence in this country, Imperial is acquiring an experienced, national sales force from Lorillard that will help it to grow the acquired brands and more effectively compete against Reynolds and Altria. Imperial has agreements in place with Reynolds to ensure continuity of supply of the acquired brands and to ensure their visibility at the point of sale. The agreements will enable Imperial to have immediate access to retail shelf space and give Imperial time to negotiate contracts with retailers.

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[6] Dissenting Statement of Commissioner Julie Brill at 6-7.

Following the divestitures, Imperial's business in the United States will account for 24% of its worldwide tobacco net revenues, thus making it important for Imperial to succeed in the United States. The acquisition will enable Imperial to be a national competitor, give it a portfolio of brands across different price points, and make its business more important to retailers, thereby enabling it to obtain visible shelf space and build stronger retailer relationships.

We are therefore satisfied that Imperial is positioned to be a sufficiently robust and aggressive competitor against a merged Reynolds-Lorillard and Altria, and to offset the competitive concerns arising from Reynolds' acquisition of Lorillard. Indeed, Imperial's incentives will stand in contrast to those of the pre-merger Lorillard, which has not been a particularly aggressive competitor in this market, having instead been generally content to rely on Newport's strong brand equity to drive most of its sales. We believe that Imperial will behave differently.

For these reasons, we are allowing the merger of Reynolds and Lorillard to go forward and accepting a consent decree to ensure that the divestitures to Imperial occur on a timely and effective basis.[7]

[7] Although he agrees that the merger of Reynolds and Lorillard is likely to substantially lessen competition and that a consent order increases the likelihood that the divestitures to Imperial are properly and promptly effectuated, Commissioner Wright believes a consent order is unwarranted and on that basis dissents. We respectfully disagree with Commissioner Wright's suggestion that our action is improper under these circumstances. Our obligation under the Hart-Scott-Rodino Act is to take appropriate steps to ensure that any competitive issues with a proposed transaction are addressed effectively and that is precisely what we have done here. Indeed, we believe that our responsibility would not be fully discharged if we did not guard against the risks that Commissioner Wright himself acknowledges exist in the absence of a consent order.

DISSENTING STATEMENT OF COMMISSIONER JULIE BRILL

A majority of the Commission has voted to accept a consent to resolve competitive concerns stemming from Reynolds American, Inc.'s $27.4 billion acquisition of Lorillard Tobacco Company, a transaction combining the second and third largest cigarette manufacturers in the United States. Under the terms of the consent, Reynolds will divest some of its weaker non-growth brands Winston, Kool, and Salem as well as Lorillard's brand Maverick to Imperial Tobacco Group plc, a British firm that currently operates as Commonwealth here in the United States.[1] The Commission will allow Reynolds to retain its sought-after growth brands, Camel and Pall Mall, as well as Lorillard's flagship brand Newport. I respectfully dissent because I am not convinced that the remedy accepted by the Commission fully resolves the competitive concerns arising from this transaction. By accepting the parties' proposed divestitures and allowing the merger to proceed, the Commission is betting on Imperial's ability and incentive to compete vigorously with a set of weak and declining brands. For the reasons explained below, Imperial's ability to do so is at best uncertain. I thus have reason to believe that Reynolds' acquisition of Lorillard, even after the divestitures to Imperial, is likely to substantially lessen competition in the U.S. cigarette market. As a result of the Commission's failure to take meaningful action against this merger, the remaining two major cigarette manufacturers Altria/Philip Morris and Reynolds will likely be able to impose higher cigarette prices on consumers.

I have reason to believe this merger increases both the likelihood of coordinated interaction between the remaining participants in the cigarette market, and the likelihood that the merged firm will unilaterally exercise market power. While both theories are presented in the Commission's Complaint,[2] I describe below additional facts and evidence not included in the Complaint

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[1] Reynolds will also sell Lorillard's e-cigarette Blu to Imperial; that sale is not part of the Commission's proposed order.

[2] Complaint, ¶ 8, *In the Matter of Reynolds American Inc. and Lorillard Inc.*, File No. 141-0168, (May 26, 2015).

that I believe illustrate why the transaction remains anticompetitive, notwithstanding the divestitures to Imperial.

Coordinated Effects

Under a coordinated effects theory, as set forth in the 2010 Horizontal Merger Guidelines, the Commission is likely to challenge a merger if the following three conditions are met: "(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."[3] Importantly, the Guidelines explain "the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. . .".[4] The Guidelines also instruct that "[p]ursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place."[5]

I have reason to believe that the facts in this case demonstrate a substantial risk of coordinated interaction because all three conditions for coordinated interaction spelled out in the Horizontal Merger Guidelines are satisfied.

The first condition is easily satisfied. After the dust settles on the merger and divestitures, Reynolds and market leader Altria/Philip Morris will have over 80 percent of the U.S. market for traditional combustible cigarettes.[6]

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[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [*hereinafter* Guidelines].

[4] *Id*.

[5] *Id*.

[6] As the majority notes, the relevant market is combustible cigarettes in the United States. Statement of the F.T.C., *In the Matter of* Reynolds American Inc. and Lorillard Inc., File No. 141-0168, May 26, 2015, at 1 [*hereinafter* Majority Statement].

The second condition is also easily satisfied. The Guidelines identify a number of market characteristics that are generally considered to make a market more vulnerable to coordination.[7] These include (1) evidence of past express collusion affecting the relevant market; (2) firms' ability to monitor rivals' behavior and detect cheating with relative ease; (3) availability of rapid and effective forms of punishment for cheating; (4) difficulties associated with attempting to gain significant market share from aggressive price cutting; and (5) low elasticity of demand. The cigarette market has many of these characteristics.

First, for the last decade, the cigarette market in the United States has been dominated by three firms Reynolds, Lorillard, and Altria/Philip Morris which together represent over 90 percent of the market. Over the same 10-year period, these "Big Three" tobacco firms have made lock-step cigarette list price increases unrelated to any change in costs or market fundamentals.[8]

Second, there is a high degree of pricing transparency at the wholesale and retail levels in the cigarette market, giving cigarette manufacturers the ability to monitor each other's prices and

[7] Guidelines, *supra* note 3,. at § 7.2.

[8] In this context, it is worth noting that, in 2006, U.S. District Judge Kessler held Reynolds, Lorillard, Philip Morris, and a number of other cigarette manufacturers liable under the Racketeer Influenced and Corrupt Organizations Act (RICO). *United States v. Philip Morris*, 449 F. Supp 2d 1 (D.D.C. 2006), *aff'd* 566 F.3d 1095 (D.C. Cir. 2009). In a lengthy decision containing over 4000 paragraphs of findings of fact, the district court highlighted the coordinated nature of the defendants' activities in furtherance of the racketeering scheme. The conduct involved was indirectly related to price, as the overarching purpose behind the scheme was to maximize the competing cigarette firms' profits. The district court explained that "[t]he central shared objective of Defendants has been to maximize the profits of the cigarette company Defendants by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud existing and potential smokers. . . ." (*Philip Morris*, 449 F. Supp 2d at 869). The court also found that "[t]here is overwhelming evidence demonstrating Defendants' recognition that their economic interests would best be served by pursuing a united front on smoking and health issues and by a global coordination of their activities to protect and enhance their market positions in their respective countries." (*Id.* at 119). I find this evidence troubling when viewed in conjunction with the evidence in this case showing the U.S. cigarette market's vulnerability to coordinated interaction relating to prices.

engage in disciplinary action necessary to maintain coordination. The major manufacturers all receive detailed wholesale volume information from firms collecting data. Reynolds and Lorillard also receive numerous analyst reports that track manufacturers' pricing behavior and project whether the industry will enjoy a stable or aggressive competitive environment as a result. These conditions will allow the new "Big Two" cigarette manufacturers to quickly detect volume shifts due to price cuts and other competitive activity, allowing them to monitor each other's prices, detect cheating, and quickly discipline each other – or threaten to do so. Third, many U.S. smokers are addicted to tobacco, resulting in fairly inelastic market demand, and rendering successful coordination more profitable for industry members. As the Guidelines describe, coordination is more likely the more participants stand to gain from it.

Apart from the market characteristics identified in the Guidelines that make a market more vulnerable to coordination, it is important to consider that the cigarette market in the United States has experienced an ongoing decline in volume for over 20 years. This creates pressure on manufacturers to increase prices to offset volume losses, potentially easing the difficulties associated with formation of coordinating arrangements by making price increases a focal strategy.

In 2004, the Commission elected not to challenge the merger of Reynolds and Brown & Williamson in part because it found that the cigarette market was not vulnerable to coordinated interaction. However, three key market dynamics have changed since then. These three changes have limited the market significance of the discount fringe and its ability to constrain cigarette prices, and increased entry barriers both of which make the market more vulnerable to coordination. First, Reynolds' Every Day Low Price (EDLP) program, substantially modified in 2008 to reposition and grow Pall Mall as the EDLP brand, requires participating retailers to maintain Pall Mall as the lowest price brand sold in the store, creating an effective price floor that discount manufacturers are not allowed to undercut. Second, the vast majority of states that signed the Tobacco Master Settlement Agreement ("MSA") have enacted Non-Participating Manufacturer Legislation and Allocable Share Legislation, further

diminishing the impact of discount brands.[9] Under this legislation, companies that do not participate in the MSA typically the discount cigarette manufacturers are required to pay an escrow fee to approximate the costs incurred by the participating cigarette companies, thereby eliminating much of the cost advantage that discounters had previously enjoyed. Third, the FDA's 2010 regulations,[10] implementing the 2009 Family Smoking Prevention and Tobacco Control Act,[11] restrict tobacco advertising and promotion in the United States. Thus the 2010 FDA regulation limits the ability of new firms to enter the market, and limits the ability of existing fringe market participants to grow through

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[9] The Tobacco Master Settlement Agreement ("MSA") was entered in November 1998, originally between the four largest U.S. tobacco companies – Philip Morris Inc., R.J. Reynolds, Brown & Williamson and Lorillard – the original participating manufacturers ("OPMs"), and the attorneys general of 46 states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Marianas. The MSA resolved over 40 lawsuits brought by the states against tobacco manufacturers to recover billions of dollars in costs incurred by the states to treat smoking related illnesses and to obtain other relief. The OPMs agreed (1) to make multi-billion dollar payments, annually and in perpetuity, to the states and (2) to significantly restrict the way they market and advertise their tobacco products, including a prohibition on the use of cartoons in cigarette advertising or any other method that targets youth. In exchange, the states agreed to release the OPMs, and any other tobacco company that became a signatory to the MSA, from past and future liability arising from the health care costs caused by smoking. All MSA states subsequently enacted legislation requiring non-participating manufacturers ("NPMs") to make certain payments based on the number of cigarettes sold into the state. These payments are placed in an escrow account to ensure that funds are available to satisfy state claims against NPMs. Although all MSA states enacted this legislation, many NPMs were not making the required payments, or were exploiting a loophole by withdrawing their escrow deposits in a way that conflicted with the legislation's intent. To address those issues, many states adopted additional legislation to provide enforcement tools to ensure that NPMs make the required escrow payments ("complementary enforcement legislation"), as well as legislation to close a loophole in the state escrow statutes by preventing NPMs from withdrawing escrow payments in a way that was never contemplated when those statutes were enacted ("Allocable Share Legislation").

[10] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 FR 13225 (March 19, 2010).

[11] 21 U.S.C. § 301 (2009).

aggressive advertising. The combined effect of these three, relatively new market dynamics has been a reduction in the competitive significance of the fringe discount brand manufacturers. Indeed, the number of discount brand manufacturers has fallen from over 100 in 2005, to around 50 today, now representing just two percent of the market.

The third and final condition identified in the Guidelines as leading the Commission to challenge a proposed merger based on a theory of coordination that the Commission has a credible basis to conclude that the merger may enhance the market's vulnerability to coordination is also satisfied in this case. Prior to the transaction, a large percentage of Reynolds' portfolio consisted of non-growth brands (including Winston, Kool, and Salem), and overall Reynolds' volumes were declining. In the years leading up to this transaction Reynolds also had a noticeable portfolio gap, as it lacked a strong premium menthol brand. Reynolds initiated new competition in the menthol segment with the introduction of Camel Crush and Camel Menthol, but Reynolds was still playing catch-up. Seeking to stop further volume loss to its competitors' menthol brands Lorillard's Newport and Altria/Philip Morris' Marlboro Reynolds implemented a strategy of aggressive promotion of Camel and Pall Mall. The proposed merger eliminates many of Reynolds' incentives to continue these strategies. With Newport added to its portfolio, Reynolds will no longer face a gap in menthol and will not be subject to the same level of volume losses. Post-transaction, there will be greater symmetry between Altria/Philip Morris and Reynolds, bringing Reynolds' incentives into closer alignment with Altria/Philip Morris to place greater emphasis on profitability over market share growth. This increase in symmetry between Reynolds and Altria/Philip Morris thus enhances the market's vulnerability to coordination.[12]

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[12] *See* Statement of the F.T.C., *In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp.*, File No. 141-0235, May 8, 2015, *available at* https://www ftc.gov/system/files/document/cases/150515zffrn.pdf. *See also* Marc Ivaldi, et al., *The Economics of Tacit Collusion* 66 & 67, Final Report for DG Competition, European Commission (2003), *available at* http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf ("By eliminating a competitor, a merger reduces the number of participants and thereby tends to facilitate collusion. This effect is likely to

Unilateral Effects

This transaction also raises concerns about unilateral anticompetitive effects, because it eliminates the growing head-to-head competition between Reynolds and Lorillard. The Guidelines explain that "[t]he elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."[13] As the majority explains, the Commission's econometric modeling showed likely price effects from the combination of the parties' cigarette portfolios.[14]

The econometric analysis supports the substantial qualitative evidence of unilateral anticompetitive effects. For years, Lorillard's Newport brand has been able to rely on strong brand equity and brand loyalty to sustain its high market share and high prices for its menthol product line. As noted above, Reynolds, on the other hand, has been lagging behind Altria/Philip Morris and Lorillard in terms of profitability and pricing, with no comparably strong menthol product. As a result, in recent years Reynolds has been making efforts to challenge Newport's established leadership position and increase its share in menthol through increased promotional activity. Reynolds also engaged in the first innovation in this industry in many years with the introduction of Camel Crush,[15] which has generated strong sales growth for a new brand. Post-merger, with Newport in its hands, Reynolds will no longer need to innovate or increase its promotional activity to increase its share in menthol.

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be the higher, the smaller the number of participants already left in the market.") ("[I]t is easier to collude among equals, that is, among firms that have similar cost structures, similar production capacities, or offer similar ranges of products. This is a factor that is typically affected by a merger. Mergers that tend to restore symmetry can facilitate collusion.").

[13] Guidelines, *supra* note 3, at § 6.

[14] Majority Statement, *supra* note 6, at 2.

[15] Camel Crush allows consumers to change the cigarette from non-menthol to menthol or from menthol to stronger menthol by crushing a menthol capsule inside the filter.

In sum, I have reason to believe that this merger poses a real danger of anticompetitive harm through coordinated effects and unilateral exercise of market power in the U.S. cigarette market.

Adequacy of Divestitures to Imperial to Restore Competition

As the Supreme Court has stated, restoring competition is the "key to the whole question of an antitrust remedy."[16] Both Supreme Court precedent and Commission guidance makes clear that any remedy to a transaction found to be in violation of Section 7 of the Clayton Act must fully restore the competition lost from the transaction,[17] and a remedy that restores only *some* of the competition lost does not suffice.[18] Because Clayton Act merger enforcement is predictive, it is hard to define what will precisely fully restore lost competition in any given case. The agency has on occasion allowed for remedies that are not an exact replica of the pre-merger market, usually when there is evidence that the buyer can have a strong competitive impact with the divested assets. Yet the focus of the inquiry is always on whether the proposed divestitures are sufficient to maintain or restore

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[16] *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

[17] *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.' . . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.").

[18] *See* F.T.C. Frequently Asked Questions About Merger Consent Order Provisions, *available at* https://www ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq ("There have been instances in which the divestiture of one firm's entire business in a relevant market was not sufficient to maintain or restore competition in that relevant market and thus was not an acceptable divestiture package. To assure effective relief, the Commission may thus order the inclusion of additional assets beyond those operating in the relevant market. . . In all cases, the objective is to effectuate a divestiture most likely to maintain or restore competition in the relevant market. . . At all times, the burden is on the parties to provide concrete and convincing evidence indicating that the asset package is sufficient to allow the proposed buyer to operate in a manner that maintains or restores competition in the relevant market.").

competition in the relevant market that existed prior to the transaction.[19]

Under these well-grounded principles, I have serious concerns about whether the divestiture remedy in this case is sufficient to restore competition in the U.S. cigarette market. As a preliminary matter, it is worth noting that, post-transaction, Imperial will be less than one-third the size of the combined Reynolds/Lorillard, with a 10 percent market share compared to the combined Reynolds/Lorillard's 34 percent market share. Prior to the transaction, Reynolds and Lorillard were more comparable in size to each other Reynolds with a 26 percent market share and Lorillard with a 15 percent market share. And despite the divestitures, the HHI will increase 331 points to 3,809. Moreover, there is nothing dynamic about the cigarette market by any measure that could plausibly make these measures less useful in analyzing the likelihood of the divestiture to fully restore the competition lost from this transaction.

Beyond the resulting increased concentration, the question is whether Imperial can nonetheless maintain or restore competition in the market with the divested brands due to its own business acumen and incentives post-divestiture. I have reason to believe Imperial will not be up to the job. Indeed, I believe Imperial's post-divestiture market share may overstate its competitive significance. Through this transaction, Reynolds will obtain the second largest selling brand in the country (Newport), and keep the third largest selling brand (Camel). Imperial, on the other hand, will continue to have no strong brands in its portfolio. Reynolds' Winston, Kool, and Salem are declining and unsuccessful. Their combined market share has gone from approximately 14 percent in 2010 to 8 percent in 2013 (a 6

[19] *Id.* ("Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets. . . An acceptable divestiture package is one that maintains or restores competition in the relevant market. . .."). *See also* Statement of the F.T.C.'s Bureau of Competition on Negotiating Merger Remedies, at 4, January 2012, *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf ("If the Commission concludes that a proposed settlement will remedy the merger's anticompetitive effects, it will likely accept that settlement and not seek to prevent the proposed merger or unwind the consummated merger.").

percent decline), and they are still losing share. It is no surprise that Reynolds would want to unload these weak brands, and refuse to provide a meaningful divestiture package that would replace the competition lost through its merger with Lorillard. I am not convinced that Imperial will have any greater ability to grow these declining brands. Indeed, I have reason to believe that Winston, Kool, and Salem, as well as Maverick, will languish even further outside the hands of Reynolds and Lorillard.

There is no doubt that Imperial *hopes* to make these brands successful and will make every attempt to do so. Imperial's strong global financial position will help. The Commission cannot rely on hopes and aspirations alone, however. We must base our decision on facts and demonstrated performance in the market. And it is by this measure that Imperial, with the added weak brands from Reynolds, comes up short. Imperial has a poor track record of growing acquired brands in the U.S. Imperial entered the U.S. market in 2007 by acquiring Commonwealth.[20] At that time Imperial also aspired to increase share. However, Imperial was not successful. Commonwealth's market share has declined since it was acquired by Imperial, and stands at less than three percent today. While in FY 2014 Imperial may have achieved modest growth with one of its other brands, USA Gold, that growth was only focused on limited geographic markets, and doesn't give me confidence that Imperial can implement a national campaign growth strategy. Reynolds, with much greater experience in the U.S. market, made numerous efforts to reinvigorate Winston, Kool, and Salem, but failed.[21] In light of Imperial's much worse track record here in the U.S., I am unconvinced that it will have *more* luck in making its wishful plans a reality.

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[20] In 1996 Commonwealth acquired brands required by the Commission to be divested to resolve competitive concerns stemming from B.A.T. Industries p.l.c.'s $1 billion acquisition of The American Tobacco Company. B.A.T. Industries p.l.c., *et al*, 119 F.T.C. 532 (1995).

[21] The majority interprets the evidence before us as showing that Reynolds emphasized Camel and Pall Mall but only put "limited marketing support behind Winston and Kool." *See* Majority Statement, *supra* note 6, at 3. In contradistinction to the majority, I believe the evidence before us demonstrates that on numerous occasions Reynolds sought – valiantly but without success – to grow Winston and Kool, even while emphasizing Camel and Pall Mall.

The majority notes that, outside the United States, Winston is the number two cigarette brand, and Imperial plans to make Winston the main focus of its strategy in the United States post-transaction.[22] But Winston's dichotomous position a strong brand outside the United States and a weak brand in the United States has held for many years. And Reynolds' multiple efforts to reposition Winston in light of its strong global position have not had any effect on slowing the dramatic decline of Winston in the United States. Indeed, by placing Winston at the center of its U.S. strategy, Imperial is demonstrating the same tone-deafness to the unique dynamics of the U.S. market that has caused Imperial to lose market share since it entered the U.S. market in 2007.

My concerns about Imperial's ability to succeed where Reynolds has failed is heightened by the fact that Imperial will have no "anchor" brand to gain traction with retailers, and as a result will have limited shelf space available to it. The divestitures of Maverick from Lorillard and Winston, Kool, and Salem from Reynolds effectively de-couple each divested brand from a strong anchor brand. These anchor brands Newport and Camel, the second and third best-selling brands in the country gave Maverick, Winston, Kool, and Salem increased shelf space and promotional spending, helping to drive the limited sales they had. Maverick in particular benefits from Newport's brand success: Lorillard gives it a portion of Newport's shelf space, and when Lorillard advertises Newport, it advertises Maverick too. In Imperial's hands, the divested brands will not have the same shelf space or the benefit of strong advertising that comes with their anchor brands. I believe that the decoupling of the divested brands from Camel and Newport will serve to further exacerbate their decline.

Recognizing Imperial's shelf space disadvantage, the proposed Consent requires Reynolds to make some short term accommodations in an attempt to give Imperial a fighting chance in its effort to gain some shelf space in stores. First, the Consent envisions Reynolds entering into a Route to Market ("RTM") agreement with Imperial, whereby Reynolds agrees to provide Imperial a portion of its post-acquisition retail shelf space for a

[22] Majority Statement, *supra* note 6, at 2.

period of five months following the close of the transaction. Imperial will pay Reynolds $7 million for this agreement. Under the terms of the RTM agreement, Reynolds commits for a period of five months to continue placing Winston, Kool, and Salem on retail fixtures according to historic business practices, and to assign Imperial a defined portion of Lorillard's current retail shelf-space allotments to use as it sees fit. Second, Reynolds is also undertaking a 12-month commitment to remove provisions in new retail marketing contracts that would otherwise require some retailers to provide it shelf space in proportion to its national market share, where Reynolds national market share is higher than its local market share. The intent of this commitment is to increase Imperial's ability to obtain shelf space at least proportional to its local market share in many retail outlets for a period of 12 months.

I have reason to believe that these provisions are insufficient to make up for Imperial's significant shelf space disadvantage. The five-month RTM Agreement and 12-month commitment pertaining to Reynolds' allocation of shelf space according to its local market share are too short. While Imperial may be optimistic that it can establish sufficient shelf space in this limited time frame, nothing in the RTM Agreement and 12-month local market share commitment will alter retailers' incentives to allocate their shelf space to popular products that sell well when those time periods expire. Even if Imperial offers better terms and uses former Lorillard salespeople who have preexisting relationships with retailers to push for greater shelf space, it likely will still be in retailers' economic interest to allocate shelf space to the strong Reynolds and Altria/Philp Morris brands, not to Imperial's collection of weak and declining brands.[23] And at the

[23] The majority places its bet on Imperial in part based on the transfer to Imperial of "an experienced, national sales force from Lorillard." Majority Statement, *supra* note 6, at 2. I do not believe the transfer of some of Lorillard's sales staff to Imperial will transform Imperial into a significant competitor in the U.S. market. Lorillard's transferred sales staff will not be able to overcome the significant market dynamics described herein. Moreover, Lorillard's sales staff likely will be unable to fundamentally transform Imperial's lackluster competitive performance in the U.S. market because, as the majority itself acknowledges, "pre-merger Lorillard . . . has not been a particularly aggressive competitor in this market, having instead been generally

end of Reynolds' 12-month local market share commitment, Reynolds will be able to squeeze Imperial's shelf space by requiring many retailers to provide it shelf space in proportion to its higher-than-local national market share. While Imperial may attempt to maintain its retail visibility by offering stores lucrative merchandising contracts, Reynolds and Altria/Philip Morris will no doubt counter those efforts with their own lucrative contracts. In the short run, arguably this may be beneficial for competition, but in the long run, Imperial's market presence will diminish and the market will in all likelihood become a stable duopoly.[24]

Conclusion

There is a great deal of discussion among academia, industry and other stakeholders about the negative impact on the market stemming from over enforcement of the antitrust laws.[25] There is consensus that over enforcement, also known as "Type 1 errors" or "false positives", can harm businesses and consumers by preventing what could otherwise be procompetitive conduct;

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content to rely on Newport's strong brand equity to drive most of its sales." Majority Statement, *supra* note 6, at 3.

[24] The majority relies on the fact that Imperial will have more favorable incentives as compared with those of the pre-merger Lorillard, since Lorillard was not a particularly aggressive competitor. Majority Statement, *supra* note 6, at 3. But that comparison does not capture the full picture of the competitive harm from this transaction. Reynolds, not Lorillard, was the firm injecting some competition into the market. And as described herein, once Reynolds adds Lorillard's flagship Newport brand to its portfolio, Reynolds will have a portfolio of brands that is symmetrical to Altria/Philip Morris, resulting in a significant change in its incentives post-merger. In considering whether Imperial will fully restore the competition lost from this transaction, the majority seems to omit from its analysis Reynolds' changed incentives post-merger, and the effect that these changed incentives will have to substantially lessen competition in the U.S. market.

[25] *See, e.g.,* Christine A. Varney & Jonathan J. Clark, Chicago and Georgetown: An Essay in Honor of Robert Pitofsky, 101 Geo. L.J. 1565 (2013); Bruce H. Kobayashi and Timothy J. Muris, Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century, 78 Antitrust L. J. 147 (2012); Alan Devlin and Michael Jacobs, Antitrust Error, 52 Wm. & Mary L. Rev. 75 (2010); *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 414 (2004); Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 15-16 (1984).

many commentators believe Type 1 errors can also have a chilling effect on future procompetitive conduct.[26] However, failing to bring antitrust enforcement actions can also cause significant harms to consumers. As has been recently demonstrated by an in-depth study of merger retrospectives, harm from under enforcement, also known as "Type 2 errors" or "false negatives", can come in the form of significant price increases.[27] The Commission has always been very careful not to take enforcement action that turns out not to be warranted, an approach I fully support. This Commission also normally pays close attention when we are presented with insufficient divestitures or other remedies, to avoid under enforcement errors that can cause significant harm to consumers. Unfortunately, the majority has failed to do so in this case.

For all of these reasons, I respectfully dissent.

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[26] *Id.*

[27] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES, A RETROSPECTIVE ANALYSIS OF U.S. POLICY, 2015.

DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and Decision & Order against Reynolds American Inc. ("Reynolds") to remedy the allegedly anticompetitive effects of Reynolds' proposed acquisition of Lorillard Inc. ("Lorillard"). I respectfully dissent because the evidence is insufficient to provide reason to believe the three-way transaction between Reynolds, Lorillard, and Imperial Tobacco Group, plc ("Imperial") will substantially lessen competition for combustible cigarettes sold in the United States. In particular, I believe the Commission has not met its burden to show that an order is required to remedy any competitive harm arising from the original three-way transaction. This is because the Imperial transaction is both highly likely to occur and is sufficient to extinguish any competitive concerns arising from Reynolds' proposed acquisition of Lorillard. This combination of facts necessarily implies the Commission should close the investigation of the three-way transaction before it and allow the parties to complete the proposed three-way transaction without imposing an order.

In July 2014, Reynolds, Lorillard, and Imperial struck a deal where, as the Commission states, "Reynolds will own Lorillard's Newport brand and Imperial will own three former Reynolds' brands, Winston, Kool and Salem, as well as Lorillard's Maverick and e-cigarette Blu brands, and Lorillard's corporate infrastructure and manufacturing facility."[1] Thus, this deal came to us as a three-way transaction. As a matter of principle, when the Commission is presented with a three (or more) way transaction, an order is unnecessary if the transaction taken as a whole does not give reason to believe competition will be substantially lessened. The fact that a component of a multi-part transaction is likely anticompetitive when analyzed in isolation does not imply that the transaction when examined as a whole is also likely to substantially lessen competition.

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[1] *See* Statement of the Federal Trade Commission 1, Reynolds American Inc., FTC File No. 141-0168 (May 26, 2015).

When presented with a three-way transaction, the Commission should begin with the following question: If the three-way deal is completed, is there reason to believe competition will be substantially lessened? If there is reason to believe the three-way deal will substantially lessen competition, then the Commission should pursue the appropriate remedy, either through litigation or a consent decree. If the deal examined as a whole *does not* substantially lessen competition, the default approach should be to close the investigation. An exception to the default approach, and a corresponding remedy, may be appropriate if there is substantial evidence that the three-way deal will not be completed as proposed. In such a case, the Commission must ask: what is the likelihood of only a portion of the deal being completed while the other portion, which is responsible for ameliorating the competitive concerns, is not completed? In this case, this second inquiry amounts to an assessment of the likelihood that Reynolds' proposed acquisition of Lorillard would be completed but the Imperial transaction would not be.

I agree with the Commission majority that the first question should be answered in the negative because the proposed transfer of brands to Imperial makes it unlikely that there will be a substantial lessening of competition from either unilateral or coordinated effects.[2] I also agree with the Commission majority that if Reynolds and Lorillard were attempting a transaction without the involvement of Imperial, the acquisition would likely substantially lessen competition.[3] Thus, taken as a whole, I do

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[2] Statement of the Federal Trade Commission, *supra* note 1, at 3.

[3] Statement of the Federal Trade Commission, *supra* note 1, at 1. While I agree with the Commission's ultimate conclusion that Reynolds' proposed acquisition of Lorillard would substantially lessen competition, I do not agree with the Commission's reasoning. In particular, I do not believe the assertion that higher concentration resulting from the transaction renders coordinated effects likely. Specifically, I have no reason to believe that the market is vulnerable to coordination or that there is a credible basis to conclude the combination of Reynolds and Lorillard would enhance that vulnerability. For further discussion of why, as a general matter, the Commission should not in my view rely upon increases in concentration to create a presumption of competitive harm or the likelihood of coordinated effects, see Statement of Commissioner Joshua D. Wright, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015).

not find the three-way transaction to be in violation of Section 7 of the Clayton Act.

The next question to consider is whether there is any evidence that the Imperial portion of the transaction will not be completed absent an order. In theory, if the probability of the Imperial portion of the transaction coming to completion in a manner that ameliorates the competitive concerns arising from just the Reynolds-Lorillard portion of the transaction were sufficiently low, then one could argue the overall transaction is likely to substantially lessen competition. I have seen no evidence that, absent an order, Reynolds and Lorillard would not complete its transfer of assets and brands to Imperial. While there are no guarantees and the probability that the Imperial portion of the transaction will be completed is something less than 100 percent, I have no reason to believe it is close to or less than 50 percent.[4]

I fully accept that a consent and order will increase the likelihood that the Imperial portion of the transaction will be completed. Putting firms under order with threat of contempt tends to have that effect. I also accept the view that a consent and order may mitigate some, but perhaps not all, potential moral hazard issues regarding the transfer of assets and brands from Reynolds-Lorillard to Imperial. Specifically, the concern is that, post-merger, Reynolds-Lorillard would complete the Imperial portion of the transaction but more in form but not in function and artificially raise the cost for Imperial. Higher costs for Imperial, such as undue delays in obtaining critical assets, would certainly materially impact Imperial's ability to compete effectively. Given this possibility, a consent and order, including the use a monitor, would make such behavior easier to detect, and consequently would provide some deterrence from these potential moral hazard issues.

It is also true, however, that a monitor in numerous other circumstances would make anticompetitive behavior easier to detect and consequently deter that behavior from occurring in the

[4] I would find a likelihood that the Imperial portion of the transaction would be completed less than 50 percent to be a sufficient basis to challenge the three-way transaction or enter into a consent decree.

first place. Based upon this reasoning, the Commission could try as a prophylactic effort to impose a monitor in all oligopoly markets in the United States. This would no doubt detect (and deter) much price fixing. Such a broad effort would be unprecedented, and of course, plainly unlawful. The Commission's authority to impose a *remedy* in any context depends upon its finding a law *violation*. Here, because the parties originally presented the three-way transaction to ameliorate competitive concerns about a Reynolds-Lorillard-only deal, and they did so successfully, there is no reason to believe the three-way transaction will substantially lessen competition; therefore, there is no legal wrongdoing to remedy.

The Commission understandably would like to hold the parties to a consent order that requires them to make the deal along with a handful of other changes. But that is not our role. There is no legal authority for the proposition that the Commission can prophylactically impose remedies without an underlying violation of the antitrust laws. And there is no legal authority to support the view that the Commission can isolate selected components of a three-way transaction to find such a violation. In the absence of such authority, the appropriate course is to evaluate the three-way transaction presented to the agency as a whole. Because I conclude, as apparently does the Commission, that the three-way transaction does not substantially lessen competition, there is no competitive harm to correct and any remedy is unnecessary and unwarranted.[5] Entering into consents is appropriate only when the transaction at issue in this case the three-way transaction is likely to substantially lessen competition. This one does not.

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[5] The Commission points to the HSR Act as providing the legal basis for the FTC to enter into consent orders "to ensure that any competitive issues with a proposed transaction are addressed effectively." Statement of the Federal Trade Commission, *supra* note 1, at 4 n.7. When a proposed transaction or set of transactions would not substantially lessen competition, as is the case with the three way transaction originally proposed here, there are no competitive issues with the proposed transaction to be addressed, and the belief that a consent order may even further mitigate concerns regarding the transfer of assets is not material to our analysis under the Clayton Act. The HSR Act is not in conflict with the Clayton Act and does not change this result.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted from Reynolds American Inc. ("Reynolds") and Lorillard Inc. ("Lorillard"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from Reynolds's proposed acquisition of Lorillard.

Reynolds's July 2014 agreement to acquire Lorillard in a $27.4 billion transaction ("the Acquisition") would combine the second- and third-largest cigarette producers in the United States. After the Acquisition, Reynolds and the largest U.S. cigarette producer, Altria Group, Inc. ("Altria"), would together control approximately 90% of all U.S. cigarette sales. 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 market for traditional combustible cigarettes.

Under the terms of the Consent Agreement, Reynolds must divest a substantial set of assets to Imperial Tobacco Group plc. ("Imperial"). These assets include four cigarette brands, Lorillard's manufacturing facility and headquarters, and most of Lorillard's current workforce. The Consent Agreement also requires Reynolds to provide Imperial with visible shelf-space at retail locations for a period of five months following the close of the transaction. This Consent Agreement provides Imperial's U.S. operations with the nationally relevant brands, manufacturing facilities, and other tangible and intangible assets needed to effectively compete in the U.S. cigarette market. Reynolds must complete the divestiture on the same day it acquires Lorillard.

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 review the Consent Agreement, and comments received, to decide whether it

should withdraw or modify the Consent Agreement, or make the Consent Agreement final.

THE PARTIES

All parties to the proposed Acquisition and Consent Agreement are current competitors in the U.S. cigarette market.

Reynolds has the second-largest cigarette manufacturing and sales business in the United States. Its brands include two of the best-selling cigarettes in the country: Camel and Pall Mall. It also manages a number of smaller cigarette brands that it promotes less heavily. These include Winston, Kool, and Salem. Reynolds primarily sells its cigarettes in the United States.

Lorillard has the third-largest cigarette manufacturing and sales business in the United States. Its flagship brand, Newport, is the best-selling menthol cigarette in the country, and the second-best-selling cigarette brand overall. In addition to recently introduced non-menthol styles of Newport, Lorillard manufactures and sells a few smaller discount-segment brands, such as Maverick. Like Reynolds, Lorillard competes primarily in the United States.

Imperial is an international tobacco company operating in many countries including Australia, France, Germany, Greece, Italy, Turkey, Taiwan, the United Kingdom, and the United States. It sells tobacco products in the U.S. through its Commonwealth-Altadis subsidiary. Imperial's U.S. cigarette portfolio consists of several smaller discount brands, including USA Gold, Sonoma, and Montclair.

THE RELEVANT MARKET AND MARKET STRUCTURE

The relevant line of commerce in which to analyze the effects of the Acquisition is traditional combustible cigarettes ("cigarettes"). Consumers do not consider alternative tobacco products to be close substitutes for cigarettes. Cigarette producers similarly view cigarettes and other tobacco products as separate product categories, and cigarette prices are not significantly constrained by other tobacco products.

The United States is the relevant geographic market in which to analyze the effects of the Acquisition on the cigarette market. Both Reynolds and Lorillard sell cigarettes primarily in this country. U.S. consumers are in practice limited to the set of current U.S. producers when seeking to buy cigarettes.

The U.S. cigarette market has experienced declining demand since 1981. Total shipments fell by approximately 3.2% in 2014, with similar annual declines expected in the future. The market includes three large producers Altria, Reynolds, and Lorillard who together account for roughly 90% of all cigarette sales. Two smaller producers Liggett and Imperial have roughly 3% market shares apiece. All other producers have individual market shares of 1% or less.

Competition in the U.S. cigarette market involves brand positioning, customer loyalty management, product promotion, and retail presence. Cigarette advertising is severely restricted in the United States: various forms of advertising and marketing are prohibited by law, by regulation, and by the terms of settlement agreements between major cigarette producers and the individual States. The predominant form of promotion remaining for U.S. cigarette producers is retail price reduction.

ENTRY

Entry or expansion in the U.S. cigarette market is unlikely to deter or counteract any anticompetitive effects of the proposed Acquisition. New entry in the cigarette market is difficult because of falling demand and the potentially slow and costly process of obtaining Food and Drug Administration clearance for new cigarette products. Expansion by new or existing cigarette producers is further obstructed by legal restrictions on advertising, limited retail product-visibility for fringe cigarette brands, and existing retail marketing contracts.

EFFECTS OF THE ACQUISITION

The proposed Acquisition is likely to substantially lessen competition in the U.S. cigarette market. It would eliminate current and emerging head-to-head competition between Reynolds and Lorillard, particularly for menthol cigarette sales,

which is an increasingly important segment of the market. The Acquisition would also increase the likelihood that the merged firm will unilaterally exercise market power. Finally, the Acquisition will increase the likelihood of coordinated interaction between the remaining participants in the cigarette market.

THE CONSENT AGREEMENT

The purpose of the Consent Agreement is to mitigate the anticompetitive threat of the proposed acquisition. The Consent Agreement allows Reynolds to complete its acquisition of Lorillard, but requires Reynolds to divest several of its post-acquisition assets to Imperial.

Among other terms, the Consent Agreement requires Reynolds to sell Imperial four of its post-acquisition cigarette brands: Winton, Kool, Salem, and Maverick. These brands have a combined share of approximately 7% of the total U.S. cigarette market. Reynolds must also sell Lorillard's manufacturing facility and headquarters to Imperial, give Imperial employment rights for most of Lorillard's current staff and salesforce, and guarantee Imperial visible retail shelf-space for a period of five months following the close of the transaction. Finally, Reynolds must also provide Imperial with certain transition services.

This divestiture package, including the nationally recognized Winston and Kool brands, provides Imperial an opportunity to rapidly increase its competitive significance in the U.S. market. Imperial will shift immediately from being a small regional producer with limited competitive influence on the larger firms to become a national competitor with the third-largest cigarette business in the market. While Imperial's plans call for it to reposition the acquired brands, which have lost market share as part of the Reynolds portfolio, Imperial has successfully executed similar turnarounds with brands in other international markets.

Imperial will have greater opportunity and incentive to promote and grow sales of the divested brands because, unlike Reynolds, incremental sales of these brands are unlikely to cannibalize sales from more profitable cigarette brands in its portfolio. Imperial's incentive to reduce the price of the divestiture brands, in order to grow their market share, is a

procompetitive offset to the reduction in competition that will result from the consolidation of Reynolds and Lorillard. Imperial's incentive to reduce prices and promote products in new areas likewise reduces the threat of anticompetitive coordination following the merger as coordination on price increases and other aspects of competition may be relatively difficult given Imperial's contrary incentives. Ultimately, the divestiture package provides Imperial with a robust opportunity to undertake procompetitive actions to grow its market share in the U.S. cigarette market, and address the competitive concerns raised by the merger.

OPPORTUNITY FOR PUBLIC COMMENT

By accepting the Consent Agreement, subject to final approval, the Commission anticipates that the competitive problems alleged in its Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning 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 Consent Agreement, and does not modify its terms in any way.

Complaint

IN THE MATTER OF

ZIMMER HOLDINGS, INC., LVB ACQUISITION, INC., AND BIOMET, INC.

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

Docket C-4534; File No. 141 0144
Complaint, August 11, 2015 – Decision, August 11, 2015

This consent order addresses the $13.35 billion acquisition by Zimmer of certain aspects of Biomet. Zimmer and Biomet are two of the four largest musculoskeletal medical device companies in the United States, with their revenues coming in over $1 billion annually. The complaint alleges that the proposed acquisition would violate Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act. The proposed acquisition will lessen competition in the U.S. markets for unicondylar knee implants; total elbow implants; and bone cement. The order requires Zimmer and Biomet to divest all U.S. assets and rights related to Zimmer's ZUK unicondylar knee implant to Smith & Nephew and all U.S. assets and rights related to Biomet's Discovery Total Elbow implant and Cobalt Bone Cement to DJO. Zimmer is also required to waive any non-compete employment clauses and assist in facilitating employment interviews between key employees and sales representatives from Zimmer distributors who currently sell the ZUK. The Order requires Zimmer and Biomet to divest their respective U.S. assets and rights to the divested products no later than ten days after the Proposed Acquisition is consummated or on the date the Order becomes final, whichever is earlier. The Commission has agreed to appoint an interim monitor to ensure that Zimmer and Biomet 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 assets and rights to Smith & Nephew and DJO.

Participants

For the *Commission: Meghan Iorianni, Steven C. Lavender, Kenneth A. Libby,* and *Christine Tasso.*

For the *Respondent: Rebecca Farrington* and *George Paul, White & Case LLP; Steve Newborn, Weil, Gotshal & Manages 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 Zimmer Holdings, Inc. ("Zimmer"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent LVB Acquisition, Inc. ("LVB") and its subsidiary, Respondent Biomet, Inc. ("Biomet"), 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 Zimmer 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 345 East Main Street, Warsaw, Indiana 46580.

2. Respondent LVB 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 Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

3. Respondent Biomet is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its headquarters located at 56 East Bell Drive, Warsaw, Indiana 46582.

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 an Agreement and Plan of Merger ("Agreement") dated April 24, 2014, Zimmer proposes to acquire all of the voting securities of LVB, the parent company of Biomet, for approximately $13.35 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 (a) unicondylar knee implants, (b) total elbow implants, and (c) bone cement.

a. Unicondylar knee implants are medical devices implanted into a patient's knee to replace damaged bone and cartilage, typically due to advanced osteoarthritis in one compartment of the knee.

b. Total elbow implants are medical devices that replace the elbow joint with a metal hinge affixed to stems implanted in the humerus and ulna. Total elbow implants are used to treat advanced osteoarthritis or severe trauma.

c. Bone cement is used in joint arthroplasties to affix reconstructive joint implants to bone.

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 each of the relevant lines of commerce.

IV. THE STRUCTURE OF THE MARKETS

8. Biomet and Zimmer are two of only three substantial competitors in the market for unicondylar knee implants. Biomet has a market share of at least 44%. Zimmer's market share is at least 23%. Stryker Corporation ("Stryker"), the next largest

competitor, has a market share of approximately 8%. Although other firms participate in this market, their market shares are considerably smaller. The Acquisition would reduce the number of significant suppliers of unicondylar knee implants from three to two and would create a merged entity having a market share of at least 67%.

9. As a result of the Acquisition, the market for total elbow implants would become highly concentrated. There are currently only three main suppliers of total elbow implants: Zimmer, Biomet, and Tornier N.V. ("Tornier"). Zimmer and Biomet are the two largest market participants, as well as each other's closest competitors. Tornier is the only other significant competitor. The rest of the market is comprised of fringe players that have much smaller market shares.

10. Zimmer and Biomet are two of only four significant competitors in the market for bone cement. Zimmer has a market share of approximately 30% and Biomet has a market share of approximately 10%. Stryker, the market leader in bone cement, and the DePuy Synthes Companies of Johnson & Johnson are the only other significant competitors. The Acquisition would substantially increase concentration in the bone cement market and reduce the number of major suppliers from four to three.

V. ENTRY CONDITIONS

11. 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 into each of these relevant markets would not take place in a timely manner because the product development process combined with the U.S. Food and Drug Administration approval requirements would be lengthy. A potential entrant into the relevant markets would also need to develop a reputation for quality and establish a sales network to provide surgeons with high-quality technical support. An additional barrier to de novo entry into the bone cement market is that, in order to make a significant market impact, a potential entrant must have an established portfolio of orthopedic implants to drive sales of its bone cement. No other entry is likely to occur in the relevant markets such that it would be timely and

sufficient to deter or counteract the competitive harm likely to occur from the Acquisition.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Respondents Zimmer and Biomet and reducing the number of competitors for the sale of each relevant product, thereby:

a. increasing the likelihood that Respondent Zimmer would unilaterally exercise market power in these markets;

b. increasing the likelihood that consumers would experience lower levels of quality and service for each relevant product; and

c. increasing the likelihood that customers would be forced to pay higher prices for each relevant product.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of August, 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 Zimmer Holdings, Inc. ("Zimmer") of the voting securities of Respondent LVB Acquisition, Inc. ("LVB") and its subsidiary, Respondent Biomet, Inc. ("Biomet"), 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 Zimmer Holdings, Inc. 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 345 East Main Street, Warsaw, IN 46580.

2. Respondent LVB Acquisition, Inc. 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 Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

3. Respondent Biomet, Inc. is a wholly owned subsidiary of LVB Acquisition, Inc. and is a corporation organized, existing and doing business under and by virtue of the laws of Indiana, with its office and principal place of business located at 56 East Bell Drive, Warsaw, IN 46582.

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, the following definitions shall apply:

A. "Zimmer" means Zimmer 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 Zimmer Holdings, Inc., including but not limited to Zimmer, Inc. and Zimmer US, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Zimmer shall include Biomet.

B. "Biomet" means LVB Acquisition, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each

case controlled by Biomet, including but not limited to Biomet, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondent(s)" means Zimmer and Biomet, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "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.

F. "Acquisition" means the acquisition of Biomet by Zimmer pursuant to the Agreement and Plan of Merger between Zimmer and Biomet dated as of April 24, 2014.

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 the Bone Cement, Total Elbow Implants, and Unicondylar Knee Implants, as the case may be. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

I. "Bone Cement" means an acrylic based, self-curing material used in joint arthroplasties to mechanically fix reconstructive joint implants to bone.

J. "Bone Cement Accessories" means those mixing and application products sold for use with Bone Cement.

K. "Business" means the Cobalt Business, the Discovery Business, or the ZUK Business, as the case may be.

L. "Business Service Providers" means those persons who render substantial services to the Cobalt Business, the Discovery Business or the ZUK Business, as the case may be, as described in the Remedial Agreement for the Cobalt Business, the Discovery Business or the ZUK Business, as the case may be.

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 Respondents divest a Business to a Commission-Approved Acquirer pursuant to a Remedial Agreement.

O. "Cobalt Assets To Be Divested" means the Cobalt Business and the Cobalt Background IP License.

P. "Cobalt Background IP" means all patents, copyrights, trade secrets or other intellectual property rights owned by Biomet as of the Closing Date (other than trademarks or trade dress), that are related to and used in or would otherwise be infringed by the Cobalt Business as of the Closing Date but that are not included in the Cobalt Business.

Q. "Cobalt Background IP License" means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the Cobalt Business under any Cobalt Background IP to operate the Cobalt Business, including the research, Development, manufacture, distribution, marketing or sale of Bone Cement and Bone Cement Accessories in the United States.

R. "Cobalt Business" means all of the rights, titles and interest in the United States in the Bone Cement products marketed under the brand names Cobalt™ HV Bone Cement, Cobalt™ HV Bone Cement with Gentamicin, Cobalt™ MV Bone Cement, Cobalt™ MV Bone Cement with Gentamicin, including Bone Cement Accessories, any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale in the United States only, including, but not limited to:

1. Finished product inventory designated for the United States;

2. Accessories inventory for the Cobalt Products in the United States;

3. Advertising, marketing and promotional materials for the Cobalt Products in the United States;

4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Cobalt Products in the United States;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes in the United States and copies of all training materials that are used for training in the proper use of the Cobalt Products in the United States;

6. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Cobalt Products;

7. Copies of all Cobalt Manufacturing Technology;

8. Copies of all Cobalt Scientific and Regulatory Material;

9. Cobalt Intellectual Property;

10. A list of existing and past customers for the Cobalt Products in the United States;

11. Copies of customer credit and other records for the Cobalt Products in the United States;

12. Copies of all books, ledgers and other business records for the Cobalt Products in the United States;

13. Copies of clinical, regulatory, and customer sales databases for the Cobalt Products in the United States; and

14. All licenses, permits and authorizations related to the Cobalt Products in the United States, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Cobalt Products in the United States.

provided, however, that "Cobalt Business" does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Cobalt Business that contain information (a) that relates both to Cobalt Products 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 Cobalt Products.

S. "Cobalt Intellectual Property" means all of the following to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Cobalt Products in the United States:

1. United States patents and patent applications in each case filed, or in existence, on or before the Closing Date, 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).

T. "Cobalt 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 related to the manufacture of Cobalt Products for sale in or into the United States, 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.

U. "Cobalt Products" means the Bone Cement products marketed under the brand names Cobalt™ HV Bone Cement, Cobalt™ HV Bone Cement with Gentamicin, Cobalt™ MV Bone Cement, Cobalt™ MV Bone Cement with Gentamicin , including Bone Cement Accessories, any improvements at the Closing Date and any pipeline products at the Closing Date.

V. "Cobalt 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 related to the research, Development, manufacture, marketing, distribution, or sale of Cobalt Products in the United States.

W. "Commission-Approved Acquirer" means the following:

1. Smith & Nephew, as to the ZUK Assets To Be Divested;

2. DJO, as to the Cobalt Assets To Be Divested and the Discovery Assets To Be Divested; or

3. An entity that receives the prior approval of the Commission to acquire the Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested.

X. "Confidential Business Information" means competitively sensitive, proprietary and 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 Cobalt Business, the Discovery Business, or the ZUK Business, as the case may be. 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 Cobalt Business, the

Discovery Business, or the ZUK Business, as the case may be;

2. Information that is contained in documents, records or books of any Respondent that are provided to a Commission-Approved Acquirer by a Respondent that is unrelated to the Business acquired by that 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 Cobalt Business or the Discovery Business that Zimmer can demonstrate it obtained without the assistance of Biomet prior to the Acquisition;

6. Information related to the ZUK Business that Biomet can demonstrate it obtained without the assistance of Zimmer prior to the Acquisition;

7. Information that is required by Law to be disclosed;

8. Information that does not directly relate to the Cobalt Business, the Discovery Business, or the ZUK Business; and

9. 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.

Y. "Development" means all preclinical and clinical medical device development activities, 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, product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

Z. "Discovery Assets To Be Divested" means the Discovery Business and the Discovery Background IP License.

AA. "Discovery Background IP" means all patents, copyrights, trade secrets or other intellectual property rights owned by Biomet as of the Closing Date (other than trademarks or trade dress), that are related to and used in or would otherwise be infringed by the

Discovery Business as of the Closing Date but that are not included in the Discovery Business.

BB. "Discovery Background IP License" means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the Discovery Business under any Discovery Background IP to operate the Discovery Business, including the research, Development, manufacture, distribution, marketing or sale of Total Elbow Implants in the United States.

CC. "Discovery Business" means all of the rights, titles and interest in the United States in the elbow products marketed under the brand name Discovery™ Elbow, including associated instrumentation, any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale in the United States only, including, but not limited to:

1. Finished product inventory designated for the United States;

2. Instrumentation inventory for the Discovery Products in the United States;

3. Advertising, marketing and promotional materials for the Discovery Products in the United States;

4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Discovery Products in the United States;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes in the United States and copies of all training materials that are used for

training in the proper use of the Discovery Products in the United States;

6. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Discovery Products;

7. Copies of all Discovery Manufacturing Technology;

8. Copies of all Discovery Scientific and Regulatory Material;

9. Tooling and fixtures to manufacture the Discovery Products in the United States;

10. Discovery Intellectual Property;

11. A list of existing and past customers for the Discovery Products in the United States;

12. Customer credit and other records for the Discovery Products in the United States;

13. Copies of all books, ledgers and other business records for the Discovery Products in the United States;

14. Copies of clinical, regulatory, and customer sales databases for the Discovery Products in the United States; and

15. All licenses, permits and authorizations related to the Discovery Products in the United States, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Discovery Products in the United States.

provided, however, that "Discovery Business" does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Discovery Business that contain information (a) that relates both to Discovery Products 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 Discovery Products.

DD. "Discovery Intellectual Property" means all of the following to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Discovery Products in the United States:

1. United States patents and patent applications in each case filed, or in existence, on or before the Closing Date, 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).

EE. "Discovery 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 related to the manufacture of Discovery Products for sale in or into the United States,

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.

FF. "Discovery Products" means the elbow products marketed under the brand name Discovery® Elbow, including associated instrumentation, any improvements at the Closing Date and any pipeline products at the Closing Date.

GG. "Discovery 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 related to the research, Development, manufacture, marketing, distribution, or sale of Discovery Products in the United States.

HH. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

II. "DJO" means DJO Global, Inc., a corporation organized under the laws of the state of Delaware with its principal place of business at 1430 Decision Street, Vista, CA 9208.

JJ. "DJO Agreement" means the "Asset Purchase Agreement" by and between Zimmer Holdings, Inc. and Encore Medical, L.P., an indirect wholly owned partnership of DJO, dated as of June 16, 2015, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated

thereby, related to the Cobalt Assets To Be Divested and the Discovery Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The DJO Agreement is attached to this Order as Non-Public Appendix A.

KK. "Exclusive Supplier Contract" means any contract for the supply of inputs to, or accessories or instrumentation for, the Cobalt Products, the Discovery Products, or the ZUK Products, as the case may be, where under the terms of the contract with Respondents, the Commission-Approved Acquirer would be prevented from entering into a contract for the supply of such inputs, accessories or instrumentation with such Supplier. "Exclusive Supplier Contract" includes, but is not limited to, the Materialise Contract and the MGH Contract.

LL. "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.

MM. "Interim Monitor" means any monitor appointed pursuant to Paragraph V of this Order.

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

OO. "Materialize" means Materialise NV a limited liability company existing under the laws of Belgium with a registered office at Technologielaan 15, B-3001, Leuven, Belgium.

PP. "Materialise Contract" means the October 18, 2011, Development and Distribution Agreement, as amended as of the Closing Date, between Zimmer and Materialise NV related to patient specific instrumentation.

QQ. "MGH Contract" means the January 1, 2005, Master License Agreement, as amended as of the Closing Date, by and among Zimmer and The General Hospital Corporation, Cambridge Polymer Group, Inc.

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

SS. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

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

1. The DJO Agreement;

2. The S&N Agreement; and

3. 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.

UU. "Retained Business" means:

1. All right, title and interest in and to the names "Zimmer" and "Biomet," 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 what is included in the Cobalt Business, the Discovery Business, and the ZUK Business;

2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products, including the right to manufacture Retained Products in the United States for sale exclusively outside the United States; and

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.

VV. "Retained Products" means any product researched, Developed, manufactured, marketed, sold or distributed by Respondents other than Cobalt Products, Discovery Products, or ZUK Products in the United States. For the avoidance of doubt, Retained Product includes Cobalt Products, Discovery Products, and ZUK Products for sale exclusively outside the United States.

WW. "S&N" means Smith & Nephew, Inc., a corporation organized under the laws of the state of Delaware with its principal place of business at 1450 Brooks Road, Memphis, Tennessee 38116.

XX. "S&N Agreement" means the "Asset Purchase Agreement" by and between Zimmer Holdings, Inc. and S&N dated as of June 15, 2015, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated thereby, related to the ZUK Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The S&N Agreement is attached to this Order as Non-Public Appendix B.

YY. "Supplier" means any Third Party provider of inputs to, or accessories or instrumentation for, the Cobalt Products, the Discovery Products, or the ZUK Products, as the case may be.

ZZ. "Total Elbow Implants" means medical devices that replace the elbow joint with a metal hinge affixed to stems implanted in the humerus and ulna. Total elbow implants are used to treat advanced osteoarthritis or severe trauma.

AAA. "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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be.

BBB. "Third Party(ies)" means any non-governmental Person other than the Respondents, or the Commission-Approved Acquirer.

CCC. "Unicondylar Knee Implants" means medical devices implanted into a patient's knee to replace damaged bone and cartilage in one compartment of the knee, typically due to advanced osteoarthritis.

DDD. "ZUK Assets To Be Divested" means the ZUK Business and the ZUK Background IP License.

EEE. "ZUK Background IP" means all patents, copyrights, trade secrets or other intellectual property rights owned by Zimmer as of the Closing Date (other than trademarks or trade dress), that are related to and used in or would otherwise be infringed by the ZUK Business as of the Closing Date but that are not included in the ZUK Business, other than any such intellectual property rights related to Vivacit-E® antioxidant stabilized polyethylene technology.

FFF. "ZUK Background IP License" means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the ZUK Business under any ZUK Background IP to

operate the ZUK Business, including the research, Development, manufacture, distribution, marketing or sale of Unicondylar Knee Implants in the United States.

GGG. "ZUK Business" means all of the rights, titles and interest in the United States in the partial knee system marketed under the brand name Zimmer® Unicompartmental High Flex Knee System, including instrumentation (including patient specific instrumentation), any improvements as of the Closing Date, and all products under development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale in the United States only, including, but not limited to:

1. Finished product inventory designated for the United States;

2. Instrumentation inventory for the ZUK Products in the United States;

3. Advertising, marketing and promotional materials for the ZUK Products in the United States;

4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the ZUK Products in the United States;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes in the United States and copies of all training materials that are used for training in the proper use of the ZUK Products in the United States;

6. Copies of all testing and clinical performance reports, market research reports and other

marketing related information and materials for the ZUK Products in the United States;

7. Copies of all ZUK Manufacturing Technology;

8. Copies of all ZUK Scientific and Regulatory Material;

9. ZUK Intellectual Property;

10. A list of existing and past customers for the ZUK Products in the United States;

11. Customer credit and other records for the ZUK Products in the United States;

12. Copies of all books, ledgers and other business records for the ZUK Products in the United States;

13. Copies of clinical, regulatory, and customer sales databases for the ZUK Products in the United States; and

14. All licenses, permits and authorizations related to the ZUK Products in the United States, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the ZUK Products in the United States.

provided, however, that "ZUK Business" does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the ZUK Business that contain information (a) that relates both to ZUK Products 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 ZUK Products.

HHH. "ZUK Intellectual Property" means all of the following to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of ZUK Products in the United States:

1. United States patents and patent applications in each case filed, or in existence, on or before the Closing Date, 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).

III. "ZUK 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 related to the manufacture of ZUK Products for sale in or into the United States, 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.

JJJ. "ZUK Products" means the partial knee system marketed under the brand name Zimmer® Unicompartmental High Flex Knee System, including instrumentation (including patient specific instrumentation), any improvements at the Closing Date and any pipeline products at the Closing Date.

KKK. "ZUK 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 related to the research, Development, manufacture, marketing, distribution, or sale of ZUK Products in the United States.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Zimmer shall divest the Cobalt Assets To Be Divested, absolutely and in good faith, to DJO pursuant to, and in accordance with, the DJO 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 Zimmer 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 Cobalt Assets To Be Divested to DJO 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 DJO is not an acceptable purchaser of the Cobalt Assets To Be Divested, then Respondents shall immediately rescind the transaction with DJO, in whole or in part, as directed by the Commission, and shall divest the

Cobalt 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 Cobalt Assets To Be Divested to DJO 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 Cobalt Assets To Be Divested to DJO (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 Biomet by Third Parties or Government Entities, or to Third Parties or Government Entities by Biomet, from all Third Parties or Government Entities necessary for the divestiture of the Cobalt Assets To Be Divested to the Commission-Approved Acquirer, or for the continued research, Development, manufacture, distribution, marketing or sale of Bone Cement in the United States by the Commission-Approved Acquirer.

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Cobalt Assets To Be Divested;

2. deliver all Confidential Business Information related to the Cobalt 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 Cobalt 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 Cobalt Business for the manufacture, Development, marketing or sale of Bone Cement in or into the United States, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person except in connection with the divestiture of the Cobalt 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 Cobalt Business that Respondents can demonstrate

to the Commission that Zimmer 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 or the Retained Business;

3. 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

4. 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 Biomet employees or agents who as of the Closing Date have access to Confidential Business Information related to the Cobalt 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 enter into an agreement to supply Cobalt Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture Cobalt Products in commercial quantities at economical costs at its own facility.

F. Respondents shall:

1. Not later than ten (10) business days after signing a Remedial Agreement related to the Cobalt Assets

To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the Cobalt Business and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;

2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the Cobalt Assets To Be Divested for the proposed 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 Business Service Providers related to the Cobalt Business; and (b) to make offers of employment or agency to any one or more of the Business Service Providers;

3. Not interfere, directly or indirectly, with the hiring or employing by the proposed Commission-Approved Acquirer of Business Service Providers related to the Cobalt Business, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the proposed 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 proposed Commission-Approved Acquirer, subject to the Closing occurring and the limitations on the number and locations of the Business Service Providers contained in the Remedial Agreement as approved by the Commission. In order to induce the Business Service Providers to accept employment or agency with the Commission-Approved Acquirer, Respondents shall pay a bonus to any Business Service Provider who enters into employment or agency with the Commission-Approved Acquirer in an amount contained in the

Remedial Agreement as approved by the Commission, but in no event more than twenty five (25) percent of the Business Service Provider's total compensation for the prior year. In addition, Respondents shall not make any counteroffer to a Business Service Provider who receives a written offer of employment from the proposed Commission-Approved Acquirer; and

4. Not, for a period of one (1) year following the date any Business Service Provider accepts employment or agency with the Commission-Approved Acquirer, without the Commission-Approved Acquirer's prior written consent, directly or indirectly, solicit or otherwise attempt to induce any of the Business Service Provider to terminate their employment or agency 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 Business Service Providers, or

   b. Hire Business Service Providers 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 or agency to or employing any Business Service Provider 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 or agency to that Business Service Provider.

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 the time sufficient for the Commission-Approved Acquirer to successfully manufacture Cobalt Products in commercial quantities at economical costs at its own facility.

H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Commission-Approved Acquirer from entering into a contract with the Supplier for the supply of inputs to, or accessories or instrumentation for, the Cobalt Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.

I. Respondents shall comply fully and timely with all the terms of the Defense, Indemnification and Hold Harmless Agreement dated September 22, 2014, between Biomet, Inc. and Esschem, Inc.

J. The purpose of the divestiture of the Cobalt Assets To Be Divested to a Commission-Approved Acquirer is to create an independent, viable and effective competitor in the market for the Development, license, manufacture, marketing, distribution, and sale of Bone Cement in the United States and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Zimmer shall divest the Discovery Assets To Be Divested, absolutely and in good faith, to DJO pursuant to, and in accordance with, the DJO 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 Zimmer 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 Discovery Assets To Be Divested to DJO 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 DJO is not an acceptable purchaser of the Discovery Assets To Be Divested, then Respondents shall immediately rescind the transaction with DJO, in whole or in part, as directed by the Commission, and shall divest the Discovery 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 Discovery Assets To Be Divested to DJO 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 Discovery Assets To Be Divested to DJO (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 Biomet by

Third Parties or Government Entities, or to Third Parties or Government Entities by Biomet, from all Third Parties or Government Entities necessary for the divestiture of the Discovery Assets To Be Divested to the Commission-Approved Acquirer, or for the continued research, Development, manufacture, distribution, marketing or sale of Total Elbow Implants in the United States by the Commission-Approved Acquirer.

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Discovery Assets To Be Divested;

2. deliver all Confidential Business Information related to the Discovery 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 Discovery 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 Discovery Business for the manufacture, Development, marketing or sale of Total Elbow Implants in or into the United States, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person except in connection with the divestiture of the Discovery Assets To Be Divested, to the Interim Monitor, if any, and to the Divestiture Trustee, if any, *provided however*, that:

1. This Paragraph III.D. shall not apply to any Confidential Business Information related to the Discovery Business that Respondents can demonstrate to the Commission that Zimmer obtained other than in connection with the Acquisition;

2. This Paragraph III.D. shall not apply to any Confidential Business Information to the extent related to Retained Products or the Retained Business;

3. This Paragraph III.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

4. This Paragraph III.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 Biomet employees or agents who as of the Closing Date have access to Confidential Business Information related to the Discovery 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 III.D.

E. Respondents shall enter into an agreement to supply Discovery Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture Discovery Products in commercial quantities at economical costs at its own facility.

F. Respondents shall:

1. Not later than ten (10) business days after signing a Remedial Agreement related to the Discovery Assets To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the Discovery Business as agreed with the proposed Commission-Approved Acquirer and approved by the Commission, and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;

2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the Discovery Assets To Be Divested for the proposed 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 Business Service Providers related to the Discovery Business; and (b) to make offers of employment to any one or more of the Business Service Providers;

3. Not interfere, directly or indirectly, with the hiring or employing by the proposed Commission-

Approved Acquirer of Business Service Providers related to the Discovery Business, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the proposed 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 proposed Commission-Approved Acquirer, subject to the Closing occurring and the limitations on the number and locations of the Business Service Providers contained in the Remedial Agreement as approved by the Commission. In addition, Respondents shall not make any counteroffer to a Business Service Provider who receives a written offer of employment from the proposed Commission-Approved Acquirer; and

4. Not, for a period of one (1) year following the date any Business Service Provider accepts employment or agency with the Commission-Approved Acquirer, without the Commission-Approved Acquirer's prior written consent, directly or indirectly, solicit or otherwise attempt to induce any of the Business Service Provider to terminate their employment or agency 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 Business Service Providers, or

    b. Hire Business Service Providers 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 or agency to or employing any Business Service Provider 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 Business Service Provider.

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 the time sufficient for the Commission-Approved Acquirer to successfully manufacture Discovery Products in commercial quantities at economical costs at its own facility.

H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Commission-Approved Acquirer from entering into a contract with the Supplier for the supply of inputs to, or accessories or instrumentation for, the Discovery Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.

I. The purpose of the divestiture of the Discovery Assets To Be Divested to a Commission-Approved Acquirer is to create an independent, viable and effective competitor in the market for the Development, license, manufacture, marketing, distribution, and sale of Total Elbow Implants in the United States and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Zimmer shall divest the ZUK Assets To Be Divested, absolutely and in good faith, to S&N pursuant to, and in accordance with, the S&N 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 Zimmer 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 ZUK Assets To Be Divested to S&N 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 S&N is not an acceptable purchaser of the ZUK Assets To Be Divested, then Respondents shall immediately rescind the transaction with S&N, in whole or in part, as directed by the Commission, and shall divest the ZUK 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 ZUK Assets To Be Divested to S&N 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 ZUK Assets To Be Divested to S&N (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 Zimmer by Third Parties or Government Entities, or to Third Parties or Government Entities by Zimmer, from all Third Parties or Government Entities necessary for the divestiture of the ZUK Assets To Be Divested to the Commission-Approved Acquirer, or for the continued research, Development, manufacture, distribution, marketing or sale of Unicondylar Knee Implants in the United States by the Commission-Approved Acquirer.

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the ZUK Assets To Be Divested;

2. deliver all Confidential Business Information related to the ZUK 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 ZUK 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 ZUK Business for the manufacture, Development, marketing or sale of Unicondylar Knee Implants in or into the United States, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person except in connection with the divestiture of the ZUK Assets To Be Divested, to the Interim Monitor, if any, and to the Divestiture Trustee, if any, *provided however*, that:

1. This Paragraph IV.D. shall not apply to any Confidential Business Information related to the ZUK Business that Respondents can demonstrate to the Commission that Biomet obtained other than in connection with the Acquisition;

2. This Paragraph IV.D. shall not apply to any Confidential Business Information to the extent related to Retained Products or the Retained Business;

3. This Paragraph IV.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 IV.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 IV.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 Zimmer employees or agents who as of the Closing Date have access to Confidential Business Information related to the ZUK 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 IV.D.

E. Respondents shall enter into an agreement to supply ZUK Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture ZUK Products in commercial quantities at economical costs at its own facility.

F. Respondents shall:

1. Not later than ten (10) business days after signing a Remedial Agreement related to the ZUK Assets To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the ZUK Business as agreed with the proposed Commission-Approved Acquirer and approved by the Commission, and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;

2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the ZUK Assets To Be Divested for the proposed 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 Business Service Providers related to the ZUK Business; and (b) to make offers of employment to any one or more of the Business Service Providers;

3. Not interfere, directly or indirectly, with the hiring or employing by the proposed Commission-Approved Acquirer of Business Service Providers related to the ZUK Business, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the proposed 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 proposed Commission-Approved Acquirer, subject to the Closing occurring and the limitations on the number and locations of the Business Service Providers contained in the Remedial Agreement as approved by the Commission. In addition, Respondents shall not make any counteroffer to a Business Service Provider who receives a written offer of employment from the proposed Commission-Approved Acquirer; and

4. Not, for a period of one (1) year following the date any Business Service Provider accepts employment or agency with the Commission-Approved Acquirer, without the Commission-Approved Acquirer's prior written consent, directly or indirectly, solicit or otherwise attempt to induce any of the Business Service Provider to terminate their employment or agency 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 Business Service Providers, or

b. Hire Business Service Providers 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 or agency to or employing any Business Service Provider 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 Business Service Provider.

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 the time sufficient for the Commission-Approved Acquirer to successfully manufacture ZUK Products in commercial quantities at economical costs at its own facility.

H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Commission-Approved Acquirer from entering into a contract with the Supplier for the supply of inputs to, or accessories or instrumentation for, the ZUK Products, including, but not limited to, the Materialise Contract. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such

waiver, including licensing the Zimmer Imaging Library, as defined in the Materialise Contract, as it exists as of the Closing Date to Materialize for use in making patient specific instrumentation for use with ZUK Products.

I. The purpose of the divestiture of the ZUK Assets To Be Divested to a Commission-Approved Acquirer is to create an independent, viable and effective competitor in the market for the development, license, manufacture, marketing, distribution, and sale of Unicondylar Knee Implants in the United States and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

V.

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 last supply agreement entered into pursuant to Paragraphs II.E., III.E., and IV.E. of this Order, and (ii) the end of the last Transition Services Agreement entered into pursuant to Paragraph II.G., III.G., and IV.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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, and the ZUK 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 malfeasance, 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.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to divest the Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Cobalt Assets To Be Divested,

the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be. 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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be. 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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be.

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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be, 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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be.

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 malfeasance, 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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be; *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.

VII.

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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be, 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.

VIII.

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., II.C., III.A., III.C., IV.A. and IV.C of this Order, and every sixty (60) days thereafter until Respondents have fully complied with the Paragraphs II.E., II.F., II.G., III.E., III.F., III.G., IV.E., IV.F. and IV.G. 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., III.C., and IV.C. and agreed upon by the relevant 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.

IX.

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.

X.

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on August 11, 2025.

By the Commission.

Non-Public Appendix A

DJO Agreement

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

Non-Public Appendix B

S&N Agreement

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted from Zimmer Holdings, Inc. ("Zimmer"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement"), which is designed to remedy the anticompetitive effects likely to result from Zimmer's proposed acquisition of Biomet, Inc. ("Biomet"). Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Zimmer and Biomet must divest Zimmer's Unicompartmental High Flex Knee System ("ZUK") business in the United States to Smith & Nephew, Inc. ("Smith & Nephew") and divest Biomet's Discovery Elbow and Cobalt Bone Cement businesses in the United States to DJO Global, Inc. ("DJO").

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 an agreement signed on April 24, 2014, Zimmer plans to acquire Biomet for approximately $13.35 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. markets for: (1) unicondylar knee implants; (2) total elbow implants; and (3) bone 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

Zimmer, headquartered in Warsaw, Indiana, is the third-largest musculoskeletal medical device company in the United

States and worldwide, specializing in the design, development, manufacture, and marketing of orthopedic reconstructive products. In 2013, Zimmer generated U.S. revenues of $2.42 billion.

Biomet, also headquartered in Warsaw, Indiana, is the fourth-largest musculoskeletal medical device company in the United States and the fifth-largest globally. In 2013, Biomet generated U.S. revenues of $1.86 billion.

THE RELEVANT PRODUCTS AND MARKET STRUCTURES

Unicondylar Knee Implants

Unicondylar knee implants are medical devices that replace damaged bone and cartilage in only one of the knee's three condyles. The most common indication for a unicondylar knee implant is osteoarthritic damage in the medial condyle. In comparison to a total knee implant, which replaces all three condyles, a unicondylar knee implant requires less invasive surgery and allows a patient to have a more natural feeling knee upon recovery from surgery.

Unicondylar knee implants vary in a number of ways; however, one of the most important differences among the implants is whether they have a fixed or mobile bearing. In a fixed bearing implant, a plastic piece is fixed permanently to the end of the tibia. In a mobile bearing knee, the plastic piece moves and glides over the tibia as the knee moves. The mobile bearing places less stress on the bearing surface and may extend the longevity of the implant. Despite these differences, fixed bearing and mobile bearing implants are in the same product market because surgeons regularly substitute between them as they achieve comparable functional outcomes for the same indications.

The market for unicondylar knee implants is highly concentrated. Biomet, which markets the Oxford implant, is the market leader, with a share of at least 44%. Biomet's Oxford is the only mobile bearing knee implant currently on the market. Zimmer, the second-leading supplier of unicondylar knee implants, controls at least 23% of the market with its fixed

bearing implant, ZUK. Stryker Corporation ("Stryker") offers two unicondylar knee implants with fixed bearings: the Triathlon PKR and MAKOPlasty, a robotic-assisted surgery option. Stryker's market share is approximately 8%. Johnson & Johnson, through its DePuySynthes Companies ("J&J DePuy"), and Smith & Nephew both offer fixed bearing knee implants and are distant fourth and fifth competitors, maintaining approximately 6% and 3% shares of the market, respectively. Additionally, a number of small, fringe competitors each control a small share of the market, but individually and collectively have limited competitive significance. Absent a remedy, the Proposed Acquisition would produce a single firm controlling at least 67% of the unicondylar knee implant market and substantially increase market concentration.

Total Elbow Implants

Total elbow implants are medical devices that replace damaged bone and cartilage in the elbow joint caused by osteoarthritis or a severe elbow fracture. Total elbow implants replace the elbow joint with a metal hinge that affixes to stems implanted into the humerus and the ulna. There are two types of total elbow implants: linked and unlinked. Linked total elbow implants connect the humeral stem to the ulnar stem with a pin and locking device, providing extra stability where the ligaments surrounding the elbow joint are weak. Unlinked total elbow implants do not connect the humeral stem to the ulnar stem mechanically; instead, they use the patient's natural ligaments to secure the implant. Linked and unlinked total elbow implants are viewed as reasonably interchangeable by health care providers because they treat the same indications and are priced similarly.

The market for total elbow implants is highly concentrated today, and the Proposed Acquisition would increase concentration in this market substantially. Zimmer and Biomet are the two largest suppliers of total elbow implants. Apart from the merging parties, Tornier, Inc. ("Tornier") is the only other significant supplier of total elbow implants. Zimmer offers two products the Coonrad/Morrey Total Elbow and the Nexel Total Elbow. The Coonrad/Morrey Total Elbow, developed at the Mayo Clinic, is a cemented, linked total elbow implant with twenty-four years of clinical history. In late 2013, Zimmer launched the Nexel Total

Elbow, which updated the Coonrad/Morrey Total Elbow with, among other things, a revised linkage system and instrumentation, and an improved bearing surface. Biomet's Discovery Total Elbow is also a cemented, linked implant supported by over ten years of clinical history. Tornier launched its Latitude EV implant, a cemented total elbow system capable of converting between a linked and unlinked prosthesis, in the United States in 2013.

Bone Cement

Surgeons use bone cement in a wide variety of joint arthroplasties to affix implants to bones, including the vast majority of knee and elbow implants, as well as many hip and shoulder procedures. Bone cement is available in high, medium, and low viscosities and in non-antibiotic and antibiotic formulations. Surgeons select bone cement based on its viscosity, whether it has an antibiotic component, supporting clinical data, and familiarity. Because surgeons generally use the more expensive antibiotic bone cement only for patients with a high risk of infection, it may be appropriate to analyze the Proposed Acquisition in separate relevant markets for antibiotic and non-antibiotic bone cement. Most customers, however, purchase both types of bone cement through a single contract with a single vendor, and the market participants, competitive dynamics, and entry barriers are the same for both antibiotic and non-antibiotic bone cement. Thus, for convenience and efficiency, it is appropriate to analyze the impact of the Proposed Acquisition in a relevant market for all bone cement products.

Four primary suppliers serve the U.S. bone cement market: Stryker, Zimmer, J&J DePuy, and Biomet, which together account for approximately 98% of all bone cement sales in the United States. Stryker's Simplex is the market leader, with a share of approximately 40% of the market. Zimmer, the second-largest bone cement supplier, has a market share of approximately 30%. Zimmer derives nearly all of its bone cement revenues from the sale of Palacos, which Zimmer distributes under license from Heraeus Holding. J&J DePuy takes approximately 18% of the market with its SmartSet bone cement, while Biomet's Cobalt has an approximate 10% market share. The Proposed Acquisition would reduce the number of major suppliers of bone cement in

the United States from four to three and increase concentration in this market substantially.

THE RELEVANT GEOGRAPHIC MARKET

The United States is the relevant geographic market in which to analyze the effects of the Proposed Acquisition. Medical devices sold outside of the United States are not viable alternatives for U.S. consumers, as they cannot turn to these products even in the event of a price increase for products currently available in the United States. Further, the U.S. Food and Drug Administration ("FDA") must approve any medical device before it is sold in the United States, a process that generally takes a significant amount of time. Thus, suppliers of medical devices outside the United States cannot shift their product into the U.S. market quickly enough to be considered current market participants.

ENTRY

Entry or expansion into the markets for unicondylar knee implants, total elbow implants, and bone cement would not be timely, likely, or sufficient to counteract the likely anticompetitive effects of the Proposed Acquisition. To enter or effectively expand in any of these markets successfully, a supplier would need to design and manufacture an effective product, obtain FDA approval, and develop clinical history supporting the long-term efficacy of its product. The new entrant or putative expanding firm also would need to develop and foster product loyalty and establish a nationwide sales network capable of marketing the product and providing on-site service at hospitals throughout the country. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

EFFECTS OF THE ACQUISITION

Zimmer's acquisition of Biomet would likely result in substantial anticompetitive effects in the unicondylar knee implant market by eliminating substantial head-to-head competition between the two most successful implants. Zimmer's ZUK and Biomet's Oxford are particularly close competitors because of

their well-documented clinical success records. As close competitors, customers currently leverage the Oxford and ZUK against each other to obtain better pricing. Additionally, Zimmer and Biomet continually improve features of their unicondylar knee implants in order to win business from physicians. Therefore, absent a remedy, the Proposed Acquisition would likely result in unilateral price effects and reduced innovation.

The Proposed Acquisition would also eliminate substantial competition between Zimmer and Biomet in the market for total elbow implants. Market participants indicate that Zimmer and Biomet total elbow implants are each other's next best alternative based upon design similarities and comparable clinical outcomes. As close substitutes, Zimmer and Biomet currently compete directly, including on price and service.

Zimmer's Palacos and Biomet's Cobalt Bone Cement products are particularly close substitutes that currently compete aggressively against each other. Absent a remedy, the Proposed Acquisition would result in the loss of substantial price competition between Zimmer and Biomet for the sales of their products.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the Proposed Acquisition by requiring Zimmer and Biomet to divest all U.S. assets and rights related to Zimmer's ZUK unicondylar knee implant to Smith & Nephew and all U.S. assets and rights related to Biomet's Discovery Total Elbow implant and Cobalt Bone Cement to DJO. This divestiture will preserve the competition that currently exists in each of the relevant markets.

Smith & Nephew is a global specialty pharmaceutical company headquartered in London, United Kingdom. Smith & Nephew employs more than 14,000 employees worldwide with approximately 6,225 employees in the United States. In 2014, Smith & Nephew generated worldwide revenues of approximately $5.8 billion, of which approximately $1.5 billion came from its orthopedic reconstruction business.

DJO develops, manufactures, and distributes a wide range of medical devices, including orthopedic implants. Headquartered in Vista, California, DJO employs 5,200 people, and had revenues of approximately $1.2 billion in 2014. DJO's orthopedic implant business had approximately $100 million in 2014 revenues.

Pursuant to the Order, Smith & Nephew will receive all U.S. assets and rights related to the ZUK unicondylar knee product, including intellectual property, manufacturing technology, and existing inventory. Zimmer is also required to waive any non-compete employment clauses and assist in facilitating employment interviews between key employees and sales representatives from Zimmer distributors who currently sell the ZUK. The Order further requires Zimmer to provide transitional services to Smith & Nephew to assist them in establishing their manufacturing capabilities and securing all necessary FDA approvals.

The Order requires Biomet to divest all U.S. assets and rights necessary to enable DJO to become an independently viable and effective competitor in the total elbow implant and bone cement markets. Biomet is required to divest to DJO all of its U.S. assets and rights to research, develop, manufacture, market, and sell its total elbow implant and bone cement products, including all related intellectual property, manufacturing technology, and existing inventory. Biomet will also divest all U.S. assets and rights to its bone cement accessories, which consist of mixing and delivery systems that allow surgeons to control the bone cement ingredients to ensure a complete and consistent bone cement mixture and to apply cement onto an implant accurately. Hospitals and group purchasing organizations frequently purchase bone cement and bone cement accessories together. Further, the Order facilitates DJO's hiring of the Biomet sales representatives and employees whose responsibilities are related to bone cement and total elbow implants.

The Order requires Zimmer and Biomet to divest their respective U.S. assets and rights to the divested products no later than ten days after the Proposed Acquisition is consummated or on the date the Order becomes final, whichever is earlier. If the Commission determines that Smith & Nephew or DJO is not an acceptable acquirer, or that the manner of the divestiture is not

acceptable, the Order requires Zimmer and Biomet to unwind the sale and divest the products within six months of the date the Order becomes final to another Commission-approved acquirer or acquirers. In that circumstance, the Commission may appoint a trustee to accomplish the divestiture if the parties fail to divest the products.

The Commission has agreed to appoint an interim monitor to ensure that Zimmer and Biomet 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 assets and rights to Smith & Nephew and DJO.

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

JS AUTOWORLD, INC.
D/B/A
PLANET NISSAN

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SECTION 7 OF THE CONSUMER LEASING ACT, SECTION 213.7 OF REGULATION M, THE TRUTH IN LENDING ACT, REGULATION Z, AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4535; File No. 152 3069
Complaint, August 13, 2015 – Decision, August 13, 2015

The consent order addresses JS Autoworld, Inc., d/b/a Planet Nissan's misrepresentation in certain advertisements of vehicle purchase prices, advertised monthly payment amounts were for vehicle purchases, not leases; and that consumers can pay $0 at signing to obtain vehicles shown in the advertisements for the advertised monthly amount. The respondent is a motor vehicle dealer. The complaint alleges therefore that the representations are false or misleading in violations of Section 5 of the FTC Act, Consumer Leasing Act, Regulation M, the Truth in Lending Act, and Regulation Z. the order prohibits respondent from misrepresenting the cost of: 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 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.

Participants

For the *Commission: Yan Fang*

For the *Respondent: Dominic Gentile, solo practitioner; George Chanos, solo practitioner.*

COMPLAINT

The Federal Trade Commission, having reason to believe that JS Autoworld, Inc., also doing business as Planet 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 Nevada corporation with its principal office or place of business at 5850 Centennial Center Blvd, Las Vegas, NV 89149. Respondent offers motor vehicles for purchase 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 July 2014, Respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of motor vehicles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting consumer leases for motor vehicles, 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 advertisements promoting consumer leases and purchases of motor vehicles, or promoting credit sales and other extensions of closed-end credit in consumer credit transactions, in printed publications, including in the *Las Vegas Review-Journal* newspaper. Exhibit A is an example of a full-page advertisement that Respondent ran in the *Las Vegas Review-Journal*. Respondent's advertisements in other editions of the *Las Vegas Review-Journal* contain substantially similar statements and depictions.

7. Respondent has also advertised consumer leases and purchases of motor vehicles, or promoted credit sales and other extensions of closed-end credit in consumer credit transactions, on the Internet, including on its page on Facebook, https://www.facebook.com/planetnissan. Exhibit B is an example of one such advertisement appearing on Respondent's page on Facebook.

"NOW" Prices

8. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, feature images depicting motor vehicles for purchase with a prominent "NOW" price next to each vehicle. For example, the advertisement attached as Exhibit A features a 2015 Nissan Versa S with a "NOW" price of $9,977:

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

9. Beneath the prominent statement that consumers can obtain the vehicle for "$9,977," the advertisement states in small print: "#11155, 2 or more at this price, $1,000 Trade Assistance and $600 VPP/Active Military discount and $600 College Grad discount." Thus, the prominently advertised price is not generally available to consumers. In fact, a consumer can qualify for the advertised price only if the consumer meets certain requirements for discounts or incentives, such as being a recent college graduate, being a member of the military, or trading in a vehicle.

"PURCHASE! NOT A LEASE!"

10. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, deceptively promote offers for motor vehicles with a bright yellow "PURCHASE! NOT A LEASE!" statement next to each vehicle. For example, the advertisement attached as Exhibit A promotes a 2014 Nissan Pathfinder S with a "NOW" price of "$299" or "$24,777" as a "PURCHASE! NOT A LEASE!":

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

11. Below the depicted vehicle, the advertisement states in small print: "#25114, 2 or more at this price, $1000 Trade Assistance & $600 VPP/Active Military discount and $600 College Grad discount. $299 - 36 month lease with $2,000 due at signing, 12K miles per year." Thus, despite the prominent

"PURCHASE! NOT A LEASE!" statement, the advertised "$299" payment is for a lease, not a purchase.

12. Additionally, Respondent's advertisements state certain terms, such as a payment amount, but only disclose in small print the amount due at signing, the number and timing of scheduled payments, and that the advertised payment is a monthly amount and for a lease. Respondent's advertisements fail to include other required information, such as whether or not a security deposit is required.

"$0 DOWN"

13. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit B, deceptively promote offers for motor vehicles with a prominent "$0 DOWN" statement near the depicted vehicle. For example, the advertisement attached as Exhibit B promotes a 2014 Nissan Pathfinder for "$0 DOWN":

(from Exhibit B, Facebook page posting, https://www.facebook.com/planetnissan (July 2014))

14. Beneath this prominent statement, the advertisement states in small print: "#25114, 2 or more at this price, $1000 Trade Assistance & $600 VPP/Active Military discount and $600 College Grad discount. $299 - 36 month lease with $2,000 due at signing, 12K miles per year." Thus, the offer is for a lease, and consumers must pay at least $2,000 at lease signing, substantially more than the prominently stated "$0 DOWN."

15. Additionally, Respondent's advertisements state certain terms, such as the amount down and a payment amount, but only disclose in small print the amount due at signing and the number

and timing of scheduled payments. Respondent's advertisements fail to include other required information, such as whether or not a security deposit is required.

"0% APR"

16. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, states credit terms such as "0% APR for 72 months*" and "0% APR for 60 MONTHS*":

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

17. In a block of text at the bottom of the full-page advertisement, the following statement appears in fine print:

> Must present ad at time of purchase to receive ad specials. Must test drive to receive ad specials. All offers OAC plus $399 DOC and $199 VTR fee, tax and tag. Receive these offers with Planet Nissan financing. Must take same day delivery from dealer stock and prior sales do not qualify. Offers cannot be combined. 0%APR for 36 months OAC. 1.No payments 90 days subject to credit approval. Amount will be added to end of loan balance. Subject to credit approval. 2. Free registration for first year with purchase. *0% APR on select Nissan models and must finance through NMAC.**Offers cannot be combined. See dealer for details. Source: Nissan USA. 2013 new car sales from January 2013 – Dec 2013.

18. Respondent's advertisements fail to include other required information, such as the amount of the down payment or the terms of repayment.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Vehicle Purchase Prices

19. Through the means described in Paragraphs 6 through 9, Respondent has represented, directly or indirectly, expressly or by implication, that consumers can purchase vehicles for the prominently advertised "NOW" prices.

20. In fact, vehicles are not generally available for purchase at the prominently advertised "NOW" prices. Therefore, the representation set forth in Paragraph 19 is false or misleading.

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 II

Misrepresentation of Offer

22. Through the means described in Paragraphs 7 and 10 through 15, Respondent has represented, directly or indirectly, expressly or by implication, that advertised payment amounts are for vehicle purchases, not leases.

23. In fact, the advertised payment amounts are for vehicle leases, not purchases. Therefore, the representation set forth in Paragraph 22 is false or misleading.

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).

Count III

Misrepresentation of Amount Due at Signing

25. Through the means described in Paragraphs 7 and 13 through 15, Respondent has represented, directly or indirectly, expressly or by implication, that consumers can pay $0 at signing

to obtain the vehicles shown in the advertisements for the advertised monthly payment amount.

26. In fact, consumers cannot pay $0 at signing to obtain the vehicles shown in the advertisements for the advertised monthly payment amount. Consumers must pay at least $2,000 at lease signing. Therefore, the representation set forth in Paragraph 25 is false or misleading.

27. 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

28. 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(d).

29. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 6, 7, and 10 through 15, 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

30. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 6, 7, and 10 through 15, have included CLA triggering terms, but have 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.

31. Therefore, the practices set forth in Paragraph 30 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

32. 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 number of payments or period of repayment ("TILA triggering terms").

33. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 6 and 16 through 18, are subject to the requirements of the TILA and Regulation Z.

Count V

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

34. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 6 and 16 through 18, 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.

35. Therefore, the practices set forth in Paragraph 34 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.

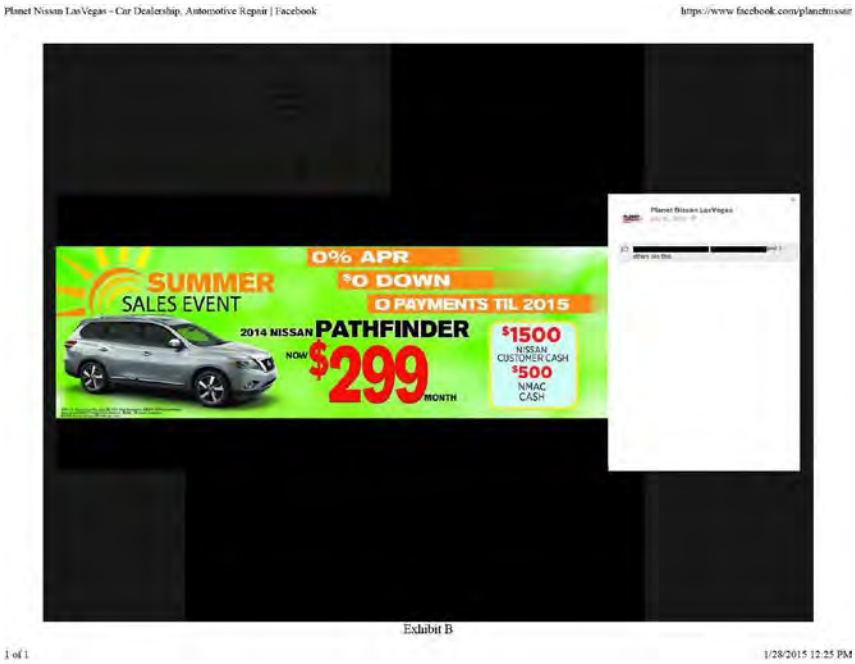
THEREFORE, the Federal Trade Commission, this thirteenth day of August, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

Exhibit A

Exhibit B



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 ("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

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, the CLA, and its implementing Regulation M, and the 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 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 JS Autoworld, Inc., also doing business as Planet Nissan, is a Nevada corporation with its principal office or place of business at 5850 Centennial Center Blvd, Las Vegas, NV 89149.

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:

A. Unless otherwise specified, "Respondent" shall mean JS Autoworld, Inc., a corporation, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly, expressly or by implication, promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. 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;

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

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

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

5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

D. "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.

E. "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.

F. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

G. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of any motor vehicle, 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, 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

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, including whether the offer is for the purchase, 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;

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.

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 such current personnel within thirty (30) days after the date of service of this order, and to such 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. JS AutoWorld, Inc**., FTC File No. 152 3069.

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. Unless otherwise directed by a representative of the Commission in writing, all reports 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. JS AutoWorld, Inc**., FTC File No. 152 3069.

VIII.

This order will terminate on August 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 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 JS Autoworld, Inc., also doing business as Planet 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 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.

The respondent is a motor vehicle dealer. According to the FTC's complaint, the respondent has misrepresented in certain advertisements: (1) vehicle purchase prices; (2) that advertised monthly payment amounts were for vehicle purchases, not leases; and (3) that consumers can pay $0 at signing to obtain vehicles shown in the advertisements for the advertised monthly amount. 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 Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising vehicles for lease.

The FTC's complaint also alleges that the respondent violated the Truth in Lending Act ("TILA") and Regulation Z by failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Part I.A of the order prohibits respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, 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 (2) leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, 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 of the proposed order addresses the CLA allegations. Part II.A prohibits 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. 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 allegations. 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. Part III.B 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 the respondent 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 respondent to file compliance reports with the Commission. Finally, Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

TC DEALERSHIP, L.P.
D/B/A
PLANET HYUNDAI

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 7 OF THE CONSUMER LEASING ACT, SECTION 213.7 OF REGULATION M, THE TRUTH IN LENDING ACT, REGULATION Z, AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No.C-4536; File No. 152 3096
Complaint, August 13, 2015 – Decision, August 13, 2015

The consent order addresses TC Dealership, L.P. d/b/a Planet Hyundai's misrepresentation in certain advertisements of vehicle purchase prices, advertised monthly payment amounts were for vehicle purchases, not leases; and that consumers can pay $0 at signing to obtain vehicles shown in the advertisements for the advertised monthly amount. The respondent is a motor vehicle dealer. The complaint alleges therefore that the representations are false or misleading in violations of Section 5 of the FTC Act, Consumer Leasing Act, Regulation M, the Truth in Lending Act, and Regulation Z. the order prohibits respondent from misrepresenting the cost of: 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 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.

Participants

For the *Commission: Yan Fang*

For the *Respondent: Joel Winston, Hudson Cook, LLP*

COMPLAINT

The Federal Trade Commission, having reason to believe that TC Dealership, L.P., also doing business as Planet Hyundai ("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 Nevada limited partnership with its principal office or place of business at 7150 W. Sahara Ave, Las Vegas, NV 89117. Respondent offers motor vehicles for purchase 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 motor vehicles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting consumer leases for motor vehicles, 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 advertisements promoting consumer leases and purchases of motor vehicles, or promoting credit sales and other extensions of closed-end credit in consumer credit transactions, in printed publications, including in the *Las Vegas Review-Journal* newspaper. Exhibit A is an example of a two-page advertisement that Respondent ran in the *Las Vegas Review-Journal*. Respondent's advertisements in other editions of the *Las Vegas Review-Journal* contain substantially similar statements and depictions.

"50% OFF" Prices

7. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, deceptively promote offers for motor vehicles with a prominent "50% OFF" statement next to each vehicle. For example, the advertisement attached as Exhibit A features a 2014 Accent with a "50% OFF" price of "$36/mo" or"$8,974":

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

8. In a block of text near the bottom of the two-page newspaper advertisement, the following statement appears in miniscule print:

> All advertised amounts include all Hyundai incentive/rebates, dealer discounts and $2500 additional down from your trade in value . . . 1.14MY Accent - *Price excludes tax, title, license, doc, and dealer fees. MSRP $18075 - $2451 Dealer Discount - $2650 HMA rebates - $4000 Trade Allowance = Net Price $8974. Lease 36 months with $0 Cash down payment. On approved credit. Must trade qualifying vehicle . . . All payment and prices include HMA College Grad Rebate, HMA Military Rebate, and HMA Valued Owner Coupon. Must be active military or spouse of same to qualify for HMA Military Rebate. Must graduate college in the next 6 months or within the last 2 years to qualify for HMA College Grad rebate. Must own currently registered Hyundai to qualify for HMA Valued Owner Coupon.

9. Thus, the prominently advertised prices are not generally available to consumers. In fact, a consumer can qualify for the advertised prices only if the consumer meets certain qualifications for incentives, rebates, or discounts, such as being a recent college graduate, being a member of the military, owning a currently registered Hyundai, or trading in a qualifying vehicle.

10. Additionally, Respondent's advertisements state certain terms, such as a monthly payment amount, but only disclose in miniscule print that the advertised monthly payment is for a lease and the number of scheduled payments. Respondent's advertisements fail to include other required information, such as the total amount due at signing and whether or not a security deposit is required.

"$0 DOWN AVAILABLE"

11. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, deceptively promote offers for motor vehicles with a prominent "$0 DOWN AVAILABLE" statement:

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

12. In fact, consumers seeking to obtain the vehicles shown in the advertisements for "$0 DOWN" must turn in a qualifying vehicle with a trade-in value of at least $2,500. Thus, "$0 DOWN" is not available to consumers who do not trade in a qualifying vehicle.

13. Additionally, Respondent's advertisements state certain terms, such as the amount down, but only disclose in miniscule print that the advertised monthly payment is for a lease and the number of scheduled payments. Respondent's advertisements fail

to include other required information, such as the total amount due at signing and whether or not a security deposit is required.

"0% APR"

14. Respondent's advertisements, including but not limited to the advertisement attached as Exhibit A, state credit terms such as "$0% APR for 72 MONTHS**":

(from Exhibit A, print advertisement, *Las Vegas Review-Journal* ((Nov. 2014))

15. In the block of text near the bottom of the full-page newspaper advertisement, the following statement appears in miniscule print:

> **0% APR for 72 months on select models subject to credit approval through HMF.

16. Respondent's advertisements fail to include other required information, such as the terms of repayment.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Vehicle Purchase Prices

17. Through the means described in Paragraphs 6 through 9, Respondent has represented, directly or indirectly, expressly or by implication, that consumers can purchase vehicles for the prominently advertised "50% OFF" prices.

18. In fact, vehicles are not generally available for purchase at the prominently advertised "50% OFF" prices. Therefore, the representation set forth in Paragraph 17 is false or 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

Misrepresentation of Offer

20. Through the means described in Paragraphs 6 through 10, Respondent has represented, directly or indirectly, expressly or by implication, that advertised monthly payment amounts are for vehicle purchases, not leases.

21. In fact, the advertised monthly payment amounts are for vehicle leases, not purchases. Therefore, the representation set forth in Paragraph 19 is false or misleading.

22. 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 Due at Signing

23. Through the means described in Paragraphs 6 and 11 through 13, Respondent has represented, directly or indirectly, expressly or by implication, that consumers can pay $0 at signing to obtain the vehicles shown in the advertisements for the advertised monthly payment amount.

24. In fact, consumers cannot pay $0 at signing to obtain the vehicles shown in the advertisements for the advertised monthly payment amount. Consumers must turn in a qualifying vehicle whose trade-in value is at least $2,500. Therefore, the representation set forth in Paragraph 22 is false or misleading.

25. 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

26. 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(d).

27. Respondent's advertisements promoting consumer leases, including but not necessarily limited to the advertisements described in Paragraphs 6 through 13, 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

28. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 6 through 13 have included CLA triggering terms, but have 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.

29. Therefore, the practices set forth in Paragraph 27 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

30. 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 number of payments or period of repayment ("TILA triggering terms").

31. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 6 and 14 through 16, are subject to the requirements of the TILA and Regulation Z.

Count V

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

32. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraphs 6 and 14 through 16, 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.

33. Therefore, the practices set forth in Paragraph 31 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 thirteenth day of August, 2015, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT

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 ("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

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, the CLA, and its implementing Regulation M, and the 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 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 TC Dealership, L.P., also doing business as Planet Hyundai, is a Nevada limited partnership with its principal office or place of business at 7150 W. Sahara Ave, Las Vegas, NV 89117.

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:

A. Unless otherwise specified, "Respondent" shall mean TC Dealership, L.P., a limited partnership, and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly, expressly or by implication, promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. 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;

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

3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and

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

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

5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

D. "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.

E. "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.

F. "Lease inception" shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

G. "Material" shall mean likely to affect a person's choice of, or conduct regarding, goods or services.

H. "Motor vehicle" or "vehicle" shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that Respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of any motor vehicle, 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 downpayment, 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

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, 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, including whether the offer is for the purchase, 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;

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.

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 downpayment, 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 downpayment;

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 limited partnership(s) or 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 limited partnership or 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 limited partnership or corporate name or address. *Provided, however*, that, with respect to any proposed change in the limited partnership or 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. TC Dealership, L.P.**, FTC File No. 152 3096.

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. Unless otherwise directed by a representative of the Commission in writing, all reports 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. TC Dealership, L.P.**, FTC File No. 152 3096.

VIII.

This order will terminate on August 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 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 TC Dealership, L.P., also doing business as Planet Hyundai. 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.

The respondent is a motor vehicle dealer. According to the FTC's complaint, the respondent has misrepresented in certain advertisements: (1) vehicle purchase prices; (2) that advertised monthly payment amounts were for vehicle purchases, not leases; and (3) that consumers can pay $0 at signing to obtain vehicles shown in the advertisements for the advertised monthly amount. 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 Consumer Leasing Act ("CLA") and Regulation M for failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising vehicles for lease.

Analysis to Aid Public Comment

The FTC's complaint also alleges that the respondent violated the Truth in Lending Act ("TILA") and Regulation Z by failing to disclose or to disclose clearly and conspicuously certain costs and terms when advertising credit.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Part I.A of the order prohibits respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the downpayment, 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 (2) leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the downpayment, 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 of the proposed order addresses the CLA allegations. Part II.A prohibits 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. 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 allegations. 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. Part III.B 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 the respondent 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 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 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

NOMI TECHNOLOGIES, INC.

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

Docket No. C-4538; File No. 132 3251
Complaint, August 28, 2015 – Decision, August 28, 2015

This consent order addresses Nomi Technologies, Inc.'s collection of information from consumer's mobile devices to provide its "Listen" service without the consumer's consent. The Commission's complaint alleges that Nomi's privacy policy represented that: consumers could opt out of Nomi's Listen service at retail locations using this service, and that consumers would be given notice when a retail location was utilizing Nomi's Listen service. The complaint alleges that Nomi violated Section 5 of the Federal Trade Commission Act by misleading consumers because, contrary to its representations, Nomi did not provide an opt-out mechanism at its clients' retail locations and neither Nomi nor its clients disclosed to consumers that Nomi's Listen service was being used at a retail location. The consent order requires Nomi to retain documents relating to its compliance with the order, requires all documents be retained for a five-year period.

Participants

For the *Commission: Jacqueline Connor* and *Amanda Koulousiaas.*

For the *Respondent: Edward Holman, Lydia Parnes,* and *Tracy Shapiro, Wilson Sonsini Goodrich & Rosati.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nomi Technologies, Inc., a corporation, has violated the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nomi Technologies, Inc. ("Nomi" or "respondent") is a Delaware corporation with its principal office or place of business at 26 West 17th Street, 2nd Floor, New York, NY 10011.

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. Nomi uses mobile device tracking technology to provide analytics services to brick and mortar retailers through its "Listen" service. Nomi has been collecting information from consumers' mobile devices to provide the Listen service since January 2013. Nomi places sensors in its clients' retail locations that detect the media access control ("MAC") address broadcast by a mobile device when it searches for WiFi networks. A MAC address is a 12-digit identifier that is unique to a particular device. Alternatively, in some instances Nomi collects MAC addresses through its clients' existing WiFi access points.

4. In addition to the MAC address, Nomi also collects the following information about each mobile device that comes within range of its sensors or its clients' WiFi access points:

a. the mobile device's signal strength;

b. the mobile device's manufacturer (derived from the MAC address);

c. the location of the sensor or WiFi access point observing the mobile device; and

d. the date and time the mobile device is observed.

5. Nomi cryptographically hashes the MAC addresses it observes prior to storing them on its servers. Hashing obfuscates the MAC address, but the result is still a persistent unique identifier for that mobile device. Each time a MAC address is run through the same hash function, the resulting identifier will be the same. For example, if MAC address 1A:2B:3C:4D:5E:6F is run through Nomi's hash function on ten different occasions, the resulting identifier will be the same each time. As a result, while Nomi does not store the MAC address, it does store a persistent unique identifier for each mobile device. Nomi collected

information about approximately nine million unique mobile devices between January 2013 and September 2013.

6. Nomi uses the information it collects to provide analytics reports to its clients about aggregate customer traffic patterns such as:

a. the percentage of consumers merely passing by the store versus entering the store;

b. the average duration of consumers' visits;

c. types of mobile devices used by consumers visiting a location;

d. the percentage of repeat customers within a given time period; and

e. the number of customers that have also visited another location within the client's chain.

7. Through October 22, 2013, Nomi's Listen service had approximately 45 clients. Some of these clients deployed the service in multiple locations within their chains.

8. Nomi has not published, or otherwise made available to consumers, a list of the retailers that use or used the Listen service.

9. Nomi does not require its clients to post disclosures or otherwise notify consumers that they use the Listen service. Through October 22, 2013, most, if not all, of Nomi's clients did not post any disclosure, or otherwise notify consumers, regarding their use of the Listen service.

10. Nomi provided, and continues to provide, an opt out on its website for consumers who do not want Nomi to store observations of their mobile device. Once a consumer has entered the MAC address of their device into Nomi's website opt out, Nomi adds it to a blacklist of MAC addresses for which information will not be stored. Nomi did not make an opt out available through any other means, including at any of its clients' retail locations.

11. From at least November 2012, until October 22, 2013, Nomi disseminated or caused to be disseminated privacy policies on its website, nomi.com or getnomi.com, which included the following statement:

> Nomi pledges to…. Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology. (*See* Exhibits A-C).

12. In order to opt out of the Listen service on Nomi's website, consumers were required to provide Nomi with all of their mobile devices' MAC addresses, without knowing whether they would ever shop at a retail location using the Listen service. Consumers who did not opt out on Nomi's website and instead wanted to make the opt out decision at retail locations were unable to do so, despite the explicit promise in Nomi's privacy policies. Consumers were not provided any means to opt out at retail locations and were unaware that the service was even being used.

VIOLATIONS OF THE FTC ACT

Count I

13. As described in Paragraph 12, Nomi represented, directly or indirectly, expressly or by implication, that consumers could opt out of Nomi's Listen service at retail locations using this service.

14. In fact, Nomi did not provide an opt-out mechanism at its clients' retail locations. Therefore, the representation set forth in Paragraph 14 is false or misleading.

Count II

15. As described in Paragraph 12, Nomi represented, directly or indirectly, expressly or by implication, that consumers would be given notice when a retail location was utilizing Nomi's Listen service.

16. In fact, neither Nomi nor its clients disclosed to consumers that Nomi's Listen service was being used at a retail location. Therefore, the representation set forth in Paragraph 16 is false or misleading.

17. 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 August, 2015, has issued this complaint against respondent.

By the Commission, Commissioner Ohlhausen dissenting.

Exhibit A

EXHIBIT A
Nomi's Privacy Policy from approximately November 2012 until January 2013.

PRIVACY IS OUR FIRST PRIORITY

Retail analytics have been around for many years. It started with market research pioneers like Paco Underhill, who deployed researchers into stores to observe customer behavior. He proved to the retail world that in-store behavioral analytics can enhance the way we shop.

However, as the world moved to the web and e-commerce emerged as an important way to shop, web analytics became crucial to a retailer's strategy so that they could deliver the best shopping experience possible. Now, as the mobile revolution gains steam, Nomi is delivering the next generation of analytics so retailers can measure customer behavior in their stores just like they can online.

With these different generations of analytics, there is one thing that remains constant and that is the privacy of consumers. Whether it was market research or web analytics, the data collected has always been anonymous and aggregated into demographic buckets. Nomi's technology has been built from the ground up with this legacy in mind.

With privacy being our number one concern, Nomi pledges to:

1. Keep each customer's data secure and private.
2. Never tie any personally identifiable consumer data to a specific device or behavior.
3. Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology.

Ultimately, this is all about the consumer. With Nomi, retailers are able to get continuous feedback on the in-store experience and optimize it for consumers.

Click here to opt out of the service.

Complaint

Exhibit B

EXHIBIT B
Nomi's Privacy Policy from approximately January 2013 to August 2013.

Nomi

- HOME
- PRODUCT
  - Why Nomi?
  - Nomi Listen
  - Nomi Measure
  - Privacy
- COMPANY
  - Team
  - Jobs
- LOGIN
- LEARN MORE!

Privacy is our First Priority

Retail analytics have been around for many years. The concept started with market research pioneers like Paco Underhill, who deployed researchers into stores to observe customer behavior through surveys and clipboards. He proved to the retail world that in-store behavioral analytics can enhance the way we shop.

However, as the world moved to the web, and e-commerce emerged as an important way to shop, web analytics became crucial to a retailer's strategy so that they could deliver the best shopping experience possible. Now, as the mobile revolution gains traction, Nomi is delivering the next generation of analytics so that retailers can measure customer behavior in their stores just like they can online.

With these different generations of analytics, there is one thing that remains constant and that is the privacy of consumers. Whether it was market research or web analytics, the data collected has always been anonymous and aggregated into demographic buckets. Nomi's technology has been built from the ground up with this legacy in mind.

With privacy as our top priority, Nomi pledges to:

1. Keep each client's data secure and private.
2. Never tie any personally identifiable consumer data to a specific device or behavior.
3. Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology.

Ultimately, this is all about the consumer. With Nomi's software, retailers are able to get continuous feedback on the in-store experience and optimize it for consumers.

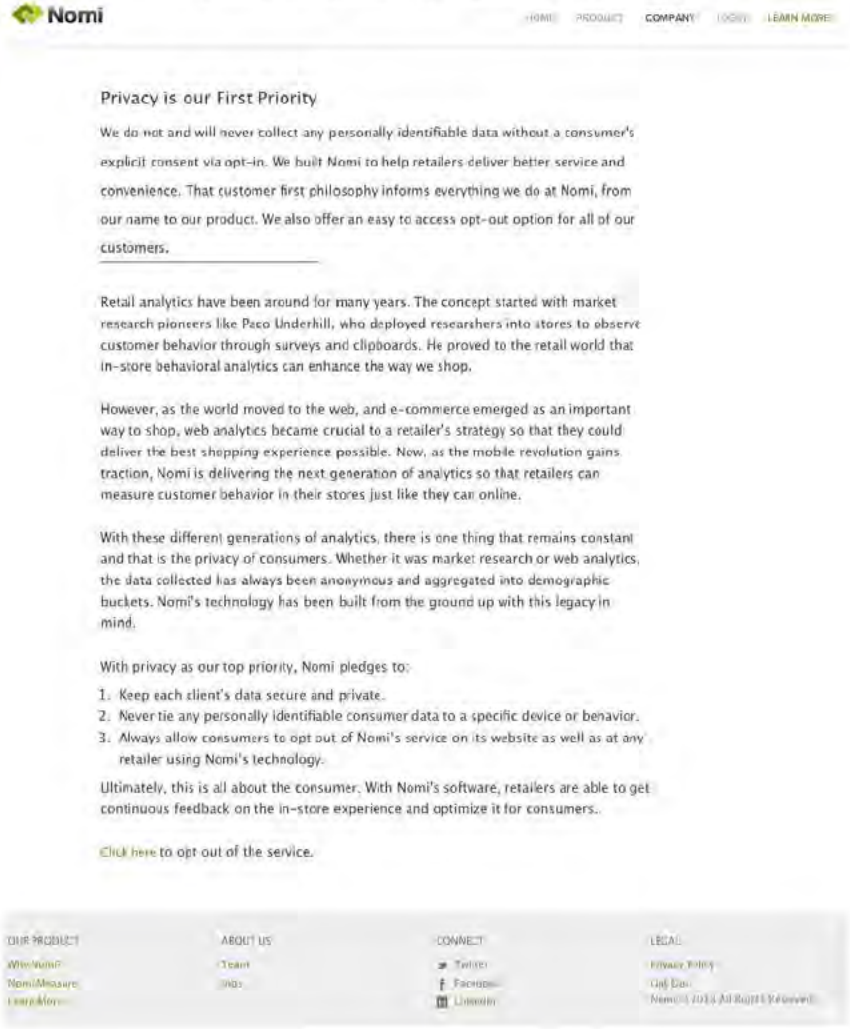
Click here to opt out of the service.

Complaint

Exhibit C

EXHIBIT C

Nomi's Privacy Policy from approximately August 2013 to October 22, 2013.



Nomi

HOME PRODUCT COMPANY LOGIN LEARN MORE

Privacy is our First Priority

We do not and will never collect any personally identifiable data without a consumer's explicit consent via opt-in. We built Nomi to help retailers deliver better service and convenience. That customer first philosophy informs everything we do at Nomi, from our name to our product. We also offer an easy to access opt-out option for all of our customers.

Retail analytics have been around for many years. The concept started with market research pioneers like Paco Underhill, who deployed researchers into stores to observe customer behavior through surveys and clipboards. He proved to the retail world that in-store behavioral analytics can enhance the way we shop.

However, as the world moved to the web, and e-commerce emerged as an important way to shop, web analytics became crucial to a retailer's strategy so that they could deliver the best shopping experience possible. Now, as the mobile revolution gains traction, Nomi is delivering the next generation of analytics so that retailers can measure customer behavior in their stores just like they can online.

With these different generations of analytics, there is one thing that remains constant and that is the privacy of consumers. Whether it was market research or web analytics, the data collected has always been anonymous and aggregated into demographic buckets. Nomi's technology has been built from the ground up with this legacy in mind.

With privacy as our top priority, Nomi pledges to:

1. Keep each client's data secure and private.
2. Never tie any personally identifiable consumer data to a specific device or behavior.
3. Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology.

Ultimately, this is all about the consumer. With Nomi's software, retailers are able to get continuous feedback on the in-store experience and optimize it for consumers.

Click here to opt out of the service.

OUR PRODUCT
Why Nomi?
NomiMeasure
Learn More

ABOUT US
Team
Jobs

CONNECT
Twitter
Facebook
LinkedIn

LEGAL
Privacy Policy
Opt Out
Nomi(c) 2013 All Rights Reserved

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, 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 by Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Nomi Technologies, Inc. is a Delaware corporation with its principal office or place of business at 26 West 17th Street, 2nd Floor, New York, NY 10011.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Nomi Technologies, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, other device, or an affiliate owned or controlled by respondent, in connection with the advertising, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication: (A) the options through which, or the extent to which, consumers can exercise control over the collection, use, disclosure, or sharing of information collected from or about them or their computers or devices, or (B) the extent to which consumers will be provided notice about how data from or about a particular consumer, computer, or device is collected, used, disclosed, or shared.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. for a period of five (5) years from the date of preparation, any documents, whether prepared by or on behalf of respondent that contradict, qualify, or call into question respondent's compliance with this order;

B. for a period of five (5) years from the date of preparation or dissemination, whichever is later, all publicly disseminated statements containing any representation covered by this order, as well as all materials used or relied upon in making or disseminating the representation; and

C. for a period of five (5) years from the date received, 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.

III.

IT IS FURTHER ORDERED that, for ten (10) years after the date of service of this order, 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 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 and subsidiaries within thirty (30) days after the date of service of this order, and to future personnel and subsidiaries within thirty (30) days after the person or subsidiary assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent

shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 the Matter of Nomi Technologies, Inc.,* File No.132-3251/C-4538.

V.

IT IS FURTHER ORDERED that respondent within ninety (90) 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 their own 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 August 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 of this order that terminated 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.

Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny

We write to express our support for the complaint and proposed consent order in this case.

Nomi Technologies, Inc. is a provider of technology services that allow retailers to track consumers' movements around their stores by detecting the media access control ("MAC") addresses broadcast by the WiFi interface on consumers' mobile devices.[1] Services like Nomi's benefit businesses and consumers. For example, they enable retailers to improve store layouts and reduce customer wait times.

At the same time, Nomi's service, and others like it, raise privacy concerns because they rely on the collection and use of consumers' precise location data. Indeed, Nomi sought to assure consumers that its practices were privacy-protecting, declaring in its privacy policy that "privacy is our first priority." A core element of Nomi's assurance was its promise that consumers could opt out of Nomi's service through its website "as well as at

[1] Although Nomi took steps to obscure the MAC addresses it collected by cryptographically hashing them, hashing generates a unique number that can be used to identify a device throughout its lifetime and is a process that can easily be "reversed" to reveal the original MAC address. *See, e.g.*, Jonathan Mayer, *Questionable Crypto in Retail Analytics*, March 19, 2014, http://webpolicy.org/2014/03/19/questionable-crypto-in-retail-analytics/ (describing successful efforts in "reversing the hash" to identify the original MAC address).

any retailer using Nomi's technology." Thus, Nomi made a specific and express promise to consumers about how, when, and where they could opt out of the location tracking services that the company provided to its clients.

As the Commission alleges in its complaint, however, this express promise was false. At no time during the nearly year-long period that Nomi made this promise to consumers did Nomi provide an in-store opt out at the retailers using its service. Moreover, the express promise of an in-store opt out necessarily makes a second, implied promise: that retailers using Nomi's service would notify consumers that the service was in use. This promise was also false. Nomi did not require its clients to provide such a notice. To our knowledge, no retailer provided such a notice on its own.

The proposed order includes carefully-tailored relief designed to prevent similar violations in the future. Specifically, it prohibits Nomi from making future misrepresentations about the notice and choices that will be provided to consumers about the collection and use of their information.

Nevertheless, Commissioner Wright argues in his dissent that Nomi's express promise to provide an in-store opt-out was not material because a website opt-out was available, and that, in any event, the Commission should not have brought this action because it will deter industry from adopting business practices that benefit consumers. In a separate statement, Commissioner Ohlhausen dissents on grounds of prosecutorial discretion. This statement addresses both dissents' arguments.

I. Nomi's Express Opt-Out Promise Was False and Material, and Therefore Deceptive

According to the Commission's Deception Policy Statement, a deceptive representation, omission, or practice is one that is material and likely to mislead a consumer acting reasonably under the circumstances. "The basic question [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or

service."[2] Furthermore, the Commission presumes that an express claim is material,[3] as is "information pertaining to the central characteristics of the product or service."[4]

Importantly, Section 5 case law makes clear that "[m]ateriality is not a test of the effectiveness of the communication in reaching large numbers of consumers. It is a test of the likely effect of the claim on the conduct of a consumer who has been reached and deceived."[5] Consumers who read the Nomi privacy statement would likely have been privacy-sensitive, and claims about how and when they could opt out would likely have especially mattered to them. Some of those consumers could reasonably have decided not to share their MAC address with an unfamiliar company in order to opt out of tracking, as the website-based opt-out required.

Instead, those consumers may reasonably have decided to wait to see if stores they patronized actually used Nomi's services and opt out then. Or they may have decided that they would simply not patronize stores that use Nomi's services, so that they could effectively "vote with their feet" rather than exercising the opt-out choice. Or consumers may simply have found it inconvenient to opt out at the moment they were viewing Nomi's privacy policy, and decided to opt out later.

These choices were rendered illusory because of Nomi's alleged failure to ensure that its client retailers provide any signs or opt-outs at stores. Further, consumers visiting stores that used Nomi's services would have reasonably concluded, in the absence of signage and the promised opt-outs, that these stores did *not* use Nomi's services. Nomi's express representations regarding how consumers may opt out of its location tracking services go to the very heart of consumers' ability to make decisions about whether

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[2] Deception Policy Statement § I.

[3] Deception Policy Statement § IV.

[4] *Id.*

[5] In the Matter of Novartis, 1999 FTC LEXIS 63 *38 (May 27, 1999).

to participate in these services. Thus, we have ample reason to believe that Nomi's opt-out representations were material.

In his dissent, Commissioner Wright points to certain evidence that, in his view, rebuts the notion that a consumer who viewed Nomi's privacy policy would "bypass the easier and immediate route (the online opt out) in favor of waiting" to opt out at a retail location.[6] According to Commissioner Wright, because consumers who viewed Nomi's privacy policy opted out at a higher rate (3.8%) than what is reported for a certain method of opting out of online behavioral advertising (less than 1%),[7] this shows that consumers who wanted to opt out of tracking were able to do so – and therefore, the representation that consumers could opt out at an individual retailer was not material. We do not believe the 3.8% opt-out rate provides reliable evidence to rebut the presumption of materiality.

The benchmark against which Commissioner Wright measures the Nomi opt-out rate – the purported opt out rate for online behavioral advertising – is neither directly comparable to, nor provides meaningful information about, consumers' likely motivations in deciding whether to opt-out of Nomi's Listen service. The difference in opt-out rates could simply mean that the practice of location tracking is much more material to consumers than behavioral advertising, and for that reason a much higher number of consumers exercised the website opt out. Indeed, recent studies have shown that consumers are concerned about offline retail tracking and tracking that occurs over time,[8] as took

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[6] Statement of Commissioner Wright at 4.

[7] *Id.* at 3 & n.15.

[8] *See* New Study: Consumers Overwhelmingly Reject In-store Tracking by Retailers, OpinionLab, March 27, 2014 http://www.opinionlab.com/press release/new-study-consumers-overwhelmingly-reject-in-store-tracking-by-retailers/ (44% of survey respondents indicated that they would be less likely to shop at a store that uses in-store mobile device tracking); *Spring Privacy Series: Mobile Device Tracking Seminar*, *available at* http://www ftc.gov/system/files/documents/public events/182251/140219mobiledevicetranscript.pdf; *Remarks of Ilana Westerman, Create with Context,* at 47-48; 50 (stating that a study of 4600 Americans showed that consumers are reluctant to give up their location histories).

place here. These relative opt-out rates could just as easily imply that many more than 3.8% of consumers were interested in opting out of Nomi's retail tracking, and that the consumers who did not opt out on the website were relying on their ability to opt out in stores, as promised by Nomi.

In short, the 3.8% opt-out rate for Nomi's website opt-out, along with the comparison to opt-out rates in other contexts, is simply insufficient evidence to evaluate what choices the other 96.2% of visitors to the website intended to make, given the promises Nomi made to them about their options. Commissioner Wright is simply speculating when he extrapolates from the available data his conclusion that in-store opt-out rates would have been so low as to render the in-store option immaterial. Such inconclusive evidence fails to rebut any presumption of materiality that we might apply to Nomi's statements.

II. The Proposed Order Contains Appropriate and Meaningful Relief

The Commission's acceptance of the consent agreement is appropriate in light of both Nomi's alleged deception and the relief in the proposed order. The proposed order addresses the underlying deception in an appropriately tailored way. It prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses, or shares about them or their devices.[9] It also prohibits Nomi from misrepresenting the extent to which consumers will be notified about such choices.[10] Nomi may be subject to civil penalties if it violates either of these prohibitions. While the consent order does not require that Nomi provide in-store notice when a store uses its services or offer an in-store opt out, that was not the Commission's goal in bringing this case. This case is simply about ensuring that when companies promise consumers the ability to make choices, they follow through on those promises. The relief in the order is therefore directly tied to the

[9] Order § I.

[10] *Id.*

deceptive practices alleged in the complaint.[11] The order will also serve to deter other companies from making similar false promises and encourage them to periodically review the statements they make to consumers to ensure that they are accurate and up-to-date.

In their dissents, however, Commissioners Wright and Ohlhausen argue that the Commission should have declined to take action in this case. Commissioner Ohlhausen views this action as "encourag[ing] companies to do only the bare minimum on privacy, ultimately leaving consumers worse off."[12] Similarly, Commissioner Wright argues that the action against Nomi "sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers."[13]

The Commission encourages companies to provide privacy choices to consumers, but it also must take action in appropriate cases to stop companies from providing *false* choices. Our action today does just that. Indeed, this case is very similar to prior Commission cases involving allegedly deceptive opt outs.[14] We

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[11] After arguing primarily that Nomi did not violate Section 5, Commissioner Wright argues in the alternative that the proposed order is too narrow. *See* Statement of Commissioner Wright at 4 (stating that "the proposed consent order does nothing to alleviate such harm [from retail location tracking]" because it does not require Nomi to offer, and provide notice of, an in-store opt out). This argument is based on a misunderstanding of the injury at issue in this case. Here, the injury to consumers was Nomi's allegedly false and material statement of the opt-out choices available to consumers. The proposed order prohibits Nomi from making such representations and thereby addresses the underlying consumer injury.

[12] Statement of Commissioner Ohlhausen.

[13] Statement of Commissioner Wright at 4.

[14] *See U.S. v. Google Inc.*, No. CV 12-04177, (N.D. Cal. Nov. 16, 2012) (stipulated injunction) ($22.5 million settlement over Google's allegedly deceptive opt out, which did not work on the Safari browser); *Chitika, Inc.*, No. C-4324, (F.T.C. June 7, 2011) (consent order) *available at* http://www.ftc.gov/enforcement/cases- proceedings/1023087/chitika-inc-matter (alleging that advertising network deceived consumers by not telling them that their opt out of behavioral advertising cookies would last only 10 days); *U.S. Search, Inc.*, No. C-4317 (Mar. 14, 2011) (consent order) *available at* http://www ftc.gov/enforcement/cases-proceedings/us-search-inc (alleging that

do not believe that any of these actions – including the one announced today – have deterred or will deter companies from providing truthful choices. To the contrary, companies are voluntarily adopting enforceable privacy commitments in the retail location tracking space[15] and in other areas.[16]

* * * * * *

The application of Section 5 deception authority to express statements likely to affect a consumer's choice of or conduct regarding a good or service is well established. For close to a year, Nomi claimed to offer two opt-out methods but in fact it provided only one. We believe this failure was material and that Nomi had a legal obligation to fulfill the promises it made to consumers.

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a data broker deceived consumers by failing to disclose limitations of its opt out).

[15] The Future of Privacy Forum has developed an entire self-regulatory code that requires industry members to provide such choices. *See also* JAN LAUREN BOYLES ET AL., PEW INTERNET PROJECT, PRIVACY AND DATA MANAGEMENT ON MOBILE DEVICES 2 (2012), *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIPMobile PrivacyManagement.pdf (reporting that 19% of consumers "turned off the location tracking feature on their cell phone because they were concerned that other individuals or companies could access that information) *and* Westerman, *supra* note 8, at 50-52 (describing sensitivity of location history, based on study of 4600 U.S. consumers).

[16] *See, e.g.*, Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), *available at* http://www futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/.

Dissenting Statement

Statement of Commissioner Julie Brill

I vote to finalize the Nomi case, for the reasons articulated in the Majority Statement.[1]

In her dissent, Commissioner Ohlhausen expresses concern that our order will deter companies from offering privacy choices in the marketplace.[2] I agree that, in approving our orders, we should always consider whether they provide the appropriate marketplace incentives. I believe this order provides companies with an incentive to periodically review the statements they make to consumers, and make sure their practices line up with those statements. In this case, we took issue with the fact that Nomi offered a deceptive choice to consumers for nearly a year. Our order today makes sure that this doesn't happen again. In addition, the concern that our order will deter companies from offering choices is belied by the fact that, like many of its competitors in retail mobile location tracking, Nomi continues to offer an online choice to consumers to opt-out of retail mobile tracking. However, as a result of our order, the company no longer offers a deceptive choice.

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[1] Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny, In the Matter of Nomi, Inc. ("Majority Statement") at 2-3(Apr. 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf.

[2] Dissenting Statement of Commissioner Ohlhausen, In the Matter of Nomi, Inc., at 2 (Aug. 28, 2015).

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

On April 23, 2015, a divided Commission issued a complaint and accepted a proposed consent order with regard to the practices of Nomi Technologies, Inc., a startup company offering its retail merchant clients the ability to analyze aggregate data about consumer traffic in the merchants' stores.[1] The Commission subsequently published a description of the consent agreement package in the Federal Register, seeking public comment.[2] The comment window closed on May 25, 2015.[3]

The record now before the Commission confirms that the FTC should not have adopted this complaint and order because it undermines the Commission's own goals of increased consumer choice and transparency of privacy practices and because the order imposes a penalty far out of proportion to the non-existent consumer harm.

The FTC has long called on companies to implement best practices "giving consumers greater control over the collection and use of their personal data through simplified choices and increased transparency."[4] Consistent with such best practices, Nomi went beyond its legal duty by offering increased transparency and consumer choice through an easy and effective global opt-out. Granted, part of Nomi's privacy policy was

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[1] In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Compl. ¶ 3 (Apr. 23, 2015). I dissented in this matter, as did Commissioner Wright. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen (April 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf; Dissenting Statement of Commissioner Joshua D. Wright (April 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

[2] Nomi Technologies, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 80 Fed. Reg. 24923 (May 1, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150501nomifrn.pdf.

[3] *Id* at 24924.

[4] Fed. Trade Comm'n, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, at i, (Mar. 2012).

inaccurate because the company promised, but failed to implement, an additional privacy choice for consumers. However, by applying a *de facto* strict liability deception standard absent any evidence of consumer harm, the proposed complaint and order inappropriately punishes a company that acted consistently with the FTC's privacy goals by offering more transparency and choice than legally required.

The record demonstrates that this enforcement action may, ironically, undermine the FTC's own established privacy goals. Commenters generally agree that the order will diminish companies' incentives to be transparent about their privacy practices.[5] Commenters also generally agree that the Order will discourage companies from offering privacy choices to consumers. As one commenter explained, "[T]he consent order could discourage companies from offering choices to consumers about data collection and use practices…" because "[c]ompanies may be justifiably concerned that communicating those options clearly and accurately to consumers is difficult, and that even harmless communications errors will result in harsh penalties."[6] Another commenter concluded, "This enforcement action sends a message to any business considering privacy-by-design: if you

[5] Comments of Application Developers Alliance, at 2 (May 26, 2015) ("[C]ompanies may change their privacy policies to make broad statements to eliminate or at least mitigate the risk of violating its own promises… result[ing] in less transparency for consumers.") ("ADA Comments"); Comments of Computer & Communications Industry Association at 2 (May 26, 2015) ("[T]he FTC's action against Nomi will ultimately result in adverse outcomes for consumer protection by leading to reduced transparency and fewer privacy-protective choices for consumers."); Comments of Information Technology & Innovation Foundation, at 3 (May 26, 2015) ("[C]ompanies like Nomi would be better off providing no privacy guarantees to their consumers…") ("ITIF Comments"); Comments of the International Center for Law & Economics and TechFreedom, att. at 2 (May 26, 2015) ("Out of a desire to encourage – effectively require – companies to disclose data collection, the FTC is actually discouraging companies from doing so."). *See also*, Comments of Chamber of Commerce, at 1 (May 22, 2015) (arguing that such aggressive Section 5 enforcement could "dissuade [smaller entities] from voluntary adoption of consumer privacy protections."). All public comments on this matter are available at https://www ftc.gov/policy/public-comments/initiative-608.

[6] ADA Comments at 2.

attempt to protect consumers' privacy in multiple ways, you multiply your legal risk of FTC prosecution."[7]

I share one commenter's particular concern that "the takeaway for most companies will be: if you do not want the FTC to come after you, do the bare-minimum on privacy."[8] In response to the case's release, one legal analyst advised readers that "giving individuals more information is not better" and that where notice is not legally required, companies should "be sure the benefits of notice outweigh potential risks."[9] Another pointed out that "[t]he ironic upshot of the majority decision is that Nomi could have avoided the FTC enforcement action altogether by not posting a privacy policy, not describing its practices to consumers, and not offering an opt-out mechanism at all."[10] Indeed, upon learning of the Commission's investigation, Nomi simply eliminated a potential privacy choice from its privacy policy.

This record contradicts the majority's belief that its decision in this case will not "deter companies from providing truthful choices."[11] The majority justifies this belief by arguing that some companies continue to voluntarily adopt privacy commitments despite past deceptive opt out cases. However, the responses of commenters and the reaction of analysts show that this order will

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[7] Comments of NetChoice, at 3 (May 26, 2015) ("NetChoice Comments").

[8] ITIF Comments at 3.

[9] Elizabeth Litten, *When Privacy Policies Should NOT Be Published – Two Easy Lessons from the FTC's Nomi Technologies Case*, HIPPA, HITECH & HIT (May 26, 2015), http://hipaahealthlaw.foxrothschild.com/2015/05/articles/privacy/when-privacy-policies-should-not-be-published-two-easy-lessons-from-the-ftcs-nomi-technologies-case/.

[10] James DeGraw, David Cohen and Joe Cleemann, *Nomi Highlights Risks of Publicizing Privacy Policies*, LAW360 (May 27, 2015), http://www.law360.com/articles/659398/nomi-highlights-risks-of-publicizing-privacy-policies.

[11] In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny (April 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf.

certainly deter some companies from providing truthful consumer privacy choices. Thus, the record clearly demonstrates that overly aggressive deception enforcement comes at a cost to the FTC's privacy goals and to consumers.

Furthermore, the record supports rejecting the order as too severe given the nature of Nomi's violation. Commenters argue that the proposed order "is disproportionate and heavy-handed" and "the equivalent of calling in the SWAT team to take down a driver for a broken tail light."[12] Several argue that because there was no evidence of consumer harm in this case, the more appropriate response would have been for FTC staff to notify the company of the problem and verify that it was corrected.[13] Alternatively, one commenter suggested "an order with a shorter enforcement period or a less onerous compliance requirement could have been tailored for a startup company that made a harmless error."[14]

For the reasons discussed above, I conclude that the comments on the record and the marketplace reaction to the complaint and order provide additional persuasive evidence that the costs of this enforcement action outweigh the benefits. The Commission therefore ought to vacate the proposed complaint and consent order. Because the majority declines to do so, I dissent.

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[12] ADA Comments at 1; ITIF Comments at 3. *See also*, Comments of James C. Cooper at 5 (May 26, 2015) ("[I]t is simply not in the public interest to subject an innovative firm to an invasive twenty-year order for an oversight that harmed no one" because this will "hobble Nomi's ability to compete [and] threatens to chill innovation more generally…").

[13] ITIF Comments at 3; NetChoice Comments at 3-4; ADA Comments at 2.

[14] ADA Comments at 2.

Dissenting Statement of Commissioner Joshua D. Wright

Today, the Commission finds itself in the unfortunate position of trying to fix a problem that no longer exists by stretching a legal theory to fit the unwieldy facts before it. I dissent from the Commission's decision to accept for public comment a consent order with Nomi Technologies, Inc. (Nomi) not only because it is inconsistent with a fair reading of the Commission's Policy Statement on Deception, but also because even if the facts were to support a technical legal violation – which they do not – prosecutorial discretion would favor restraint.

Nomi does *not* track individual consumers – that is, Nomi's technology records whether individuals are unique or repeat visitors, but it does not identify them. Nomi provides analytics services based upon data collected from mobile device tracking technology to brick-and-mortar retailers through its "Listen" service.[1] Nomi uses sensors placed in its clients' retail locations or its clients' existing WiFi access points to detect the media access control (MAC) address broadcast by a consumer's mobile device when it searches for WiFi networks. Nomi passes MAC addresses through a cryptographic hash function before collection and creates a persistent unique identifier for the mobile device.[2] Nomi does not "unhash" this identifier to retrieve the MAC addresses and Nomi does not store the MAC addresses of the mobile devices. In addition to creating this unique persistent identifier, Nomi collects the device manufacturer information, the device's signal strength, and the date, time and locating sensor of the mobile device. This information is then used to provide analytics to Nomi's clients. For example, even without knowing the identity of those visiting their stores, the data provided by Nomi's Listen service can generate potentially valuable insights about aggregate in-store consumer traffic patterns, such as the average duration of customers' visits, the percentage of repeat

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[1] In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Compl. ¶ 3 (Apr. 23, 2015).

[2] For more information on cryptographic hashing, see Rob Sobers, *The Definitive Guide to Cryptographic Hash Functions (Part I)*, VARONIS (Aug. 2, 2012), http://blog.varonis.com/the-definitive-guide-to-cryptographic-hash-functions-part-1/.

customers, or the percentage of consumers that pass by a store rather than entering it. These insights, in turn, allow retailers to measure how different retail promotions, product offerings, displays, and services impact consumers. In short, these insights help retailers optimize consumers' shopping experiences,[3] inform staffing coverage for their stores, and improve store layouts.

The Commission's complaint focuses upon a single statement in Nomi's privacy policy. Specifically, Nomi's privacy policy states that "Nomi pledges to . . . Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology."[4]

Count I of the complaint alleges Nomi represented in its privacy policy that consumers could opt out of its Listen service at retail locations using the service, but did not in fact provide a retail level opt out. Count II relies upon this same representation to allege a second deceptive practice – that the failure to provide the opt out in the first instance also implies a failure to provide notice to consumers that a specific retailer would be using the Listen service.[5]

The Commission's decision to issue a complaint and accept a consent order for public comment in this matter is problematic for both legal and policy reasons. Section 5(b) of the FTC Act requires us, before issuing any complaint, to establish "reason to believe that [a violation has occurred]" and that an enforcement action would "be to the interest of the public."[6] While the Act

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[3] *See, e.g.*, Alyson Shontell, *It Took Only 13 Days for Former Salesforce Execs to Raise $3 Million for Their Startup, Nomi*, BUSINESS INSIDER (Feb. 11, 2013), http://www.businessinsider.com/former-salesforce-and-buddy-media-executives-raise-3-million-nomi-2013-2 ("The moment you open Amazon.com, your entire retail experience is personalized, down to the promotions you see and the products you are pushed. That's because e-commerce is a data-driven industry, and websites know a lot about customers who stumble on to their websites. Physical stores however, where 90% of all retail purchases still occur, know nothing about the customers who walk in their doors.").

[4] Compl. ¶ 12.

[5] Compl. ¶ 16-17.

[6] 15 U.S.C. §45(b).

does not set forth a separate standard for accepting a consent decree, I believe that threshold should be at least as high as for bringing the initial complaint. The Commission has not met the relatively low "reason to believe" bar because its complaint does not meet the basic requirements of the Commission's 1983 Deception Policy Statement. Further, the complaint and proposed settlement risk significant harm to consumers by deterring industry participants from adopting business practices that benefit consumers.

The fundamental failure of the Commission's complaint is that the evidence simply does not support the allegation that Nomi's representation about an opportunity to opt out of the Listen service at the retail level – in light of the immediate and easily accessible opt out available on the webpage itself – was material to consumers. This failure alone is fatal. A representation simply cannot be deceptive under the long-standing FTC Policy Statement on Deception in the absence of materiality.[7] The Policy Statement on Deception highlights the centrality of the materiality inquiry, observing that the "basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service."[8] The materiality inquiry is critical because the Commission's construct of "deception" uses materiality as an evidentiary proxy for consumer injury: "[i]njury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well."[9] This is a critical point. Deception causes consumer harm because it influences consumer behavior – that is, the deceptive statement is one that is not merely misleading in the abstract but one that causes cause consumers to make choices to their detriment that they would not have otherwise made. This essential link between materiality and consumer injury ensures the Commission's deception authority is

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[7] Fed. Trade Comm'n, Policy Statement on Deception (1983), *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 175, 182 (1984) [hereinafter FTC Policy Statement on Deception], *available at* https://www ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

[8] FTC Policy Statement on Deception, 103 F.T.C. at 175.

[9] *Id.* at 183.

employed to deter only conduct that is likely to harm consumers and does not chill business conduct that makes consumers better off.

This link also unifies the Commission's two foundational consumer protection authorities – deception and unfairness – by tethering them to consumer injury.

The Commission does not explain how it finds the materiality requirement satisfied; presumably it does so upon the assumption that "express statements" are presumptively material.[10] However, that presumption was never intended to substitute for common sense, evidence, or analysis. Indeed, the Policy Statement on Deception acknowledges the "Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality."[11] Here, the Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that Nomi's failure to implement an *additional*, retail-level opt out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not "have chosen differently" but for the allegedly deceptive representation.

Nomi represented that consumers could opt out on its website as well as in the store where the Listen service was being utilized. Nomi did offer a fully functional and operational global opt out from the Listen service on its website.[12] Thus, the only remaining potential issue is whether Nomi's failure to offer the represented in-store opt out renders the statement in its privacy policy deceptive. The evidence strongly implies that specific representation was not material and therefore not deceptive. Nomi's "tracking" of users was widely publicized in a story that

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[10] *See* POM Wonderful LLC, 2013 FTC LEXIS 6, *121 (2013); Novartis Corp., 127 F.T.C. 580, 686 (1999); American Home Prods., 98 F.T.C. 136, 368 (1981).

[11] FTC Policy Statement on Deception, 103 F.T.C. at 182 n.47.

[12] As such, the facts of this case are distinguishable from the cases cited for support by the majority in its statement. In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny 5 n.14 (Apr. 23, 2015).

appeared on the front page of *The New York Times*,[13] a publication with a daily reach of nearly 1.9 million readers.[14] Most likely due to this publicity, Nomi's website received 3,840 unique visitors during the relevant timeframe and received 146 opt outs – an opt-out rate of 3.8% of site visitors. This opt-out rate is significantly higher than the opt-out rate for other online activities.[15] This high rate, relative to website visitors, likely reflects the ease of a mechanism that was immediately and quickly available to consumers at the time they may have been reading the privacy policy.

The Commission's reliance upon a presumption of materiality as to the additional representation of the availability of an in-store opt out is dubious in light of evidence of the opt- out rate for the webpage mechanism. Actual evidence of consumer behavior indicates that consumers that were interested in opting out of the Listen service took their first opportunity to do so. To presume the materiality of a representation in a privacy policy concerning the availability of an *additional*, in-store opt-out mechanism requires one to accept the proposition that the privacy-sensitive consumer would be more likely to bypass the easier and immediate route

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[13] Stephanie Clifford & Quentin Hardy, *Attention, Shoppers: Store is Tracking Your Cell*, NEW YORK TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell html?pagewanted=all& r=0.

[14] The Associated Press, *Top 10 Newspapers by Circulation: Wall Street Journal Leads Weekday Circulation*, HUFFINGTON POST (Apr. 30, 2013), http://www.huffingtonpost.com/2013/05/01/newspaper-circulation-top-10n3188612.html.

[15] In perhaps the most comparable circumstance -- Do Not Track mechanisms -- the opt-out rate is extremely low. *See, e.g.,* Jack Marshall, *The Do Not Track Era*, DIGIDAY (Feb. 27, 2012), http://digiday.com/platforms/advertising-in-the-do-not-track-era/ ("[a]ccording to data from Evidon, which facilitates the serving of those icons, someone clicks and goes through the opt-out process once for every 10,000 ad impressions served"); Matthew Creamer, *Despite Digital Privacy Uproar, Consumers are Not Opting Out*, ADVERTISING AGE (May 31, 2011), http://adage.com/article/digital/digital-privacy-uproar-consumers-opting/227828/ ("Evidon, which has the longest set of data, is seeing click-through of 0.005% with only 2% opting out from 30 billion impressions"). *See also* Richard Beaumont, *Cookie Opt-Out Stats Revealed*, THE COOKIE COLLECTIVE (Feb. 19, 2014), http://www.cookielaw.org/blog/2014/2/19/cookie-opt-out-statistics-revealed/.

(the online opt out) in favor of waiting until she had the opportunity to opt out in a physical location. Here, we can easily dispense with shortcut presumptions meant to aid the analysis of consumer harm rather than substitute for it. The data allow us to know with an acceptable level of precision how many consumers – 3.8% of them – reached the privacy policy, read it, and made the decision to opt out when presented with that immediate choice. The Commission's complaint instead adopts an approach that places legal form over substance, is inconsistent with the available data, and defies common sense.

The Commission's approach here is problematic for another reason. To the extent there is consumer injury when consumers are offered an opt out from tracking that cannot be effectuated, or that more generally, consumers are uncomfortable with such tracking and it should be disclosed to them, the proposed consent order does nothing to alleviate such harm and will, instead, likely exacerbate it. Nomi has removed its representation about a retail level opt- out mechanism from its privacy policy. The proposed consent order does not require Nomi to offer such a mechanism, nor does it require Nomi to disclose the tracking in retail locations.[16] It is unlikely that Nomi could agree to such a condition any case – Nomi contracts with retailers and has no control over the retailers' premises. The order does not – and cannot – compel retailers to disclose the tracking technology.

Even assuming *arguendo* Nomi's privacy policy statement is deceptive under the Deception Policy Statement, the FTC would better serve consumers by declining to take action against Nomi. The analytical failings of the Commission's approach are not harmless error.

Rather, aggressive prosecution of this sort will inevitably deter industry participants like Nomi from engaging in voluntary practices that promote consumer choice and transparency – the very principles that lie at the heart of the Commission's consumer protection mission.[17] Nomi was under no legal obligation to post a

[16] In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Proposed Consent Order Part I (Apr. 23, 2015).

[17] In addition, Nomi arguably offered a product that was more privacy-protective than other, more intrusive methods that retailers currently employ,

privacy policy, describe its practices to consumers, or to offer an opt-out mechanism. To penalize a company for such a minor shortcoming – particularly when there is no evidence the misrepresentation harmed consumers – sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers.

Finally, market forces already appear to be responding to consumer preferences related to tracking technology. For example, in response to potential consumer discomfort some retailers have discontinued or changed the methods by which they track visitors to their physical stores.[18] Technological innovation has also responded to incentives to provide a better consumer experience, including a Bluetooth technology that provides not only an opt-in choice for consumers,[19] but also gives retailers the opportunity to provide their consumers with a more robust shopping experience.[20] Notably, Nomi itself has responded to

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such as video cameras. *See* Clifford & Hardy, *supra* note 14 ("Cameras have become so sophisticated, with sharper lenses and data-processing, that companies can analyze what shoppers are looking at, and even what their mood is.").

[18] *See, e.g.*, Amy Hollyfield, *Philz to Stop Tracking Customers via Smartphones*, ABC 7 NEWS (May 29, 2014), http://abc7news.com/business/philz-to-stop-tracking-customers-via-smartphones/83943/; Peter Cohan, *How Nordstrom Uses WiFi to Spy On Shoppers*, FORBES (May 9, 2013), http://www forbes.com/sites/petercohan/2013/05/09/how-nordstrom-and-home-depot-use-wifi-to-spy-on-shoppers/.

[19] *See, e.g.*, Siraj Datoo, *High Street Shops are Studying Shopper Behaviour by Tracking their Smartphones or Movement*, THE GUARDIAN (Oct. 3, 2013), http://www.theguardian.com/news/datablog/2013/oct/03/analytics- amazon-retailers-physical-cookies-high-street ("If customers create accounts on the wireless network - something millions have done - they first have to accept terms and conditions that opts them in to having their movements monitored when inside the stores"); Jess Bolluyt, *What's So Bad About In-Store Tracking?*, THE CHEAT SHEET (Nov. 27, 2014), http://www.cheatsheet.com/technology/whats-so-bad-about-in-store-tracking html/?a=viewall ("customers have to turn on Bluetooth, accept location services, and opt in to receive notifications").

[20] *See, e.g.*, Greg Petro, *How Proximity Marketing Is Driving Retail Sales*, FORBES (Oct. 8, 2014), http://www forbes.com/sites/gregpetro/2014/10/08/how-proximity-marketing-is-driving-retail-sales/ ("[This will] allow Macy's to send personalized department-level deals, discounts, recommendations and rewards to customers who opt-in to receive the offers"); Datoo, *supra* note 20

these market changes and no longer offers the MAC address tracking technology to any retailer other than its legacy customers.

Accordingly, I dissent from the issuance of this complaint and the acceptance of a consent decree for public comment.

(after opting in, "[u]sers can then add their loyalty card numbers to receive personalised recommendations.").

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Nomi Technologies, Inc. ("Nomi").

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.

Nomi uses mobile device tracking technology to provide analytics services to brick and mortar retailers through its "Listen" service. Nomi has been collecting information from consumers' mobile devices to provide the Listen service since January 2013. Nomi places sensors in its clients' retail locations that detect the media access control ("MAC") address broadcast by a mobile device when it searches for WiFi networks. A MAC address is a 12-digit identifier that is unique to a particular device. Alternatively, in some instances Nomi collects MAC addresses through its clients' existing WiFi access points. In addition to the MAC address, Nomi also collects the following information about each mobile device that comes within range of its sensors or its clients' WiFi access points: the mobile device's signal strength; the mobile device's manufacturer (derived from the MAC address); the location of the sensor or WiFi access point observing the mobile device; and the date and time the mobile device is observed.

Nomi cryptographically hashes the MAC addresses it observes prior to storing them on its servers. Hashing obfuscates the MAC address, but the result is still a persistent unique identifier for that mobile device. Each time a MAC address is run through the same hash function, the resulting identifier will be the same. For example, if MAC address 1A:2B:3C:4D:5E:6F is run through Nomi's hash function on ten different occasions, the resulting identifier will be the same each time. As a result, while Nomi does not store the MAC address, it does store a persistent

unique identifier for each mobile device. Nomi collected information about approximately nine million unique mobile devices between January 2013 and September 2013.

Nomi uses the information it collects to provide analytics reports to its clients about aggregate customer traffic patterns such as: the percentage of consumers merely passing by the store versus entering the store; the average duration of consumers' visits; types of mobile devices used by consumers visiting a location; the percentage of repeat customers within a given time period; and the number of customers that have also visited another location within the client's chain. Through October 22, 2013, Nomi's Listen service had approximately 45 clients. Some of these clients deployed the service in multiple locations within their chains.

Nomi has not published, or otherwise made available to consumers, a list of the retailers that use or used the Listen service. Nomi does not require its clients to post disclosures or otherwise notify consumers that they use the Listen service. Through October 22, 2013, most, if not all, of Nomi's clients did not post any disclosure, or otherwise notify consumers, regarding their use of the Listen service.

From at least November 2012, until October 22, 2013, Nomi disseminated or caused to be disseminated privacy policies on its website, nomi.com or getnomi.com, which included the following statement:

> Nomi pledges to.... Always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology.

Nomi provided, and continues to provide, an opt out on its website for consumers who do not want Nomi to store observations of their mobile device. In order to opt out of the Listen service on Nomi's website, consumers were required to provide Nomi with all of their mobile devices' MAC addresses, without knowing whether they would ever shop at a retail location using the Listen service. Once a consumer has entered the MAC address of their device into Nomi's website opt out, Nomi adds it to a blacklist of MAC addresses for which information will not be

stored. Consumers who did not opt out on Nomi's website and instead wanted to make the opt out decision at retail locations were unable to do so, despite the explicit promise in Nomi's privacy policies. Consumers were not provided any means to opt out at retail locations and were unaware that the service was even being used.

The Commission's complaint alleges that Nomi's privacy policy represented that: (1) consumers could opt out of Nomi's Listen service at retail locations using this service, and (2) that consumers would be given notice when a retail location was utilizing Nomi's Listen service. The complaint alleges that Nomi violated Section 5 of the Federal Trade Commission Act by misleading consumers because, contrary to its representations, Nomi did not provide an opt-out mechanism at its clients' retail locations and neither Nomi nor its clients disclosed to consumers that Nomi's Listen service was being used at a retail location.

The proposed order contains provisions designed to prevent Nomi from engaging in the future in practices similar to those alleged in the complaint. Part I of the proposed order prohibits Nomi from misrepresenting: (A) the options through which, or the extent to which, consumers can exercise control over the collection, use, disclosure, or sharing of information collected from or about them or their computers or devices, or (B) the extent to which consumers will be provided notice about how data from or about a particular consumer, computer, or device is collected, used, disclosed, or shared.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Nomi to retain documents relating to its compliance with the order. The order requires that all of the documents be retained for a five-year period. Part III 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 IV ensures notification to the FTC of changes in corporate status. Part V mandates that Nomi submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

DOLLAR TREE, INC.
AND
FAMILY DOLLAR STORES, INC.

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

Docket C-4530; File No. 141 0207
Complaint, July 2, 2015 – Decision, September 16, 2015

This consent order addresses the $9.2 billion acquisition by Dollar Tree of certain assets of Family Dollar. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial competitor in localized geographic markets in 222 cities nationwide. The elimination of this competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices unilaterally above competitive levels. The consent order requires the divestiture of 330 Family Dollar stores to the private equity Sycamore within 150 days from the date of the Acquisition.

Participants

For the *Commission: Lucas Ballet, Kimberly Biagioli, Timothy Carson, Michelle Fetterman, Stephanie Greco, Amanda Lewis, David Owyang* and *Sean Pugh.*

For the *Respondents: David A. Schwartz, Wachtell, Lipton, Rosen & Katz; Brian Byrne, Cleary Gottlieb Steen & Hamilton 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 Dollar Tree, Inc. ("Dollar Tree"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Family Dollar Stores, Inc. ("Family Dollar"), 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

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 Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia.Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina.

II. JURISDICTION

2. 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 ACQUISITION

3. Pursuant to an Agreement and Plan of Merger dated as of July 27, 2014, as amended on September 4, 2014, Dollar Tree proposes to purchase all issued and outstanding common stock of Family Dollar in a transaction valued at approximately $9.2 billion ("the Acquisition").

IV. THE RELEVANT PRODUCT MARKET

4. The relevant line of commerce in which to analyze the Acquisition is no narrower than discount general merchandise retail stores. "Discount general merchandise retail stores" means small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under $10 (*i.e.*, dollar stores) and the retailer Walmart.

5. In certain geographic markets the relevant line of commerce may be as broad as the sale of discounted general merchandise in retail stores (*i.e.*, discount general merchandise retail stores as well as supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores).

6. Whether the relevant line of commerce is discount general merchandise retail stores or the sale of discounted general merchandise in retail stores depends on the specifics of the geographic market at issue, such as population density and the density and proximity of the Respondents' stores and competing retailers.

V. THE RELEVANT GEOGRAPHIC MARKETS

7. The relevant geographic markets in which to analyze the competitive effects of the Acquisition are local markets. The size of the geographic market depends on the specific area at issue. In highly urban areas, the geographic markets are generally no broader than a half-mile radius around a given store. In highly rural areas, the geographic market is generally no narrower than a three-mile radius around a given store. In areas neither highly urban nor highly rural, the geographic market is generally within a half-mile to three-mile radius around a given store.

VI. ENTRY CONDITIONS

8. Entry into the relevant markets that is timely and sufficient to prevent or deter the expected anticompetitive effects of the Acquisition is unlikely. Entry barriers include the time, costs, and feasibility (which may be limited by restrictive-use covenants in lease agreements) associated with identifying and potentially constructing an appropriate and available location for a discount general merchandise retail store; the resources required to support one or more new stores over a prolonged ramp-up period; and the sufficient scale to compete effectively.

VII. EFFECTS OF THE ACQUISITION

9. The Acquisition, if consummated, is likely to substantially lessen competition in the relevant line of commerce in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents Dollar Tree and Family Dollar; and

b. by increasing the likelihood that Respondent Dollar Tree will unilaterally exercise market power.

10. The ultimate effect of the Acquisition would be to increase the likelihood that prices of discounted general merchandise will increase, and that the quality, selection, and services associated with the sale of such merchandise will decrease, in the relevant geographic markets.

VIII. VIOLATIONS CHARGED

11. The agreement described in Paragraph 4 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 second day of July, 2015, issues its complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Dollar Tree, Inc. ("Dollar Tree") of Respondent Family Dollar Stores, Inc. ("Family Dollar"), 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 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 Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia 23320.

2. Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina 28105.

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.

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Confidential Business Information" means information not in the public domain that is related to or used in connection with the Assets To Be Divested, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, marketing, promotional, and sales information.

B. "Control Dollar Stores" means the Dollar Stores identified on Confidential Appendix A of this Order.

C. "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.

D. "Orders" means the Decision and Order in this matter 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. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or

deterioration of any of the Assets To Be Divested. Respondents shall not 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.

B. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course of business, 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 regular and ordinary course of business, in accordance with past practice.

C. Respondents shall not terminate the operation of any of the Assets To Be Divested.

D. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections in the regular and ordinary course of business, in accordance with past practice.

E. Respondents shall maintain the organization and properties of each of the Assets To Be Divested, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Assets To Be Divested.

F. Included in the above obligations, Respondents shall, without limitation:

1. Maintain all operations at each of the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice, including maintaining customary hours of operation and departments;

2. Use best efforts to retain employees at each of the Assets To Be Divested; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not transfer any employees from any of the Assets To Be Divested;

3. Provide each employee of the Assets To Be Divested with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Assets To Be Divested;

4. Not transfer inventory from any Asset To Be Divested, other than in the ordinary course of business, in accordance with past practice;

5. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Assets To Be Divested, in each case in a manner in accordance with past practice;

6. Maintain the books and records of each of the Assets To Be Divested;

7. 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 any Asset To Be Divested to another location, or that indicates an Asset To Be Divested will close;

8. Not conduct any "going out of business," "close-out," "liquidation," or similar sales or promotions at or relating to any Asset To Be Divested;

9. Not materially change or modify the existing pricing or advertising practices, marketing, or merchandising programs and policies, or price zones for or applicable to any of the Assets To Be

Divested, other than changes or modifications in the regular and ordinary course of business, in accordance with past practices and business strategy, and consistent with the changes or modifications applicable to Family Dollar Dollar Stores retained by Respondents;

10. Provide each of the Assets To Be Divested with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such businesses, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Assets To Be Divested;

11. Continue, at least at their scheduled pace, any additional expenditures for each of the Assets To Be Divested authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;

12. Provide such resources as may be necessary to respond to competition and to prevent any diminution in sales at each of the Assets To Be Divested;

13. Make available for use by each of the Assets To Be Divested funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Dollar Stores at each of the Assets To Be Divested; and

14. Provide support services to each of the Assets To Be Divested at least at the level as were being provided to such Assets To Be Divested by Respondents as of the date the Consent Agreement was signed by Respondents.

G. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Assets To Be Divested as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondents and the Assets To Be Divested, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Assets To Be Divested,

A. 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 these Orders;

   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 Monitor (if any has been appointed);

3. Not disclose or convey, directly or indirectly, any such Confidential Business Information that is exclusively related to the marketing, promotional activities, or sales of the Assets To Be Divested to

employees with responsibilities relating to the marketing, promotional activities, or sales of those Dollar Stores that were owned or operated by Dollar Tree at the time the Consent Agreement was signed by the parties; and

4. Institute procedures and requirements to ensure that the above-described employees:

   a. Do not disclose or convey, 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.

B. Not later than thirty (30) days from the earlier of (i) the Divestiture 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.

C. 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 Divestiture 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 the Acquirer, Respondents shall provide the Acquirer with copies of all certifications sent to the Commission and all notifications and reminders sent to Respondents'

personnel related to restrictions on the use and disclosure of the Confidential Business Information.

D. 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.

IV.

IT IS FURTHER ORDERED that:

A. Gary Smith shall serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements, including any Transition Services Agreement approved by the Commission.

B. Respondents shall enter into the Monitor Agreement with the Monitor that is attached as Appendix B. The Monitor Agreement shall become effective on the date this Order To Maintain Assets is issued. Respondents shall transfer to, and confer upon, the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities pursuant to this Order to Maintain Assets in a manner consistent with the purposes of the Orders, and in consultation with Commission staff, and shall require that the Monitor act in a fiduciary capacity for the benefit of the Commission. Respondents shall assure that, and the Monitor Agreement shall provide that:

1. The Monitor shall have the responsibility for monitoring the operations and transfer of the Assets To Be Divested; overseeing the maintenance of the Assets To Be Divested; overseeing the provision of support services;

ensuring that the Assets To Be Divested receive continued and adequate funding by Respondents, as provided for in this Order; and monitoring Respondents' compliance with their obligations pursuant to the Orders and the Remedial Agreements.

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

3. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Orders and the Remedial Agreements.

4. The Monitor shall have full and complete access to all of Respondents' facilities, personnel, books, documents, and records relating to the Assets To Be Divested, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders and the Remedial Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set.

6. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

7. 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 of the Monitor.

8. Respondents shall report to the Monitor in accordance with the requirements of the Orders, and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

9. 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 a customary confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

10. 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.

11. 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 to Maintain Assets. 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 the Orders.

C. If the Commission determines that the Monitor has ceased to act, or failed to act diligently, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:

1. If Respondents has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than five (5) business days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the prior approval of the Commission, confers on the substitute Monitor all of the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in this Paragraph IV. of the Order to Maintain Assets.

D. The Monitor shall serve as long as Respondents are providing Transition Services to the Acquirer pursuant to the Transition Services Agreement; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. 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 these Orders or the Remedial Agreement.

F. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III., and IV. of the Decision and Order, and until Respondents are no longer required to provide Transition Services to the Acquirer pursuant to the Transition Services Agreement, Respondents shall submit to the Commission and to the Monitor, if one is appointed, verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with these Orders. 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 these Orders, including, but not limited to, documents sufficient to show that Respondents have not changed or modified pricing at, or price zones applicable to, each of the Dollar Stores included in the Assets To Be Divested, other than in the regular and ordinary course of business, consistent with the changes or modifications applicable to Dollar Stores retained by Respondents, and in accordance with past practices and business strategy; and

B. Within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondents have divested the Assets To Be Divested, Respondents shall submit to the Monitor, in

such form as required by the Monitor after consultation with Commission staff:

1. For each Dollar Store included in the Assets To Be Divested, and for each of the Control Dollar Stores, on a weekly basis, total sales and total number of transactions; and

2. For each Dollar Store included in the Assets To Be Divested, the price zone applicable to the Dollar Store at the time Respondents executed the Consent Agreement; the price zone applicable to the Dollar Store at the time of filing the report; all details regarding any changes to the price zone for the Dollar Store, including how the price zone is defined; all details regarding any plans to change the price zone of the Dollar Store; the number of Dollar Stores to be retained by Respondents in the price zone; and confirmation that the retail pricing with respect to each Dollar Store included in the Assets To Be Divested is, at the time of filing the report, the same as that of the Dollar Stores that will be retained by Respondents in that price zone;

Provided, however, that Respondents shall submit any additional information or documentation that the Commission or the Monitor requires.

VI.

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

A. Any proposed dissolution of any Respondent;

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

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

VII.

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

A. Access, during office hours and in the presence of counsel, to all facilities, and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda, and other records and documents, in the possession or under the control of Respondents, related to compliance with the Consent Agreement and/or the Orders, for which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and

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

VIII.

IT IS FURTHER ORDERED that this Order 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. The business day after Respondents are no longer required to provide Transition Services to the Acquirer pursuant to the Transition Services Agreement approved by the Commission.

Provided, however, that if the Commission, pursuant to Paragraph II.B. of the Decision and Order, requires the Respondents to

rescind any Divestiture 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 are no longer required to provide Transition Services to the Acquirer, as described in and required by the Decision and Order.

By the Commission, Commissioner Wright dissenting.

CONFIDENTIAL APPENDIX A

CONTROL GROUP STORES

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

APPENDIX B

MONITOR AGREEMENT

[Redacted Public Version]

Public Version

MONITOR AGREEMENT

This Interim Monitor Agreement ("Interim Monitor Agreement" or "Agreement") entered into this ____ day of June 2015, among Gary A. Smith ("Interim Monitor"), who has been chosen to act as Interim Monitor, and Dollar Tree, Inc. ("Respondent") (Interim Monitor and Respondent are each individually referred to herein as a "Party" and collectively referred to herein as the "Parties"), provides as follows:

WHEREAS, Family Dollar Stores, Inc. ("Family Dollar"), and Respondent have entered into an Agreement and Plan of Merger, by and among Family Dollar, Respondent, and Dime Merger Sub, Inc., a wholly-owned subsidiary of Respondent ("Dime"), dated as of July 27. 2014, as amended by amendment no. 1 on September 4, 2014 (as it may be further amended from time to time, the "Family Dollar Merger Agreement"), pursuant to which, among other things, Dime will merge with and into Family Dollar, with Family Dollar as the surviving corporation and a wholly-owned subsidiary of Respondent;

WHEREAS, the United States Federal Trade Commission (the "Commission") has entered into an Agreement containing Consent Orders with Respondent, which includes an Order to Maintain Assets and a Decision and Order (the "Consent Order", which is attached hereto as Exhibit A, and which includes the Decision and Order as accepted by the Commission for public comment and the final Decision and Order as issued by the Commission), that provides, among other things, that Respondent shall maintain the full economic viability, marketability and competitiveness of the Assets To Be Divested;

WHEREAS, the Consent Order further provides for the appointment of an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities required by the Decision and Order and the Remedial Agreements;

WHEREAS, the Consent Order further provides that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights, powers, and authority necessary to permit the Interim Monitor to perform its duties and responsibilities pursuant to the Consent Order;

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

WHEREAS, the Interim Monitor is well versed in the operation of retail establishments like Dollar Stores and wishes to accept such appointment upon the terms and conditions stated herein; and

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

NOW, THEREFORE, the Parties agree as follows:

Order to Maintain Assets

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

2. The Interim Monitor shall have all of the powers, authority, and responsibilities conferred upon the Interim Monitor by the Consent Order, including, without limitation, the responsibility, consistent with the Consent Order, for monitoring Respondent's compliance with its obligations under the Consent Order and the Remedial Agreements. The Interim Monitor shall have the authority, in its sole discretion, to consult with third parties in the exercise of its duties under the Consent Order and this Agreement.

3. In the performance of its functions and duties under this Agreement, the Interim Monitor warrants that he will perform his obligations hereunder in good faith, using his best efforts to perform these services in accordance with generally accepted industry standards.

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

5. If the Interim 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 performance by the Interim Monitor of any of his duties under this Agreement, the Interim Monitor shall promptly inform Respondent and the Commission of any such conflict.

6. The Interim Monitor shall have full and complete access, subject to any legally recognized privilege of Respondent, to Respondent's personnel, books, records, documents, facilities and technical information to the extent relating to the Respondent's compliance with its obligations under the Consent Order, including its obligations related to the Assets To Be Divested, as the Interim Monitor may reasonably require to perform the services set forth herein, subject to the limitations contained in the Consent Order. Such access shall include, inter alia, access to all relevant information related to the Assets To Be Divested. Respondent shall cooperate with any reasonable request of the Interim Monitor, including but not limited to complying with Interim Monitor's requests for onsite visits and interviews with employees of Respondent. Respondent shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Consent Order and the Remedial Agreements.

7. Respondent shall designate a senior employee(s) of Respondent to be a primary contact for the Interim Monitor and to notify the Interim Monitor regarding any changes in the contact personnel. Respondent shall notify the Interim Monitor of meetings and other critical events relating to the Assets To Be Divested, the Consent Order, or the Remedial Agreements, and provide any available minutes of such meetings to the Interim Monitor.

8. Respondent shall provide and the Interim Monitor shall evaluate the reports submitted by Respondent pursuant to the Consent Order, and within thirty (30) days from the date the Interim Monitor receives the first such report, and every sixty (60) days thereafter until the end of the Interim Monitor's term, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of their obligations under the Consent Order.

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9. In response to a request by the Commission or its staff, the Interim Monitor shall report in writing to the Commission concerning Respondent's compliance with its obligations under the Consent Order.

10. The Interim Monitor shall maintain the confidentiality of all information provided by Respondent, all Confidential Business Information and all confidential aspects of the performance of its duties under this Agreement. Except as provided in this Agreement, such information may be disclosed only to (i) Persons employed by, or working with, the Interim Monitor under this Interim Monitor Agreement (provided that such Person shall execute a confidentiality agreement prior to receiving confidential information), (ii) any other Person to whom disclosure is reasonably necessary for the Interim Monitor to fulfill his duties (provided that such Person shall execute a confidentiality agreement prior to receiving confidential information), or (iii) the Commission and Commission staff. When providing such information to a third party pursuant to this Paragraph, the Interim Monitor shall label such information "Confidential." The Interim Monitor shall request confidential treatment by the Commission and Commission staff of any confidential information turned over to the Commission, including any information labeled "Confidential" by Respondent. The Interim Monitor shall use the information provided by Respondent pursuant to this Agreement or learned in connection with performing its obligations under this Agreement only in performance of the duties set forth herein. At no time shall the Interim Monitor use such information for any other purpose or for the benefit of any other Person. The confidentiality obligations of this Paragraph shall survive the termination of this Agreement.

11. Nothing in this Agreement shall require Respondent or the Interim Monitor to disclose any material or information that is subject to a legally recognized privilege or that Respondent or the Interim Monitor is prohibited from disclosing by reason of law.

12. Respondent will pay the Interim Monitor fees for time spent in the performance of its duties in the amount of [REDACTED] per hour, such amount to be increased annually on the anniversary of this Agreement by the percentage increase, if any, between the U.S. Consumer Price Index – All Urban Consumers (CPI-U), as published by the United States Department of Labor in June of the year compared to June of the immediately preceding calendar year. This rate will be reviewed annually on the anniversary of this Agreement and may be adjusted to reflect changes in the standard fee rate structure of the Interim Monitor. In addition, Respondent will pay all documented out-of-pocket expenses reasonably incurred by the Interim Monitor in the performance of the Interim Monitor's duties, including all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. Payments under this Paragraph 11 shall be made on a monthly basis until the Interim Monitor ceases its activities under this Agreement. The Interim Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Interim Monitor submits an invoice to Respondent. Respondent shall pay such invoices within 30 days of receipt. The Interim Monitor and Respondent shall submit any disputes about invoices to the Commission's Compliance Division for assistance in resolving such disputes. In the event that a Divestiture Trustee is required under Paragraph VI of the Decision and Order and the Interim Monitor serves as the Divestiture Trustee, a new fee schedule would be negotiated to govern that arrangement.

13. Respondent hereby confirms its obligation to indemnify the Interim Monitor (and all Persons retained by 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 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

14. In the event of a disagreement or dispute between Respondent and the Interim Monitor, and in the event that such disagreement or dispute cannot be resolved by the Parties, either Party may seek the assistance of the Assistant Director of the Commission's Compliance Division, to resolve the issue. In the event that such disagreement or dispute cannot be resolved by the Parties, the Parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning Respondent's obligations pursuant to any Consent Order entered by the Commission.

15. The term of this Agreement shall commence on the Closing Date, and shall continue until the latter of (i) the completion of all divestitures required by the Consent Order, and (ii) the end of any Transition Services Agreement in effect with any Acquirer; provided further, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Consent Order. In the event that Interim Monitor is no longer able to perform the duties described in this Agreement, Interim Monitor may terminate this Agreement by providing Respondent thirty (30) days written notice. In the event of such termination, Interim Monitor shall cooperate with Respondent pursuant to Paragraph 17.

16. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent 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 Respondent to return or destroy materials that Respondent 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 that was obtained while acting as a Monitor.

17. Should the Commission appoint a substitute monitor pursuant to the Order to Maintain Assets or should the Interim Monitor terminate this Agreement pursuant to Paragraph 15, the Interim Monitor shall cooperate with Respondent and the substitute monitor in order to effect a prompt transition to the substitute monitor. Such cooperation shall include, but is not limited to, (i) the prompt return to Respondent of all confidential materials as required by the preceding Paragraph of this Agreement, and (ii) the provision of access to the Interim Monitor and any personnel hired by the Interim Monitor for interviews by Respondent and/or the

substitute monitor for purposes of gathering relevant information relating the performance by the Interim Monitor of its duties.

18. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, e-mail, or fax (with acknowledgment of receipt of such having been received), to the applicable Party at its address below (or to such other address as to which such Party shall hereafter notify the other party):

If to the Interim Monitor, to:
Gary A. Smith
3824 Timberline Way
Vestavia Hills, Alabama 35243
Home Phone: (205) 969-3399
Mobile Phone: (205) 500-1824
Email: gsmith828@charter.net

If to Respondent, to:
William A. Old, Jr., Esq.
Chief Legal Officer and Corporate Secretary
Dollar Tree, Inc.
500 Volvo Parkway
Chesapeake, VA 23320
Phone: (757) 321-5419
Fax: (757) 321-5111
Email: wold@dollartree.com

19. The Interim Monitor Agreement may not be assigned by Respondent or the Interim Monitor without the prior written consent of the other Party and the Commission.

20. It is understood and agreed that the Interim Monitor shall act as an independent contractor in the undertaking of this Agreement and the Interim Monitor shall exercise control over and employ its own means and methods of accomplishing the projects and tasks in performing services hereunder.

21. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

22. This Interim Monitor Agreement contains the entire agreement between the Parties relating to the subject matter hereof and supersedes all previous negotiations, agreements, undertakings and representations, documents, minutes of meetings, letters or notices (whether oral or written) between the Parties and/or their respective affiliates with respect to the subject matter.

23. This Interim Monitor Agreement shall not become binding until it has been approved by the Commission and the Consent Order has been accepted for public comment. The Consent Order shall govern this Interim Monitor Agreement and any provisions herein that conflict or are inconsistent with such orders may be declared void by the Commission

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and any provision not in conflict shall survive and remain a part of this Interim Monitor Agreement.

24. This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of New York.

IN WITNESS WHEREOF, the parties hereto have executed this Interim Monitor Agreement as of the date first above written.

Dollar Tree, Inc.

By:_____
Name: William A. Old, Jr., Esq.
Title: Chief Legal Officer and Corporate Secretary

Interim Monitor: Gary A. Smith

_____
Name: Gary A. Smith

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Dollar Tree, Inc. ("Dollar Tree") of Respondent Family Dollar Stores, Inc. ("Family Dollar"), collectively "Respondents," and Respondents and Sycamore Partners II, L.P. ("Sycamore"), 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, Sycamore, and their respective attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission 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 duly considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia 23320.

2. Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina 28105.

3. Sycamore is a limited partnership and is organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its office and principal place of business located at 9 West 57th Street, 31st Floor, New York, New York, 10019.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and of Sycamore, 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. "Dollar Tree" means Dollar Tree, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Dollar Tree, Inc. (including Dime Merger Sub, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Family Dollar" means Family Dollar Stores, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Family

Dollar Stores, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Dollar Tree and Family Dollar, individually and collectively.

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

E. "Acquisition" means Dollar Tree's proposed acquisition of Family Dollar pursuant to the Acquisition Agreement.

F. "Acquisition Agreement" means the Agreement and Plan of Merger by and among Family Dollar, Dollar Tree, and Dime Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Dollar Tree, dated as of July 27, 2014, as amended on September 4, 2014.

G. "Assets To Be Divested" means the Dollar Stores 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 operation of the Dollar Store at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, inventory as of the Divestiture Date, books and records, government approvals and permits (to the extent transferable), and telephone and fax numbers;

provided, however, that the Assets To Be Divested shall not include (1) 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 Remedial Agreement(s), and (2) assets used in the distribution of inventory that are not located at the Dollar Stores identified on Schedule A;

provided, further, 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) that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies 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.

H. "Direct Costs" means costs not to exceed the actual cost of labor, goods and material, travel, third party vendors, and other expenditures that are directly incurred to provide and fulfill the Transition Services provided pursuant to the Transition Services Agreement.

I. "Divestiture Agreement" means any agreement between Respondents and an Acquirer (or between a Divestiture Trustee appointed pursuant to Paragraph IV. 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.

J. "Divestiture Date" means the closing date of the divestitures required by this Order.

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

L. "Dollar Store" means a small-format, deep-discount retailer that sells an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under $10.

M. "Dollar Tree Dollar Store" means a Dollar Store that was owned or operated by Dollar Tree at the time the Consent Agreement was signed by Respondents.

N. "Family Dollar Dollar Store" means a Dollar Store that was owned or operated by Family Dollar at the time the Consent Agreement was signed by Respondents.

O. "Monitor" means the person appointed as monitor pursuant to Paragraph IV. of the Order to Maintain Assets.

P. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity.

Q. "Proposed Acquirer" means any proposed acquirer of the Assets To Be Divested that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order; "Proposed Acquirer" includes Sycamore.

R. "Remedial Agreement" means the Sycamore Divestiture Agreement if approved by the Commission, or

1. Any other Divestiture Agreement; and

2. Any other agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer), including any Transition Services 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.

S. "Sycamore" means Sycamore Partners II, L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its offices and principal place of business located at 9 West 57th Street, 31st Floor, New

York, NY 10019; its directors, officers, partners, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Sycamore, including Dollar Express LLC, a limited liability company organized and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 1209 Orange Street, Wilmington, Delaware 19801, and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each.

T. "Sycamore Divestiture Agreement" means the Asset Purchase Agreement dated as of May 28, 2015, by and between Respondents and Sycamore, attached as non-public Appendix I, for the divestiture of the Assets To Be Divested.

U. "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.

V. "Transition Services" means services related to payroll, employee benefits, accounting, information technology systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support, as required by the Acquirer and approved by the Commission.

W. "Transition Services Agreement" means an agreement that receives the prior approval of the Commission between one or more Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for an Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED that:

A. No later than one hundred and fifty (150) days after the date on which the Acquisition is consummated, Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Dollar Store businesses, to Sycamore pursuant to and in accordance with the Sycamore Divestiture Agreement.

B. *Provided, however,* that if, prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested to Sycamore pursuant to Paragraph II.A. of this Order and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Sycamore is not an acceptable Acquirer, then Respondents shall, within five (5) days of notification by the Commission, rescind such transaction with Sycamore and shall divest the Assets To Be Divested as ongoing Dollar Store 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 ninety (90) days of the date the Commission notifies Respondents that Sycamore is not an acceptable Acquirer; or

2. The manner in which the 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 IV. of this Order, to effect such modifications to the manner of divesting the Assets To Be Divested to Sycamore (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Remedial Agreements) 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 Divestiture Date; *provided, however*, that for each of the Dollar Stores identified in Schedule A, Part III, that require landlord consent in order to effectuate the required divestiture, for each Dollar Store for which Respondents are unable to obtain the necessary landlord consent, Respondents may, in consultation with the Monitor and Commission staff, substitute the corresponding Dollar Tree Dollar Store that is identified in Schedule A, Part III, in a manner specified by the Acquirer, but exclusive of the "Dollar Tree" name and any variation thereof, including similar trade names, symbols, trademarks, service marks, and logos.

D. At the option of the Acquirer, and subject to the prior approval of the Commission, Respondents shall provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for up to eighteen (18) months following the Divestiture Date, with an opportunity to extend for up to an additional six (6) months at the option of the Acquirer. The Transition Services provided pursuant to the Transition Services Agreement shall be provided at no more than Respondents' Direct Costs and shall enable the Acquirer to operate Dollar Stores at least at the same level of quality and service as they were operated prior to the divestiture.

E. The purpose of the divestiture is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Dollar Store 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 Respondents shall:

A. No later than ten (10) days after a request from the Proposed Acquirer, provide the Proposed Acquirer with the following information for each employee of the Assets To Be Divested, as requested by the Proposed Acquirer, and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;

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

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

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

B. Within a reasonable time after a request from a Proposed Acquirer, provide to the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one, or all, of the employees of the Assets To Be Divested, and to make offers of employment to any one, or more, of the employees of the Assets To Be Divested.

C. Not interfere, directly or indirectly, with the hiring or employing by the Proposed Acquirer of any employee of the Assets To Be Divested, not offer any incentive to such employees to decline employment with the Proposed Acquirer, and not otherwise interfere with the recruitment or employment of any employee by the Proposed Acquirer.

D. Remove any impediments within the control of Respondents that may deter employees of the Assets To Be Divested from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment, or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Proposed Acquirer, and shall not make any counteroffer to an employee who has an outstanding offer of employment from the Proposed Acquirer or has accepted an offer of employment from the Proposed Acquirer.

E. Provide all employees with reasonable financial incentives to continue in their positions until the Divestiture Date. Such incentives shall include, but are not limited to, a continuation, until the Divestiture Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting as of the Divestiture Date of any unvested qualified 401(k) plan account balances (to the extent permitted by law, and for those employees covered by a 401(k) plan), offered by Respondents.

F. Not, for a period of one (1) year following the Divestiture Date, directly or indirectly, solicit, or otherwise attempt to induce any of the employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in

either case not targeted specifically at employees of the Assets To Be Divested; or

2. Hire employees of the Assets To Be Divested who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to, or employing, any such employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested 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 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, Respondents 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 IV. 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, Respondents 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 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.

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, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant 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 IV.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 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 IV. 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 Respondents' 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 Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. 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(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 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 required to be divested by this Order.

8. 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 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 IV.

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 and Respondents 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.

V.

IT IS FURTHER ORDERED that:

A. No Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreements.

B. Each Remedial Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all terms of each Remedial Agreement, and any failure by Respondents to comply with the terms of any Remedial Agreement shall constitute a violation of this Order. 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.

VI.

IT IS FURTHER ORDERED that the Acquirer:

A. Shall not, for a period of three (3) years from the Divestiture Date, sell, or otherwise convey, directly or indirectly, without the prior approval of the Commission:

1. Any of the Assets To Be Divested to Dollar Tree; or

2. All or substantially all of the Assets To Be Divested to any Person; and

B. Shall, within sixty (60) days after the Divestiture Date, and every sixty (60) days thereafter, for a period of two (2) years from the Divestiture Date, submit to the Commission verified written reports identifying any Dollar Stores included in the Assets To Be Divested that have been, or will be, sold or closed, setting forth in detail the reasons why the Dollar Stores have been, or will be, sold or closed.

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 Respondents have fully complied with the provisions of Paragraphs II., III., and IV. of this Order, Respondents shall submit to the Commission and the Monitor verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order; and

B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

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 this Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, 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, for which copying services shall be provided by such Respondents at the request of the authorized representative(s) of the Commission and at the expense of Respondents; and

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on September 16, 2025.

By the Commission.

STATEMENT OF THE FEDERAL TRADE COMMISION

The Federal Trade Commission has accepted a proposed settlement to resolve the likely anticompetitive effects of Dollar Tree, Inc.'s proposed $9.2 billion acquisition of Family Dollar Stores, Inc.[1] We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially lessen competition between Dollar Tree and Family Dollar in numerous local markets. Under the terms of the proposed consent order, Dollar Tree and Family Dollar are required to divest 330 stores to a Commission-approved buyer. As we explain below, we believe the proposed divestitures preserve competition in the markets adversely affected by the acquisition and are therefore in the public interest.

Dollar Tree operates over 5,000 discount general merchandise retail stores across the United States under two banners which follow somewhat different business models. In its Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise all for $1 or less. At its Deals banner stores, Dollar Tree sells an expanded assortment of this merchandise at prices that may go above the $1 price point but are generally less than $10. Family Dollar operates over 8,000 discount general merchandise retail stores. Family Dollar sells an assortment of consumables, home products, apparel and accessories, seasonal items, and electronic merchandise at prices generally less than $10, including items priced at or under $1.

Dollar Tree and Family Dollar compete head-to-head in numerous local markets across the United States. They are close competitors in terms of format, pricing, customer service, product offerings, and location. When making competitive decisions regarding pricing, product assortment, and other salient aspects of their businesses, Dollar Tree and Family Dollar focus most directly on the actions and responses of each other and other "dollar store" chains, while also paying close attention to Walmart. In many local markets, Dollar Tree and Family Dollar

[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Ohlhausen, and McSweeny.

operate stores in close proximity to each other, often representing the only or the majority of conveniently located discount general merchandise retail stores in a neighborhood.

To evaluate the likely competitive effects of this transaction and identify the local markets where it may likely harm competition, the Commission considered multiple sources of quantitative and qualitative evidence. One component of the investigation involved a Gross Upward Pricing Pressure Index ("GUPPI") analysis. As described in the 2010 Horizontal Merger Guidelines, this mode of analysis can serve as a useful indicator of whether a merger involving differentiated products is likely to result in unilateral anticompetitive effects.[2] Such effects can arise "when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm" because the merged entity stands to profit from any sales that are then diverted to products that would have been "previously sold by the other merging firm."[3] Using the value of diverted sales as an indicator of the upward pricing pressure resulting from the merger, a GUPPI is defined as the value of diverted sales that would be gained by the second firm measured in proportion to the revenues that would be lost by the first firm. If the "value of diverted sales is proportionately small, significant unilateral price effects are unlikely."[4]

The Commission's investigation involved thousands of Dollar Tree and Family Dollar stores with overlapping geographic markets. A GUPPI analysis served as a useful initial screen to flag those markets where the transaction might likely harm competition and those where it might pose little or no risk to competition. As a general matter, Dollar Tree and Family Dollar stores with relatively low GUPPIs suggested that the transaction was unlikely to harm competition, unless the investigation uncovered specific reasons why the GUPPIs may have

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[2] U.S. DEPT. OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[3] *Id*.

[4] *Id*.

understated the potential for anticompetitive effects. Conversely, Dollar Tree and Family Dollar stores with relatively high GUPPIs suggested that the transaction was likely to harm competition, subject to evidence or analysis indicating that the GUPPIs may have overstated the potential for anticompetitive effects.

While the GUPPI analysis was an important screen for the Commission's inquiry, it was only a starting point. The Commission considered several other sources of evidence in assessing the transaction's likely competitive effects, including additional detail regarding the geographic proximity of the merging parties' stores relative to each other and to other retail stores, ordinary course of business documents and data supplied by Dollar Tree and Family Dollar, information from other market participants, and analyses conducted by various state attorneys general who were also investigating the transaction. After considering all of this evidence, the Commission identified specific local markets where the acquisition would be likely to harm competition and arrived at the list of 330 stores slated for divestiture.

In his statement, Commissioner Wright criticizes the way that the Commission used the GUPPI analysis in this case and argues that GUPPIs below a certain threshold should be treated as a "safe harbor."[5] We respectfully disagree.

As an initial matter, Commissioner Wright mischaracterizes the way that the GUPPI analysis was used in this case. Contrary to his suggestion, GUPPIs were not used as a rigid presumption of harm. As explained above, they were used only as an initial screen to identify those markets where further investigation was warranted. The Commission then proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information.[6] Based on this complete body of

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[5] Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part, *Dollar Tree, Inc. and Family Dollar Stores, Inc.*, File No. 141-0207.

[6] As Joseph Farrell and Carl Shapiro have noted, "[r]eal-world mergers are complex, and our proposed test, like the concentration-based test, is consciously oversimplified. . . . In the end, the evaluation of any merger that is thoroughly investigated or litigated may come down to the fullest feasible

evidence, we have reason to believe that, without the proposed divestitures, the acquisition would substantially lessen competition in each of the relevant local markets.

Our market-by-market review showed that the model of competition underlying the GUPPI analysis was largely consistent with other available evidence regarding the closeness of competition between the parties' stores in each local market. For example, stores with high GUPPIs were generally found in markets in which there were few or no other conveniently located discount general merchandise retail stores. The GUPPI analysis did have some limitations, however. For example, there were Family Dollar stores with relatively low GUPPIs in markets that were nevertheless price-zoned to Dollar Tree stores, which meant that if Dollar Tree stores were removed as competition, then the prices of certain items at those Family Dollar stores would likely go up. The GUPPI analysis also was not sufficiently sensitive to differentiate between Dollar Tree and Family Dollar stores that were in the same shopping plaza from those that were almost a mile away from each other. For these situations, we appropriately relied on other evidence to reach a judgment about the closeness of competition.[7]

More broadly, Commissioner Wright's view that the Commission should identify and treat GUPPIs below a certain threshold as a "safe harbor" ignores the reality that merger analysis is inherently fact-specific. The manner in which GUPPI analysis is used will vary depending on the factual circumstances, the available data, and the other evidence gathered during an investigation. Moreover, whether the value of diverted sales is considered "proportionately small" compared to lost revenues will

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analysis of effects." Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1, 26 (2010).

[7] Commissioner Wright cites the Albertson's/Safeway transaction as another recent case in which a GUPPI analysis was used. *See* Wright Statement at 2 n.6. To be precise, the Commission analyzed that transaction using diversion ratios, not GUPPI scores, but in any event, Commissioner Wright himself voted to accept the consent order in that case.

vary from industry to industry and firm to firm.[8] For example, intense competition between merging firms may cause margins to be very low, which could produce a low GUPPI even in the presence of very high diversion ratios. Such conditions could produce a false negative implying that the merger is not likely to harm competition when in fact it is.[9]

Indeed, we agree with Commissioner Wright that "a GUPPI-based presumption of competitive harm is inappropriate at this stage of economic learning."[10] We think that a GUPPI-based safe harbor is equally inappropriate. In antitrust law, bright-line rules and presumptions rest on accumulated experience and economic learning that the transaction or conduct in question is likely or unlikely to harm competition.[11] We do not believe there is a basis for the recognition of a GUPPI safe harbor.

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[8] Marginal cost efficiencies, as well as pass-through rates, also will vary from industry to industry and from firm to firm. The pass-through rate will determine the magnitude of the post-merger unilateral price effects.

[9] Joseph Farrell & Carl Shapiro, *Upward Pricing Pressure and Critical Loss Analysis: Response*, CPI ANTITRUST J. 1, 6−7 & n.15 (Feb. 2010); Farrell & Shapiro, *Antitrust Evaluation of Horizontal Mergers*, *supra* note 6, at 13−14.

[10] Wright Statement, *supra* note 5, at 8 & nn.23 & 24 (citing commentators' concerns and criticisms regarding the use of GUPPI analysis generally). Such concerns and criticisms, if valid, would apply equally to the wisdom of using GUPPIs to recognize a safe harbor.

[11] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886−87 (2007) ("As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, . . ."); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) ("The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 570, 571 (6th Cir. 2014) (noting that "the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated—converge in a manner that fully supports the Commission's application of a presumption of illegality" but also noting that "the Commission did not merely rest upon the presumption, but instead discussed a wide range of evidence that buttresses it").

Accordingly, in any case where a GUPPI analysis is used, the Commission will consider the particular factual circumstances and evaluate other sources of quantitative and qualitative evidence.[12] As with other quantitative evidence such as market shares and HHIs, we believe that GUPPIs should be considered in the context of all other reasonably available evidence. The 2010 Horizontal Merger Guidelines do not instruct otherwise.[13] For all of these reasons, we believe it is appropriate to use GUPPIs flexibly and as merely one tool of analysis in the Commission's assessment of unilateral anticompetitive effects.

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[12] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 729 (2010) ("The value of diverted sales is an excellent simple measure for *diagnosing or scoring* unilateral price effects, but it cannot capture the full richness of competition in real-world industries. Indeed, as stressed above, all of the quantitative methods discussed here must be used in conjunction with the broader set of qualitative evidence that the Agencies assemble during a merger investigation."); Farrell & Shapiro, *Upward Pricing Pressure*, *supra* note 8, at 6 ("Whatever measure is used for screening purposes, it is important that the full analysis give proper weight to all the available evidence."). Notwithstanding Commissioner Wright's suggestion to the contrary, we do not believe that the Commission's use of GUPPIs as a tool for assessing unilateral effects differs materially from their use by the Department of Justice.

[13] Recognizing in the 2010 Horizontal Merger Guidelines that when the "value of diverted sales is proportionately small, significant unilateral price effects are unlikely" does not necessarily mean that "proportionately small" should be reduced to some numerical value that applies in all cases. *See* Merger Guidelines, *supra* note 2, § 1 ("These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology.").

Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part

The Commission has voted to issue a Complaint and a Decision & Order against Dollar Tree, Inc. ("Dollar Tree") and Family Dollar Stores, Inc. ("Family Dollar") to remedy the allegedly anticompetitive effects of the proposed acquisition by Dollar Tree of Family Dollar. I dissent in part from and concur in part with the Commission's decision. I dissent in part because in 27 markets I disagree with the Commission's conclusion that there is reason to believe the proposed transaction violates the Clayton Act.

The record evidence includes a quantitative measure of the value of diverted sales as well as various forms of qualitative evidence. The value of diverted sales is typically measured as the product of the diversion ratio between the merging parties' products – the diversion ratio between two products is the percentage of unit sales lost by one product when its price rises, that are captured by the second product – and the profit margin of the second product. When the value of diverted sales is measured in proportion to "the lost revenues attributable to the reduction in unit sales resulting from the price increase,"[1] it is the "gross upward pricing pressure index," or "GUPPI." The GUPPI is an economic tool used to score or rank the incentives for potential unilateral price effects. In the markets where I depart from the Commission's decision the GUPPI is below 5 percent, indicating insignificant upward pricing pressure even before efficiencies or entry are taken into account, and weak incentives for unilateral price increases. In my view, the available quantitative and qualitative evidence are insufficient to support a reason to believe the proposed transaction will harm competition in these markets. I write separately to explain more fully the basis for my dissent in these markets.

I also write to address an important merger policy issue implicated by today's decision – that is, whether the FTC should adopt a safe harbor in unilateral effects merger investigations by

[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 n.11 (2010) [hereinafter MERGER GUIDELINES].

defining a GUPPI threshold below which it is presumed competitive harm is unlikely. The *Merger Guidelines* clearly contemplate such a safe harbor. The *Merger Guidelines* explain that "[i]f the value of diverted sales is *proportionately small*, significant unilateral price effects are unlikely."[2] In other words, the *Merger Guidelines* recognize that if the GUPPI is small, significant unilateral price effects are unlikely.

Without more, one might reasonably conclude it is unclear whether the *Merger Guidelines* merely offer a truism about the relationship between the GUPPI and likely unilateral price effects or invite the agencies to take on the task of identifying a safe harbor of general applicability across cases. But there is more. A principal drafter of the *Merger Guidelines* has explained the *Merger Guidelines*' reference to a "proportionately small" value of diverted sales was intended to establish a GUPPI safe harbor. The Department of Justice's Antitrust Division ("Division"), consistent with this interpretation of the *Merger Guidelines*, publicly announced precisely such a safe harbor when the GUPPI is less than 5 percent.[3] Further, there is significant intellectual support for a GUPPI-based safe harbor among economists[4] once again including the principal drafters of the *Merger Guidelines.*[5] The Commission, however, has rejected the safe harbor approach both in practice – indeed, the Commission has recently entered into another consent involving divestitures in markets with

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[2] *Id.* § 6.1 (emphasis added); *see* Steven C. Salop, Serge X. Moresi & John Woodbury, CRA Competition Memo, Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines 2 (Aug. 31, 2010), *available at* http://crai.com/sites/default/files/publications/Commentary-on-the-GUPPI_0.pdf.

[3] Carl Shapiro, Deputy Ass't Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Antitrust Law Fall Forum 24 (Nov. 18 2010).

[4] *See, e.g.*, Salop, Moresi & Woodbury, *supra* note 2, at 2 (explaining that "a GUPPI of less than 5% would be reasonably treated as evidence that 'the value of diverted sales is proportionately small' and hence that the proposed merger is unlikely to raise unilateral effects concerns").

[5] *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1 (2010).

GUPPI scores below 5 percent[6] and as a matter of the policy announced in the Commission's statement today.[7]

This is unfortunate. The legal, economic, and policy case for the GUPPI-based safe harbor contemplated by the *Merger Guidelines* is strong.[8] There are a number of reasons why such a

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[6] *See* Cerberus Institutional Partners V, L.P., FTC File No. 141-0108 (July 2, 2015). There, though one could not possibly infer this from the public-facing documents in the case, the Commission applied a diversion ratio threshold to identify stores for divestiture. To be accurate, a GUPPI threshold could be implied from the Commission's analysis and, as algebraically mindful readers will note, setting a diversion ratio threshold given profit margin data and a predicted price increase is not analytically distinguishable from the analysis in this matter. The Commission rightly points out that I voted in favor of the consent in *Cerberus*. As to whether I am merely being inconsistent in my views on the role of GUPPIs in merger analysis or, alternatively, there is some other more reasonable explanation for my votes, I can provide the explanation and let readers decide. In *Cerberus*, I voted for the consent on the basis that the use of diversion or GUPPI-based analysis was a step forward relative to relying exclusively upon structural analysis. The fact that there were stores identified for divestiture with implied GUPPIs less than 5 percent was unique. It is now a trend reinforced by a Commission decision to reject a GUPPI-based safe harbor – a decision I do not believe is in the public interest.

Regarding *Cerberus*, it is worth pointing out further that even a careful reader of the public documents in that case would come away with the impression that the Commission's analysis was largely structural, and concluded a number of six-to-five mergers were presumptively anticompetitive. *See* Analysis of Agreement Containing Consent Order to Aid Public Comment Exhibit A, *id.* An ancillary benefit of the transparency reluctantly generated by today's Commission statement is that the antitrust community is now on notice that more sophisticated economic tools were used in that matter, how they were used, and that the potential structural policy change signaled by those public documents does not appear to describe accurately the Commission's complete analysis in that case.

[7] Statement of the Federal Trade Commission at 3, Dollar Tree, Inc., FTC File No. 141-0207 (July 13, 2015) [hereinafter Majority Statement] ("[A] GUPPI-based safe harbor is . . . inappropriate.").

[8] A second question is whether a presumption of competitive harm should follow, as a matter of economic theory and empirical evidence, from a demonstration of a GUPPI above a certain threshold value. There appears to be a consensus that the answer to this question, at this point, is no. I agree. *See, e.g.*, Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies* 13 (Heritage Foundation Legal Memorandum No. 144, Jan. 28, 2015) (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers"); Steven C. Salop, *The*

safe harbor might be desirable as a matter of antitrust policy if sufficiently supported by economic theory and evidence. Efficient resource allocation expending agency resources on the transactions most likely to raise serious competitive concerns and quickly dispensing with those that do not is one such goal.

A second reason a safe harbor for proportionately small diversion might be desirable antitrust policy is to compensate for the sources of downward pricing pressure not measured by the GUPPI but expected with most transactions, including efficiencies, entry, or repositioning. Some have argued that as a GUPPI attempts a rough measure of upward pricing pressure without a full blown analysis a symmetrical approach would include a standard efficiencies deduction which would be applied to account for the downward pricing pressure from the marginal-cost efficiencies that can typically be expected to result from transactions.[9] This approach would permit the identification of a gross-upward-pricing-pressure threshold that triggers additional scrutiny.[10]

Yet a third reason a safe harbor might be desirable is to compensate the well-known feature of GUPPI-based scoring methods to predict harm for any positive diversion ratio that is, even for distant substitutes by distinguishing *de minimis* GUPPI levels from those that warrant additional scrutiny.[11] The *Merger Guidelines* contemplate a "safe harbor" because it "reflects that a

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Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach 40-41 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/ ("The 2010 Merger Guidelines do not adopt an anticompetitive enforcement presumption based on high values of the GUPPI score. This was a practical policy decision at this time because the use of the *GUPPI* was new to much of the defense bar and the courts.").

[9] Farrell & Shapiro, *supra* note 5, at 10-12.

[10] *See id.* at 12.

[11] James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 7 ANTITRUST L.J. 587, 628 (2010) ("an uncalibrated tool cannot have predictive value as a screen if it always indicates postmerger price pressure").

small amount of upward pricing pressure is unlikely . . . to correspond to any actual post-merger price increase."[12] Carl Shapiro explained shortly after adoption of the *Merger Guidelines*, on behalf of the Division, that "Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues."[13]

Against these benefits of adopting a GUPPI-based safe harbor, the Commission must weigh the cost of reducing its own flexibility and prosecutorial discretion. This begs the question: how likely are mergers within the proposed safe harbor to be anticompetitive? The benefits of this flexibility are proportional to the probability that the Commission's economic analysis leads them to conclude that mergers with a GUPPI of less than 5 percent are anticompetitive. I am not aware of any transactions since the *Merger Guidelines* were adopted other than the two already mentioned that meet these criteria. The domain in which flexibility would be reduced with adoption of a reasonable safe harbor is small and the costs of doing so correspondingly low.

The Commission rejects a GUPPI safe harbor on the grounds that such an approach "ignores the reality that merger analysis is inherently fact-specific."[14] The Commission appears especially concerned that a GUPPI-based safe harbor might result in a false negative that is, it is possible that a merger with a GUPPI less than 5 percent harms competition. This objection to safe harbors and bright-line rules and presumptions is both conceptually misguided and is in significant tension with antitrust doctrine and

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[12] Shapiro, *supra* note 3, at 24. Shapiro further cautioned that, although a GUPPI analysis "can be highly informative, the Agencies understand full well that measuring upward pricing pressure . . . typically is not the end of the story . . . . Repositioning, entry, innovation, and efficiencies must also be considered." *Id.* at 26.

[13] *Id.* at 24. Others have interpreted this speech as clearly announcing Division policy. *See* Salop, *supra* note 8, at 43 & n.105 ("In a speech while he was Deputy AAG, Carl Shapiro also specified a GUPPI safe harbor of 5%. As a speech by the Deputy AAG, this statement appeared to reflect DOJ policy." (citing Shapiro, *supra* note 3)). Other economists agree that a GUPPI safe harbor should apply. *E.g.*, Farrell & Shapiro, *supra* note 5, at 10; Salop, Moresi & Woodbury, *supra* note 2, at 2.

[14] Majority Statement, *supra* note 7, at 3.

agency practice. Merger analysis is, of course, inherently fact specific. One can accept that reality, as well as the reality that evidence is both imperfect and can be costly to obtain, and yet still conclude that the optimal legal test from a consumer welfare perspective is a rule rather than a standard. This is a basic insight of decision theory, which provides a lens through which economists and legal scholars have long evaluated antitrust legal rules, burdens, and presumptions.[15] The Commission's assertion that the mere possibility of false negatives undermines in the slightest the case for a safe harbor reveals a misunderstanding of the economic analysis of legal rules. The relevant question is not which legal rule drives false positives or false negatives to zero, but rather which legal rule minimizes the sum of the welfare costs associated with false negatives, false positives, and the costs of obtaining evidence and otherwise administering the law.

Existing antitrust law regularly embraces bright-line rules and presumptions rejecting the flexibility of a case-by-case standard taking full account of facts that vary across industries and firms. A simple example is the application of *per se* rules in price-fixing cases.[16] This presumption of illegality is not based upon a belief that it is impossible for a horizontal restraint among competitors to increase welfare. Rather, the *per se* prohibition on naked price fixing "reflects a judgment that the costs of identifying exceptions to the general rule so far outweigh the costs of occasionally

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[15] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 27 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

[16] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on . . . whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.").

condemning conduct that might upon further inspection prove to be acceptable, that it is preferable not to entertain defenses to the conduct at all."[17] Similar decision-theoretic logic explains, for example, the presumption that above-cost prices are lawful.[18] A GUPPI-based presumption would be based upon the same economic logic not that small-GUPPI mergers can *never* result in anticompetitive effects, but rather that mergers involving small GUPPIs are sufficiently unlikely to result in unilateral price increases such that incurring the costs of identifying exceptions to the safe harbor is less efficient than simply allowing mergers within the safe harbor to move forward.[19]

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[17] Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 104-05 (2d ed. 2008); *see* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding the administrative virtues of simplicity outweigh the occasional 'economic' loss."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 50 (2005) ("[N]ot every anticompetitive practice can be condemned."); Thomas A. Lambert, Book Review, *Tweaking Antitrust's Business Model*, 85 TEX. L. REV. 153, 172 (2006) ("Hovenkamp's discussion of predatory and limit pricing reflects a key theme that runs throughout *The Antitrust Enterprise*: that antitrust rules should be easily administrable, even if that means they must permit some anticompetitive practices to go unpunished.").

[18] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993); *see also Barry Wright Corp.*, 724 F.2d at 234 ("Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. . . . [A] price cut that ends up with a price exceeding total cost in all likelihood a cut made by a firm with market power is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.' To do so opens the door to similar speculative claims that might seek to legitimate even the most settled unlawful practices.").

[19] The Commission asserts that a GUPPI safe harbor cannot be justified by economic theory and evidence unless a presumption of liability can also be supported. I appreciate the Commission clarifying its view, but I believe it to be based upon a false equivalence. The Commission appears to misunderstand

Whether the Commission should adopt a GUPPI-based safe harbor is particularly relevant in the instant matter, as the FTC had data sufficient to calculate GUPPIs for Dollar Tree, Deals,[20] and Family Dollar stores. The sheer number of stores owned and operated by the parties rendered individualized, in-depth analysis of the competitive nuances of each and every market difficult, if not impossible, to conduct. GUPPI calculations provided an efficient and workable alternative to identifying the small fraction of markets in which the transaction may be anticompetitive. This was a tremendous amount of work and I want to commend staff on taking this approach. Staff identified a GUPPI threshold such that stores with GUPPIs greater than the threshold were identified for divestiture. About half of the 330 stores divested as part of the Commission's Order were identified through this process.

What about the other stores? The Commission asserts I "mischaracterize" its use of GUPPIs and that "GUPPIs were not used as a rigid presumption of harm."[21] It claims that GUPPIs were used only as "an initial screen" to identify markets for further analysis, and that the Commission "proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information."[22] The evidence suggests otherwise. One might reasonably hypothesize that further

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the difference between evidence sufficient to conclude harm is *likely* and evidence sufficient to conclude harm is *unlikely*. These are two very different economic propositions and it should not be surprising that one might be substantiated while the other is not. For example, one might rationally be uncomfortable pointing to the economic literature for support that mergers above a certain level of concentration are sufficiently likely to harm competition to support a presumption of antitrust liability, but also recognize the same body of economic theory and evidence would indeed support a safe harbor for mergers involving markets with thousands of competitors. To the extent the Commission appeals to academics who have raised concerns with GUPPI-based merger screens, my view clearly differs from the Commission. The Commission's more important dispute, in my view, is with the *Merger Guidelines* and its principal drafters, who clearly contemplated such a safe harbor.

[20] Deals is a separate banner under which Dollar Tree operates. *See* Majority Statement, *supra* note 7, at 1.

[21] *Id.* at 2.

[22] *Id.*

consideration and analysis of "numerous sources of information" should result in both the identification of some stores *above* the GUPPI threshold that were ultimately determined unlikely to harm competition as well as some stores with GUPPIs *below* the threshold that nonetheless did create competitive problems that is, further scrutiny might reveal both false negatives and false positives.

The number of stores with GUPPIs exceeding the identified threshold that, after evaluation in conjunction with the qualitative and other evidence described by the Commission, were not slated for divestiture is nearly zero. This outcome is indistinguishable from the application of a presumption of competitive harm. The additional stores with GUPPIs below the threshold that were then identified for divestiture based upon additional qualitative factors included a significant number of stores with GUPPIs below 5 percent. The ratio of stores falling below the GUPPI threshold but deemed problematic after further qualitative evidence is taken into account to stores with GUPPIs above the threshold but deemed not to raise competitive problems after qualitative evidence is accounted for is unusual and remarkably high. It is difficult to conceive of a distribution of qualitative and other evidence occurring in real-world markets that would result in this ratio. Qualitative evidence should not be a one-way ratchet confirming the Commission's conclusion of likely anticompetitive effects when GUPPIs are high and providing an independent basis for the same conclusion when GUPPIs are low.

I applaud the FTC for taking important initial steps in applying more sophisticated economic tools in conducting merger analysis where the data are available to do so. Scoring metrics for evaluating incentives for unilateral price increases are no doubt a significant improvement over simply counting the number of firms in markets pre- and post-transaction. To be clear, it bears repeating that I agree that a GUPPI-based presumption of *competitive harm* is inappropriate at this stage of economic learning.[23] There is no empirical evidence to support the use of

[23] Joseph J. Simons & Malcolm B. Coate, *Upward Pressure on Price Analysis: Issues and Implications for Merger Policy*, 6 EUR. COMPETITION J. 377, 389 (2010) (the upward pricing pressure screen "identifies as potentially problematic far more mergers than would be challenged or even investigated

GUPPI calculations in merger analysis on a standalone basis, let alone the use of a particular GUPPI threshold to predict whether a transaction is likely to substantially harm competition.[24] I also agree that in the context of a full-scale evaluation of whether a proposed transaction is likely to harm competition, GUPPI-based analysis can and should be interpreted in conjunction with all other available quantitative and qualitative evidence. The relevant policy question is a narrow one: whether there exists a GUPPI threshold below which the Commission should presumptively conclude a proposed transaction is unlikely to violate the antitrust laws.

The FTC has not publicly endorsed a GUPPI-based safe harbor of 5 percent and disappointingly, has rejected the concept in its statement today. The Commission's interpretation is that what is a "proportionately small" value of diverted sales should vary according to the industry and even the individual firms in a given investigation.[25] As discussed, I believe this interpretation contradicts the letter and spirit of the *Merger Guidelines*.[26]

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under the enforcement standards that have existed for more than twenty years"); Lambert, *supra* note 8, at 13 ("In the end, the agencies' reliance on the difficult-to-administer, empirically unverified, and inherently biased GUPPI is likely to generate many false condemnations of mergers that are, on the whole, beneficial.").

[24] *See* Dennis W. Carlton, *Revising the Horizontal Merger Guidelines*, 10 J. COMPETITION L. & ECON. 1, 7 (2010) ("Perhaps most importantly, UPP [as described in the 2010 *Merger Guidelines*] is new and little empirical analysis has been performed to validate its predictive value in assessing the competitive effects of mergers."); Keyte & Schwartz, *supra* note 11, at 590 (discussing the 2010 *Merger Guidelines*' inclusion of the GUPPI and opining that "in light of the [its] extremely light judicial record, as well as the absence of demonstrated reliability in predicting real-world competitive effects, we think it is premature, at best, to embrace [it] as a screening tool for merger review"); Simons & Coate, *supra* note 23 ("Because screening mechanisms [such as the GUPPI] purport to highlight general results, they need empirical support to show the methodology actually predicts concerns relatively well. This empirical support is not available at this time."); Lambert, *supra* note 8, at 13 (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers").

[25] Majority Statement, *supra* note 7, at 3.

[26] *See supra* text accompanying note 12.

Moreover, the Commission's apparent discomfort with safe harbors on the grounds that they are not sufficiently flexible to take into account the fact-intensive nature of antitrust analysis in any specific matter is difficult to reconcile with its ready acceptance of presumptions and bright-line rules that trigger *liability*.[27]

Once it is understood that a safe harbor should apply, it becomes obvious that, for the safe harbor to be effective, the threshold should not move. As the plane crash survivors in *LOST* can attest, a harbor on an island that cannot be found and that can be moved at will is hardly "safe."[28]

In my view, the Commission should adopt a GUPPI-based safe harbor in unilateral effects investigations where data are available. While reasonable minds can and should debate the optimal definition of a "small" GUPPI, my own view is that 5 percent is a reasonable starting point for discussion. Furthermore, failure to adopt a safe harbor could raise concerns about the potential for divergence between Commission and Division policy

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[27] For example, the Commission regularly applies such presumptions of liability involving the number of firms in a market, or presumptions based upon increased market concentration as articulated by the *Merger Guidelines* or the courts. *See, e.g.*, Statement of the Federal Trade Commission, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015) (finding liability based upon, alternatively, changes in concentration and number of firms pre- and post-merger); Statement of the Federal Trade Commission, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (finding liability based upon number of firms pre- and post-merger); Mem. in Supp. of Pl. Federal Trade Commission's Mot. for T.R.O. and Prelim. Inj. at 23, FTC, v. Sysco Corp., 2015 WL 1501608, No. 1:15-cv-00256 (D.D.C. 2015) (arguing that the proposed merger was presumptively unlawful based upon the holding of *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963)). That the Commission's tolerance of presumptions that that satisfy its own *prima facie* burden does not extend to safe harbors raises basic questions about the symmetry of the burdens applied in its antitrust analysis. *See* Dissenting Statement of Commissioner Joshua D. Wright 6, Ardagh Group S.A., FTC File No. 131-0087 (June 18, 2014) ("[S]ymmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.").

[28] Move the Island, *LOST – Move the Island*, YOUTUBE (Nov. 17, 2008), https://www.youtube.com/watch?v=Fa57rVkLal4.

in unilateral effects merger investigations.[29] What would be most problematic, however, is if, rather than moving toward a GUPPI-based safe harbor, the FTC were to use GUPPI thresholds to employ a presumption of competitive harm.[30]

For these reasons, I dissent in part from and concur in part with the Commission's decision.

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[29] I do not take a position as to how the Division currently uses the GUPPI analysis. *But see* Majority Statement, *supra* note 7, at 4 n.12. However, public statements by the Division and the Commission – the only sources upon which business firms and the antitrust bar can rely – suggest there are material differences. *Compare id.* at 3 ("[W]hether the value of diverted sales is considered 'proportionately small' compared to lost revenues will vary from industry to industry and firm to firm.") *with* Shapiro, *supra* note 3, at 24 ("Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues.").

[30] A GUPPI-based safe harbor of the type endorsed by the *Merger Guidelines* implies a GUPPI above the threshold is necessary but not sufficient for liability. A GUPPI-based presumption of harm implies a GUPPI above the threshold is sufficient but not necessary for liability. Unfortunately, the use of GUPPIs here is more consistent with the latter than the former.

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 Order ("Consent Order") from Dollar Tree, Inc. ("Dollar Tree") and Family Dollar Stores, Inc. ("Family Dollar"), (collectively, the "Respondents"). On July 27, 2014, Dollar Tree and Family Dollar entered into an agreement whereby Dollar Tree would acquire Family Dollar for approximately $9.2 billion (the "Acquisition"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from Dollar Tree's acquisition of Family Dollar. Under the terms of the proposed Consent Order, Respondents are required to divest 330 stores in local geographic markets (collectively, the "relevant markets") in 35 states to the Commission-approved buyer. The divestitures must be completed within 150 days from the date of the Acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets to maintain the viability of Respondents' assets until they are transferred to the Commission-approved buyer.

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

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 removing an actual, direct, and substantial competitor in localized geographic markets in 222 cities nationwide.[1] The elimination of this

[1] The list of cities in which stores will be divested is attached as Appendix A. The list of stores to be divested is attached to the Decision and Order as Schedule A.

competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices unilaterally above competitive levels. Similarly, absent a remedy, there is significant risk that the merged firm may decrease the quality and service aspects of its stores. The proposed Consent Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in these markets because of the Acquisition.

II. THE RESPONDENTS

As of January 31, 2015, Dollar Tree operated 5,157 discount general merchandise retail stores across the United States under the Dollar Tree and Deals banners. Presently, Dollar Tree banner stores are located in 48 states and the District of Columbia, while Deals banner stores are currently located in 18 states and the District of Columbia. In the Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise for $1 or less. At its Deals banner stores, Dollar Tree offers an expanded assortment of this merchandise at prices generally less than $10. Dollar Tree and Deals banner stores range in size from 8,000 to 12,000 square feet of selling space and typically carry between 6,600 to 7,000 stock keeping units ("SKUs").

As of February 28, 2015, Family Dollar operated approximately 8,184 discount general merchandise retail stores nationwide. Family Dollar sells an assortment of consumables, home products, apparel and accessories, seasonal items, and electronic merchandise at prices generally less than $10. Currently, Family Dollar stores are located in 46 states and the District of Columbia. Stores typically have 7,150 square feet of selling space and carry approximately 6,500 to 7,000 SKUs.

III. COMPETITION IN THE RELEVANT MARKETS

Dollar stores are small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under $10. Dollar stores differentiate themselves from other retailers on the basis of both convenience and value by offering a broad assortment but limited variety of

general merchandise items at discounted prices in stores with small footprints (*i.e.*, approximately 7,000 to 10,000 square feet of selling space), located relatively close to consumers' homes or places of work.[2] Customers often shop at dollar stores as part of a "fill-in" shopping trip. Dollar stores typically compete most closely with other dollar stores that provide the same kind of convenient shopping trip for discounted general merchandise.

Walmart competes closely with dollar stores and offers a wide assortment of products at deeply-discounted prices. Although Walmart does not provide the same kind of convenience as that of dollar stores given its less-accessible locations, larger store footprints, and greater assortment of products, Walmart nevertheless competes closely with dollar stores by offering a comparable or better value to consumers in terms of pricing. For purposes of this matter, "discount general merchandise retail stores" refers to dollar stores and the retailer Walmart.

Although other retail stores (*i.e.*, supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores) often sell discounted merchandise similar to that offered by dollar stores and Walmart, these other retailers generally are not as effective at constraining Respondents as are other discount general merchandise retail stores.[3] These other retailers do not offer the same value as Walmart or the same combination of convenience and value offered by dollar stores, which tends to make them less effective substitutes for discount general merchandise retail stores. As a result, consumers shopping at discount general merchandise retail stores are unlikely to significantly increase purchases of discounted merchandise at

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[2] The term "dollar stores" as used here includes stores operated by Respondents, Dollar General, 99 Cents Only, and Fred's Super Dollar. Independently-owned retailers that sell discounted merchandise at the $1 or multi-price point in substantially smaller stores are not included.

[3] The term "supermarkets" as used here includes traditional supermarkets such as Kroger and Publix, as well as supermarkets included within hypermarkets such as SuperTarget or Kroger's Fred Meyer banner. The term "pharmacies" includes national retail drug stores such as CVS, Rite Aid, and Walgreens. The term "mass merchandisers" includes retailers such as Target and K-Mart. The term "discount specialty merchandise retail stores" includes retailers such as Big Lots and Aldi.

other retailers in response to a small but significant price increase at discount general merchandise retail stores. However, in certain geographic markets, typically characterized by high population density, where the number and geographic proximity of these other retailers is substantial relative to the competing discount general merchandise retail stores, the collective presence of these other retailers acts as a more significant price constraint on the discount general merchandise retail stores operating in the area.[4]

Thus, the relevant line of commerce in which to analyze the Acquisition is no narrower than discount general merchandise retail stores. In certain geographic markets, the relevant line of commerce may be as broad as the sale of discounted general merchandise in retail stores (*i.e.*, discount general merchandise retail stores as well as supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores). Whether the relevant line of commerce is discount general merchandise retail stores or discounted general merchandise in retail stores depends on the specifics of the geographic market at issue, such as population density and the density and proximity of the Respondents' stores and competing retailers.

The relevant geographic market varies depending on the unique characteristics of each market, including the local road network, physical boundaries, and population density. A strong motivation of consumers shopping at discount general merchandise retail stores is convenience. As with grocery shopping, the vast majority of consumers who shop for discounted general merchandise do so at stores located very close to where they live or work. The draw area of a dollar store, which varies depending on whether it is located in an urban, suburban, or rural area, may range from a couple of city blocks to several miles. Other market participants, such as supermarkets and retail pharmacies, may have similar, although somewhat broader draw areas. Walmart's stores, particularly Walmart Supercenters, tend to have a considerably broader draw area. In highly urban areas,

[4] Online retailers are not participants in the relevant product market. The primary appeal of dollar stores is the combination of value and convenience they offer consumers. Given the time required to process and ship items ordered online, Internet retailers are less convenient shopping options for consumers looking to make an immediate purchase on a fill-in trip.

the geographic markets are generally no broader than a half-mile radius around a given store. In highly rural areas, the geographic market is generally no narrower than a three-mile radius around a given store. In areas neither highly urban nor highly rural, the geographic market is generally within a half-mile to three-mile radius around a given store.

Respondents are close competitors in terms of format, customer service, product offerings, and location in the relevant geographic markets. With regard to pricing, product assortment, and a host of other competitive issues, Respondents typically focus most directly on the actions and responses of each other and other dollar stores, while also paying close attention to Walmart. In many of the relevant geographic markets, Dollar Tree and Family Dollar operate the only dollar stores in the area or the vast majority of conveniently-located discount general merchandise retail stores. Absent relief, the Acquisition would increase the incentive and ability of Dollar Tree to raise prices unilaterally post-Acquisition in the relevant geographic markets. The Acquisition would also decrease incentives to compete on non-price factors, including product selection, quality, and service.

Entry into the relevant geographic markets that is timely and sufficient to prevent or counteract the expected anticompetitive effects of the Acquisition is unlikely. Entry barriers include the time, costs, and feasibility associated with identifying and potentially constructing an appropriate and available location for a discount general merchandise retail store, the resources required to support one or more new stores over a prolonged ramp-up period, and the sufficient scale to compete effectively. An entrant's ability to secure a viable competitive location may be hindered by restrictive-use commercial lease covenants, which can limit the products sold, or even the type of retailer that can be located, at a particular location.

IV. THE PROPOSED CONSENT ORDER

The proposed remedy, which requires the divestiture of 330 Family Dollar stores in the relevant markets to Sycamore Partners ("Sycamore"), will restore fully the competition that otherwise would be eliminated in these markets as a result of the Acquisition. Sycamore is a private equity firm specializing in

consumer and retail investments. The proposed buyer appears to be a highly suitable purchaser and is well positioned to enter the relevant geographic markets and prevent the likely competitive harm that otherwise would result from the Acquisition. Sycamore's proposed executive team has extensive experience operating discount general merchandise retail stores.

The proposed Consent Order requires Respondents to divest 330 stores to Sycamore within 150 days from the date of the Acquisition. If, at any time before the proposed Consent Order is made final, the Commission determines that Sycamore is not an acceptable buyer, Respondents must immediately rescind the divestitures and divest the assets to a different buyer that receives the Commission's prior approval.

The proposed Consent Order contains additional provisions to ensure the adequacy of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will be issued at the time the proposed Consent Order is accepted for public comment. The Order to Maintain Assets requires Family Dollar to operate and maintain each divestiture store in the normal course of business through the date the store is ultimately divested to Sycamore. Because the divestiture schedule runs for an extended period of time, the proposed Consent Order appoints Gary Smith as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Order and Order to Maintain Assets. Mr. Smith has the experience and skills to be an effective Monitor, no identifiable conflicts, and sufficient time to dedicate to this matter through its conclusion.

* * *

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.

Complaint

IN THE MATTER OF

PINGER, INC.

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

Docket C-4550; File No. 152 3137
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Pinger, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Pinger, Inc. develops apps for mobile phones and devices. 'Textfree', is the proposed defendant's most popular application. The Commission's complaint alleges that Pinger, Inc. falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from March 2014 until April 2015, Pinger, Inc. was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in March 2011, Pinger, Inc. submitted its self-certification to the Safe Harbor Frameworks. Pinger, Inc. did not renew its self-certification in March 2014 and Commerce subsequently updated Pinger, Inc.'s status to "not current" on its public website. In May 2015, Pinger, Inc. recertified with Commerce and is now a current participant in the Safe Harbor Frameworks. The consent order prohibits Pinger, Inc. 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. As well as, requiring Pinger, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Pinger, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Monique Einhorn*

For the *Respondent: Lydia Parnes, Wilson, Sonsini, Goodrich & Rosati*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pinger, 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 Pinger, Inc. is a Delaware corporation with its principal office or place of business at 97 S. 2nd Street, Suite 210, San Jose, CA 95113.

2. Respondent develops apps for mobile phones and tablets.

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

4. Respondent has set forth on its website, http://www.pinger.com/content/company/privacy_policy.html, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The 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. 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. 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.

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 and the U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). 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 Frameworks.

Violations of Section 5 of the FTC Act

10. In March 2011, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

11. In March 2014, 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. In May 2015, respondent renewed its self-certification to the Safe Harbor Frameworks and respondent's status was changed to "current" on Commerce's website.

12. Since at least March 2011, respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.pinger.com/content/company/privacy_policy.html website, including, but not limited to, the following statements:

> Pinger complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor

> Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland (the "Safe Harbor Frameworks"). Pinger has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view Pinger's certification, please visit http://www.export.gov/safeharbor/

13. Through the means described in Paragraph 12, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

14. In truth and in fact, from March 2014 through April 2015, respondent was not a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks. Therefore, the representation set forth in Paragraph 13 was false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 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 Pinger, Inc., is a Delaware corporation with its principal office or place of business at 97 S. 2nd Street, Suite 210, San Jose, CA 95113.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Pinger, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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. 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 within fourteen (14) days of 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. 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 Pinger, Inc.*, FTC File No. 1523137.

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 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 September 29, 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 Pinger, Inc. (“Pinger”).

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 Pinger made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") and the U.S. and Switzerland (collectively, "Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with EU and Swiss 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. 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.

Pinger develops apps for mobile phones and tablets. According to the Commission's complaint, Pinger has set forth on its website, www.pinger.com/content/company/privacy_policy.html, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor Frameworks.

Analysis to Aid Public Comment

The Commission's complaint alleges that Pinger falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from March 2014 until April 2015, Pinger was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in March 2011, Pinger submitted its self-certification to the Safe Harbor Frameworks. Pinger did not renew its self-certification in March 2014 and Commerce subsequently updated Pinger's status to "not current" on its public website. In May 2015, Pinger recertified with Commerce and is now a current participant in the Safe Harbor Frameworks.

Part I of the proposed order prohibits Pinger 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 Pinger 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 Pinger 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

NAICS ASSOCIATION, LLC

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

Docket C-4548; File No. 152 3138
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses NAICS Association, LLC's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). NAICS Association, LLC provides services to assist companies in working with or understanding NAICS ("North American Industry Classification System") and SIC ("Standard Industry Classification") system codes. The Commission's complaint alleges that NAICS Association, LLC falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from February 2014 until April 2015, NAICS Association, LLC was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in February 2013, NAICS Association, LLC submitted its self-certification to the Safe Harbor Frameworks. NAICS Association, LLC did not renew its self-certification in February 2014 and Commerce subsequently updated NAICS Association, LLC's status to "not current" on its public website. The consent order prohibits NAICS Association, LLC 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. As well as, requiring NAICS Association, LLC to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that NAICS Association, LLC submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Monique Einhorn*

For the *Respondent: Mitch Feldman, President; pro se*

COMPLAINT

The Federal Trade Commission, having reason to believe that NAICS Association, 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:

Complaint

1. Respondent NAICS Association, LLC is a New Jersey limited liability company with its principal office or place of business at 129 Lake Shore Drive, Rockaway NJ 07866.

2. Respondent provides services to assist companies in working with or understanding NAICS ("North American Industry Classification System") and SIC ("Standard Industry Classification") system codes. NAICS and SIC codes are used by federal government statistical agencies to classify industry sectors or businesses entities for the purposes of collecting, analyzing, and publishing statistical data pertaining to the U.S. business economy.

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

4. Respondent has set forth on its website, http://www.naics.com/privacy-policy/ , privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The 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. 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. 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.

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 and the U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). 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 Frameworks.

Violations of Section 5 of the FTC Act

10. In February 2013, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

11. In February 2014, 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.

12. Since at least February 2013, respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.naics.com/privacy-policy/ website, including, but not limited to, the following statements:

> NAICS Association, LLC comply [sic] with the requirements of the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework established by the U.S. Department of Commerce with respect to personally identifiable information (PII) within the scope of the NAICS Association's Safe Harbor certification that is transferred from the European Economic Area or Switzerland to the United States. The NAICS Association adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access and enforcement with respect to such PII. . . For further information about the Safe Harbor Program, see the U.S. Department of Commerce website at http://www.export.gov/safeharbor/.

13. Through the means described in Paragraph 12, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

14. In truth and in fact, from February 2014 through April 2015, respondent was not a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks. Therefore, the representation set forth in Paragraph 13 was false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 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 NAICS Association, LLC is a New Jersey limited liability company with its principal office or

place of business at 129 Lake Shore Drive, Rockaway, New Jersey 07866.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean NAICS Association, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 NAICS Association, LLC*, FTC File No. 1523138.

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 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 September 29, 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 NAICS Association, LLC. (“NAICS”).

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 NAICS made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") and the U.S. and Switzerland (collectively, "Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with EU and Swiss 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. 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.

NAICS provides services to assist companies in working with or understanding NAICS ("North American Industry Classification System") and SIC ("Standard Industry Classification") system codes. According to the Commission's complaint, NAICS has set forth on its website, http://www.naics.com/privacy-policy/, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor Frameworks.

The Commission's complaint alleges that NAICS falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from February 2014 until April 2015, NAICS was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in February 2013, NAICS submitted its self-certification to the Safe Harbor Frameworks. NAICS did not renew its self-certification in February 2014 and Commerce subsequently updated NAICS's status to "not current" on its public website.

Part I of the proposed order prohibits NAICS 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 NAICS 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 NAICS 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

JUBILANT CLINSYS, INC.

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

Docket C-4549; File No. 152 3140
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Jubilant Clinsys, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Jubilant Clinsys, Inc. is a research organization that provides pharmaceutical, biotechnology and medical device companies with services in support of drug and device development. The Commission's complaint alleges that Jubilant Clinsys, Inc. falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from November 2012 through April 2015, Jubilant Clinsys, Inc. was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in November 2007, Jubilant Clinsys, Inc. submitted its self-certification to the U.S.-EU Safe Harbor Framework. Jubilant Clinsys, Inc. did not renew its self-certification in November 2012 and Commerce subsequently updated Jubilant Clinsys, Inc.'s status to "not current" on its public website. In May 2015, Jubilant Clinsys, Inc. removed its Safe Harbor representation from its website privacy policy. The consent order prohibits Jubilant Clinsys, Inc. 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. As well as, requiring Jubilant Clinsys, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Jubilant Clinsys, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Monique Einhorn*

For the *Respondent: Stanley Brener, LeClair Ryan*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jubilant Clinsys, 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 Jubilant Clinsys, Inc. is a New Jersey corporation with its principal office or place of business at One Crossroads Drive, Building A, Second Floor, Bedminster, New Jersey 07921.

2. Respondent is a research organization that provides pharmaceutical, biotechnology and medical device companies with services in support of drug and device development.

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

4. Respondent has set forth on its website, http://www.clinsys.com/index.php?option=com_content&view=article&id=8&Itemid=19, 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 November 2007, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In November 2012, 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.

11. Since at least November 2007, respondent has disseminated or caused to be disseminated privacy policies and statements on the http://www.clinsys.com/index.php?option=com_content&view=article&id=8&Itemid=19 website. In certain instances, these policies and statements reference the U.S.-EU Safe Harbor Framework in the context of Clinsys employees. However, all of the policies and statements appear on the company's publicly available website, and, therefore, are conveyed to all consumers. The privacy policies and statements include, but are not limited to, the following:

> This policy's purpose is to inform employees of the principles under with [sic] Clinsys processes personal information received from countries belonging to the European Union (EU). This policy complies with the U.S. Department of Commerce Safe Harbor framework, which has been approved by the EU as an adequate way for Clinsys to demonstrate that it complies with the protections outlined in the EU Directive on Data Privacy. More information about the Safe Harbor Program is available at: http://export.gov/safeharbor/. . .
>
> Data subjects may contact compliance@clinsys.com to register complaints, access requests or address any other issues arising under Safe Harbor Principles. . .
>
> Clinsys conducts an annual self-assessment in order to verify that this Policy on Data Protection and Privacy of Personal Information is published and implemented within Clinsys and that it conforms to the Safe Harbor Principles.
>
> In addition, Clinsys self-certifies annually with the U.S. Department of Commerce as a data controller.

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, from November 2012 through April 2015, 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 twenty-ninth day of September 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 Jubilant Clinsys, Inc., is a New Jersey corporation with its principal office or place of business at One Crossroads Drive, Building A, Second Floor, Bedminster, New Jersey 07921.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Jubilant Clinsys, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 Jubilant Clinsys, Inc.*, FTC File No. 1523140.

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 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 September 29, 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 Jubilant Clinsys, Inc. (“Jubilant Clinsys”).

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 Jubilant Clinsys 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 EU 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.

Jubilant Clinsys is a research organization that provides pharmaceutical, biotechnology and medical device companies with services in support of drug and device development. According to the Commission's complaint, Jubilant Clinsys has set forth on its website, http://www.clinsys.com/index.php?option=com_content&view=article&id=8&Itemid=19, 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 Jubilant Clinsys falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from November 2012 through April 2015, Jubilant Clinsys was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in November 2007, Jubilant Clinsys submitted its self-certification to the U.S.-EU Safe Harbor Framework. Jubilant Clinsys did not renew its self-certification in November 2012 and Commerce subsequently updated Jubilant Clinsys' status to "not current" on its public website. In May 2015, Jubilant Clinsys removed its Safe Harbor representation from its website privacy policy.

Part I of the proposed order prohibits Jubilant Clinsys 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 Jubilant Clinsys 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 Jubilant Clinsys 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

GOLF CONNECT, LLC

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

Docket C-4540; File No. 152 3141
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Golf Connect, LLC's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Golf Connect, LLC provides communication platforms and software and technology services to the golf industry. The Commission's complaint alleges that Golf Connect, LLC falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from April 2014 until April 2015, Golf Connect, LLC was not a "current" participant in the Safe Harbor Frameworks. The company's predecessor in interest had submitted its self-certification to the Safe Harbor Frameworks, but that self-certification had lapsed. Commerce subsequently updated the company's status to "not current" on its public website. The consent order prohibits Golf Connect, LLC 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. As well as, requiring Golf Connect, LLC to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Golf Connect, LLC submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Monique Einhorn*

For the *Respondent: Stephanie Fierro, Frutkin*

COMPLAINT

The Federal Trade Commission, having reason to believe that Golf Connect, 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 Golf Connect, LLC is a Delaware limited liability company with its principal office or place of business at 6200 E. Thomas Road, Suite 308, Scottsdale, Arizona 85251. In

April 2014, respondent acquired the assets and intellectual property of GolfSwitch, Inc., a Nevada corporation with its principal office or place of business at 6200 E. Thomas Road, Suite 308, Scottsdale, Arizona 85251. Respondent acquired, *inter alia*, the website www.golfhub.com and has operated that website since April 2014.

2. Respondent provides a communication platform and software and technology services to the golf industry.

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 the website, http://www.golfhub.com/CustomerService/PrivacyPolicy?lang+en , privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework") and the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The 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. 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. 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.

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 and the U.S.-Swiss Safe Harbor Framework ("Safe Harbor Frameworks"). 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 Frameworks.

Violations of Section 5 of the FTC Act

10. In May 2010, GolfSwitch, Inc. submitted to Commerce a self-certification of compliance with the Safe Harbor Frameworks.

11. In May 2013, GolfSwitch, Inc. 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.

12. In April 2014, Golf Connect, LLC acquired the assets and intellectual property of GolfSwitch, Inc., including the website www.golfhub.com.

13. Since at least April 2014, Golf Connect, LLC has disseminated or caused to be disseminated privacy policies and statements on the http://www.golfhub.com/CustomerService/PrivacyPolicy?lang+en website, including, but not limited to, the following statements:

> This Privacy Statement covers the website http://www.golfhub.com, which is operated by GolfSwitch, Inc. ("we" or "us"). Your data will be maintained by GolfSwitch in accordance with this Privacy Statement…
>
> The company complies with U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland. The company has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view the company's certification, please visit http://www.export.gov/safeharbor/

14. Through the means described in Paragraph 13, respondent represents, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks.

15. In truth and in fact, from April 2014 through April 2015, respondent was not a "current" participant in the U.S.-EU Safe Harbor and U.S.-Swiss Safe Harbor Frameworks. Therefore, the representation set forth in Paragraph 14 was false and misleading.

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-ninth day of September 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 Golf Connect, LLC is a Delaware limited liability company with its principal office or place of business at 6200 E. Thomas Road, Suite 308, Scottsdale, Arizona 85251.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Golf Connect, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 all LLC managers and members, 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 company 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 company; 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 company name or address. *Provided, however*, that, with respect to any proposed change in the company 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 Golf Connect, LLC*, FTC File No. 1523141.

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 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 September 29, 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 Golf Connect, LLC (“Golf Connect”).

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 Golf Connect made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") and the U.S. and Switzerland (collectively, "Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S. companies to transfer data outside the EU and Switzerland consistent with EU and Swiss 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. 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.

Golf Connect provides a communication platform and software and technology services to the golf industry. According to the Commission's complaint, Golf Connect has set forth on its website, http://www.golfhub.com/CustomerService/PrivacyPolicy?lang+en, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor Frameworks.

The Commission's complaint alleges that Golf Connect falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from April 2014 until April 2015, Golf Connect was not a "current" participant in the Safe Harbor Frameworks. The company's predecessor in interest had submitted its self-certification to the Safe Harbor Frameworks, but that self-certification had lapsed. Commerce subsequently updated the company's status to "not current" on its public website.

Part I of the proposed order prohibits Golf Connect 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 Golf Connect 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 Golf Connect 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

CONTRACT LOGIX, LLC

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

Docket C-4541; File No. 152 3184
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Contract Logix, LLC's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Contact Logix, LLC describes its business as providing contract management software and associated services. The Commission's complaint alleges that Contract Logix, LLC falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from August 2012 until May 2015, Contract Logix, LLC was not a "current" participant in the U.S.-EU Safe Harbor Framework. The company's predecessor in interest had submitted its self-certification to the U.S.-EU Safe Harbor Framework, but that self-certification had lapsed. Commerce subsequently updated the company's status to "not current" on its public website. The consent order prohibits Forensics Consulting Solutions, LLC 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. As well as, requiring Contact Logix, LLC to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Contact Logix, LLC submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Ruth Yodaiken*

For the *Respondent: Edward Glynn* and *Mark E. Schreiber, Locke Lord LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Contract Logix, 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 Contract Logix, LLC ("Contract Logix") is a Delaware limited liability company with its principal office or place of business at 248 Mill Road, Chelmsford, Massachusetts. In August 2012, respondent acquired the assets of Contract Logix, Inc., a corporation with its principal office or place of business at the same address. Respondent acquired, inter alia, the website www.contractlogix.com and has operated that website since August 2012.

2. Respondent Contract Logix describes the business it offers on contractlogix.com as providing contract management software and associated services.

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.contractlogix.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Safe Harbor Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. 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 U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

Misrepresentations Regarding Safe Harbor Participation

10. In July 2010, Contract Logix, Inc. submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework.

11. In July 2012, Contract Logix, Inc. 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.

12. In August 2012, Contract Logix, LLC acquired the assets of Contract Logix, Inc., including the website www.contractlogix.com.

13. Since at least August 2012 until May 2015, respondent disseminated or caused to be disseminated privacy policies and statements on the Contract Logix website, www.contractlogix.com, including but not limited to, the following statements:

E.U.Safe Harbor Privacy Policy

Contract Logix,Inc. E.U.SafeHarbor Privacy Policy

Contract Logix Inc. . recognizes that privacy is very important to our customers, and we pledge to protect the security and privacy of any personal information that customers provide to us. This includes customer's names, addresses, telephone numbers, email addresses and any information that can be linked to an individual. Not only does Contract Logix strive to collect, use and disclose personal information in a manner consistent with the laws of the countries in which it does business, but it also has a tradition of upholding the highest ethical standards in its business practices. This Safe Harbor Privacy Policy (the "Policy") sets forth the privacy principles that Contract Logix follows with respect to transfers of personal information from the European Union (EU) to the .

SAFEHARBOR

The United States Department of Commerce and the European Commission have agreed on a set of data protection principles and frequently asked questions (the "Safe Harbor Principles") to enable companies to satisfy the EU law requirement that personal information transferred from the EU to the be adequately protected. Consistent with its

> pledge to protect personal privacy, Contract Logix adheres to the Safe Harbor Principles.

14. Through the means described in Paragraph 13, respondent represented, expressly or by implication, that it was a current participant in the U.S.-EU Safe Harbor Framework.

15. In truth and in fact, beginning in August 2012, respondent was not a current participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 14 is false and misleading.

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-ninth day of September 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 Contract Logix, LLC is a Delaware limited liability company with its principal office or place of business at 248 Mill Road, Chelmsford, Massachusetts.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Contract Logix, LLC, and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 it 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 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 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 within fourteen (14) days of any change in the corporations 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. 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 Contract Logix, LLC*, FTC File No. 1523184.

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 September 29, 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 Contract Logix, LLC ("Contract Logix").

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.

Analysis to Aid Public Comment

This matter concerns alleged false or misleading representations that the company 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 EU 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 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 Safe Harbor Framework.

Contract Logix describes its business as providing contract management software and associated services. According to the Commission's complaint, the company has set forth on its website, www.contractlogix.com, 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 Contract Logix falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from August 2012 until May 2015, Contract Logix was not a "current" participant in the U.S.-EU Safe Harbor Framework. The company's predecessor in interest had submitted its self-certification to the U.S.-EU Safe Harbor Framework, but that self-certification had lapsed. Commerce subsequently updated the company's status to "not current" on its public website.

Part I of the proposed order prohibits Contract Logix from making misrepresentations about its membership in any privacy or security program sponsored by the government or any 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 Contract Logix 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 Contract Logix 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

FORENSICS CONSULTING SOLUTIONS, LLC

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

Docket C-4551; File No. 152 3185
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Forensics Consulting Solutions, LLC's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Forensics Consulting Solutions, LLC describes itself as an electronic discovery-consulting firm. The Commission's complaint alleges that in August 2009, Forensics Consulting Solutions, LLC submitted its self-certification to the U.S.-EU Safe Harbor Framework and its status was listed as "current" on Commerce's website. Forensics Consulting Solutions, LLC did not renew its self-certification in August 2012 and Commerce subsequently updated Forensics Consulting Solutions, LLC's "status" on its public website. In May 2015, Forensics Consulting Solutions, LLC recertified with Commerce and is now a current participant in the U.S-EU Safe Harbor Framework. The consent order prohibits Forensics Consulting Solutions, LLC 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. As well as, requiring Forensics Consulting Solutions, LLC to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Forensics Consulting Solutions, LLC submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Ruth Yodaiken*

For the *Respondent: Kelly "KJ" Kuchta, pro se*

COMPLAINT

The Federal Trade Commission, having reason to believe that Forensics Consulting Solutions, 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:

Complaint

1. Respondent Forensics Consulting Solutions, LLC ("Forensics Consulting Solutions") is an Arizona limited liability company with its principal office or place of business at 2600 N. Central Ave., Phoenix, Arizona.

2. Respondent describes itself as an electronic discovery consulting firm.

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.aboutfcs.com, privacy policy 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 ("the U.S.-EU Safe Harbor Framework").

The Safe Harbor Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. 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 U.S.-EU Safe Harbor Framework.

Violation of Section 5 of the FTC Act

Misrepresentations Regarding Safe Harbor Participation

10. In August 2009, respondent submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework, which is publicly available at the www.export.gov/safeharbor website.

11. In August 2012, 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.

12. From at least August 2012 until May 2015, respondent disseminated or caused to be disseminated privacy policies and statements on its website, www.aboutfcs.com/security-privacy, including but not limited to, the following statements:

Complaint

Privacy & Safe Harbor

FORENSICS CONSULTING SOLUTIONS, LLC Safe Harbor Privacy Policy

Date: 8/24/2009 - Safe Harbor Privacy Statement

FORENSICS CONSULTING SOLUTIONS, LLC (FCS)) participates in the Safe Harbor program and adheres to the Safe Harbor Principles developed by the U.S. Department of Commerce and the European Union.'

...

FCS educates its employees about compliance with the Safe Harbor Principles and has self-assessment procedures in place to ensure its compliance.FCS adheres to the U.S.-EU Safe Harbor Framework as set forth by the U.S. Department of Commerce.

...

Enforcement: FCS utilizes the self-assessment approach to assure its compliance with its privacy statement and will annually self certify with the US Department of Commerce as being in full compliance. FCS will conduct compliance audits to verify adherence to this policy.

Count 1

13. Through the means described in Paragraph 12, respondent represented, expressly or by implication, that it was a current participant in the U.S.-EU Safe Harbor Framework.

14. In truth and in fact, beginning in 2012, respondent was not a current participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 13 is false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 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 Forensics Consulting Solutions, LLC is an Arizona limited liability company with its principal office or place of business at 2600 N. Central Ave., Phoenix, Arizona.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Forensics Consulting Solutions, LLC and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 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. 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 within fourteen (14) days of 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. 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 Forensics Consulting Solutions, LLC*, FTC File No. 1523185.

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 September 29, 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 Forensics Consulting Solutions, LLC ("Forensics Consulting Solutions").

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 the company 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 EU 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 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 Safe Harbor Framework.

Forensics Consulting Solutions describes itself as an electronic discovery consulting firm. According to the Commission's complaint, the company has set forth on its website, www.aboutfcs.com/security-privacy, 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 Forensics Consulting Solutions falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from August 2012 until May 2015, Forensics Consulting Solutions was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in August 2009, Forensics Consulting Solutions submitted its self-certification to the U.S.-EU Safe Harbor Framework and its status was listed as "current" on Commerce's website. Forensics Consulting Solutions did not renew its self-certification in August 2012 and Commerce subsequently updated Forensics Consulting Solutions' status to "not current" on its public website. In May 2015, Forensics Consulting Solutions recertified with Commerce and is now a current participant in the U.S-EU Safe Harbor Framework.

Part I of the proposed order prohibits Forensics Consulting Solutions from making misrepresentations about its membership in any privacy or security program sponsored by the government or any self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Forensics Consulting Solutions 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 Forensics Consulting Solutions 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

IOACTIVE, INC.

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

Docket C-4542; File No. 152 3187
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses IOActive, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). IOActive, Inc serves as a "trusted security advisor" to the Global 500 and other progressive enterprises, helping to safeguard their most important assets and improve their overall security posture. The Commission's complaint alleges that IOActive, Inc. falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, IOActive, Inc. was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits IOActive, Inc. 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. As well as, requiring IOActive, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that IOActive, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: Ruth Yodaiken*

For the *Respondent: Martin Kaminski, solo practioner*

COMPLAINT

The Federal Trade Commission, having reason to believe that IOActive, 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 IOActive, Inc. is a Washington corporation with its principal office or place of business at 701 5th Avenue, Suite 6850, Seattle, Washington.

2. Respondent describes itself as providing security consulting services.

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.ioactive.com, privacy policy 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 ("the U.S.-EU Safe Harbor Framework").

The Safe Harbor Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. 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.

The U.S.-EU Safe Harbor Framework Certification Mark

9. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

Violations of Section 5 of the FTC Act

Misrepresentations Regarding Safe Harbor Participation

10. In May 2009, respondent submitted to Commerce a self-certification of compliance with the U.S.-EU Safe Harbor Framework, which is publicly available at the www.export.gov/safeharbor website.

11. In May 2012, 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.

12. Since at least May 2009 until May 2015, respondent disseminated or caused to be disseminated privacy policies and statements on its website, www.ioactive.com/privacy-policy.html, including but not limited to, the following privacy policy statement and display of the mark:

Safe Harbor Compliance

The company complies with the U.S.-EU Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries. The company has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view the company's certification, please visit the Safe Harbor website.

We self-certify compliance with

13. Through the means described in Paragraph 12, respondent represented, expressly or by implication, that it was a current participant in the U.S.-EU Safe Harbor Framework.

14. In truth and in fact, beginning in 2012, respondent was not a current participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 13 is false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 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 IOActive, Inc. is a Washington corporation with its principal office or place of business at 701 5th Avenue, Suite 6850, Seattle, Washington.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean IOActive, Inc. and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU 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 IOActive, Inc.,* FTC File No. 1523187.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, within ninety (90) 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 September 29, 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 IOActive, Inc. ("IOActive").

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 the company 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 EU 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 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 Safe Harbor Framework.

IOActive provides security consulting services. According to the Commission's complaint, the company has set forth on its website, www.ioactive.com/privacy-policy.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 IOActive falsely represented that it was a current participant in the U.S.-EU Safe Harbor Framework when, in fact, from May 2012 until May 2015, IOActive was not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in May 2009, IOActive submitted self-certification to the U.S.-EU Safe Harbor Framework and and its status was changed to "current" on Commerce's website. IOActive did not renew its self-certification in May 2012 and Commerce subsequently updated IOActive's status to "not current" on its public website.

Part I of the proposed order prohibits IOActive from making misrepresentations about its membership in any privacy or security program sponsored by the government or any self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires IOActive 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 IOActive 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

DALE JARRETT RACING ADVENTURE, INC.

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

Docket C-4545; File No. 152 3190
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Dale Jarrett Racing Adventure, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Dale Jarrett Racing Adventure, Inc. is a race car driving school that offers consumers an opportunity to ride in and drive genuine stock cars with professional drivers, and was founded by NASCAR champion Dale Jarrett. The Commission's complaint alleges that Dale Jarrett Racing Adventure, Inc. falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, Dale Jarrett Racing Adventure, Inc. was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits Dale Jarrett Racing Adventure, Inc. 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. As well as, requiring Dale Jarrett Racing Adventure, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Dale Jarrett Racing Adventure, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson.*

For the *Respondent: Tim Shannon, President; pro se*

COMPLAINT

The Federal Trade Commission, having reason to believe that Dale Jarrett Racing Adventure, 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 Dale Jarrett Racing Adventure, Inc., is a Florida corporation with its principal office or place of business at 116 3rd Street NW, Suite 302, Hickory, North Carolina 28601.

2. Respondent is a race car driving school that offers consumers an opportunity to ride in and drive genuine stock cars with professional drivers. It was founded by NASCAR champion Dale Jarrett.

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

4. Respondent has set forth on its website, *http://www.racingadventure.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 Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://www.racingadventure.com/privacy.html* website, including, but not limited to, the following statement:

> **Dale Jarrett Racing adventure adheres to the US Safe Harbor Privacy Principles** of Notice, Choice, Onward Transfer, Security, Data Integrity, Access and Enforcement, and **is registered with the U.S. Department of Commerce's Safe Harbor Program**. Dale Jarrett Racing adventure regularly reviews **its compliance** with this Privacy Policy. When we receive formal written complaints, we fix the issues at hand. (emphasis added)

10. Through the means described in Paragraph 9, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

11. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework. Therefore,

the representation set forth in Paragraph 10 was, and is, false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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

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 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 Decision and Order ("Order"):

1. Respondent Dale Jarrett Racing Adventure, Inc., is a Florida corporation with its principal office or place of business at 116 3rd Street NW, Suite 302, Hickory, North Carolina 28601.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Dale Jarrett Racing Adventure, Inc., and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the FTC 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 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 Dale Jarrett Racing Adventure, Inc.*, FTC File No. 1523190.

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 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 September 29, 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 Dale Jarrett Racing Adventure, Inc. ("Dale Jarrett Racing Adventure").

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.

Analysis to Aid Public Comment

This matter concerns alleged false or misleading representations that Dale Jarrett Racing Adventure 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" or "Safe Harbor Framework"). The Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the 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 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 Safe Harbor Framework.

Dale Jarrett Racing Adventure is a racecar driving school that offers consumers an opportunity to ride in and drive genuine stock cars with professional drivers, and was founded by NASCAR champion Dale Jarrett. According to the Commission's complaint, since at least January 2015, Dale Jarrett Racing Adventure set forth on its website, *http://www.racingadventure.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 Dale Jarrett Racing Adventure falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, Dale Jarrett Racing Adventure was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website.

Part I of the proposed order prohibits Dale Jarrett Racing Adventure 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 Dale Jarrett Racing Adventure 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 the notification to the FTC of changes in corporate status. Part V mandates that Dale Jarrett Racing Adventure 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

STERIMED MEDICAL WASTE SOLUTIONS

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

Docket C-4552; File No. 152 3193
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses SteriMed Medical Waste Solutions' misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). SteriMed Medical Waste Solutions develops and manufactures on-site chemical-based medical waste processors. The Commission's complaint alleges that SteriMed Medical Waste Solutions falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, SteriMed Medical Waste Solutions was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits SteriMed Medical Waste Solutions 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. As well as, requiring SteriMed Medical Waste Solutions to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that SteriMed Medical Waste Solutions submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson.*

For the *Respondent: pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that SteriMed Medical Waste Solutions, 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 SteriMed Medical Waste Solutions is a Delaware corporation with its principal office or place of business at 23065 Commerce Drive, Farmington Hills, Michigan 48335.

2. Respondent is a developer and manufacturer of on-site chemical-based medical waste processors.

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

4. Respondent has set forth on its website, *http://www.sterimedsystems.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 Safe Harbor Frameworks.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://www.sterimedsystems.com/privacy.html* website, including, but not limited to, the following statements:

> **SteriMed adheres to the US Safe Harbor Privacy Principles** of Notice, Choice, Onward Transfer, Security, Data Integrity, Access and Enforcement, and **is registered with the U.S. Department of Commerce's Safe Harbor Program**. (emphasis added)

10. Through the means described in Paragraph 9, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

11. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 10 was, and is, false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 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 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 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 Decision and Order ("Order"):

1. Respondent SteriMed Medical Waste Solutions is a Michigan corporation with its principal office or place of business at 23065 Commerce Drive, Farmington Hills, Michigan 48335.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean SteriMed Medical Waste Solutions, and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 SteriMed Medical Waste Solutions*, FTC File No. 1523193.

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 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 September 29, 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 SteriMed Medical Waste Solutions.

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 SteriMed Medical Waste Solutions 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" or "Safe Harbor Framework"). The Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with EU law.

Analysis to Aid Public Comment

To join the 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 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 Safe Harbor Framework.

SteriMed Medical Waste Solutions develops and manufactures on-site chemical-based medical waste processors. According to the Commission's complaint, since at least January 2015, SteriMed Medical Waste Solutions set forth on its website, *http://www.sterimedsystems.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 SteriMed Medical Waste Solutions falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, SteriMed Medical Waste Solutions was never a participant in the Safe Harbor Framework. Commerce has never included the company on its public website.

Part I of the proposed order prohibits SteriMed Medical Waste Solutions 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 SteriMed Medical Waste Solutions 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 the

notification to the FTC of changes in corporate status. Part V mandates that SteriMed Medical Waste Solutions 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

JHAYRMAINE DANIELS
D/B/A
CALIFORNIA SKATE-LINE

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

Docket C-4543; File No. 152 3198
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses California Skate-Line's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). California Skate-Line sells skating-related lessons and clothing, hosts events, and sponsors live performances. The Commission's complaint alleges that California Skate-Line falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, California Skate-Line was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits California Skate-Line 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. As well as, requiring California Skate-Line to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that California Skate-Line submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson.*

For the *Respondent: Jhayrmaine Daniels, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jhayrmaine Daniels, d/b/a California Skate-Line ("respondent"), 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 Jhayrmaine Daniels operates California Skate-Line as a sole proprietorship, with its principal office or place of

business at 335 E. Albertoni St. #200-727, Carson, California, 90746.

2. Respondent sells skating-related lessons and clothing, hosts events, and sponsors live performances.

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

4. Respondent has set forth on its website, *http://caliskateline.com/index.php?col=3&page=privacy*, 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 Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://caliskateline.com/index.php?col=3&page=privacy* website, including, but not limited to, the following statements:

> **We adhere to** the US-EU Safe Harbor Privacy Principles ("EU Safe Harbor") with respect to certain personally identifiable information that we receive from customers and employees in the European Union. DC Shoes has various other business units, service offerings and data collections which are not covered by this Privacy Policy, nor by **California Skate-Line participation in** the EU Safe Harbor, and California Skate-Line makes no EU Safe Harbor representations with respect to any data collected or used in these business units, service offerings or data collections. For further background about the EU Safe Harbor, please refer to the U.S. Department of Commerce's Website at *http://www.export.gov/safeharbor*. (emphasis added)

10. Through the means described in Paragraph 9, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

11. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 10 was, and is, false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 2015, has issued this complaint against respondent.

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 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 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 Decision and Order ("Order"):

1. Respondent Jhayrmaine Daniels, doing business as California Skate-Line, is a California sole proprietorship with its principal office or place of business at 335 E. Albertoni Street #200-727, Carson, California 90746.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Jhayrmaine Daniels, doing business as California Skate-Line, and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the FTC 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 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 Jhayrmaine Daniels, d/b/a California Skate-Line*, FTC File No. 1523198

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 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 September 29, 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 Jhayrmaine Daniels, d/b/a California Skate-Line ("California Skate-Line").

Analysis to Aid public Comment

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 California Skate-Line 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" or "Safe Harbor Framework"). The Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the 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 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 Safe Harbor Framework.

California Skate-Line sells skating-related lessons and clothing, hosts events, and sponsors live performances. According to the Commission's complaint, since at least January 2015, California Skate-Line set forth on its website, *http://caliskateline.com/index.php?col=3&page=privacy*, 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 California Skate-Line falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, California Skate-Line was

never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website.

Part I of the proposed order prohibits California Skate-Line 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 U.S.-Swiss Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires California Skate-Line 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 the notification to the FTC of changes in corporate status. Part V mandates that California Skate-Line 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

JUST BAGELS MANUFACTURING, INC.

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

Docket C-4547; File No. 152 3199
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Just Bagels Manufacturing, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Just Bagels Manufacturing, Inc. is a wholesale bagel manufacturer that distributes bagels to restaurants, hotels, supermarkets, retail stores, airlines, and schools around the United States. The Commission's complaint alleges that Just Bagels Manufacturing, Inc. falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, Just Bagels Manufacturing, Inc. was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits Just Bagels Manufacturing, Inc. 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. As well as, requiring Just Bagels Manufacturing, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Just Bagels Manufacturing, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson*

For the *Respondent: pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Just Bagels Manufacturing, 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 Just Bagels Manufacturing, Inc. is a New York corporation with its principal office or place of business at 340 West 57th Street, Apt. 11J, New York, New York 10019.

2. Respondent is a wholesale bagel manufacturer that distributes bagels to restaurants, hotels, supermarkets, retail stores, airlines, and schools around the United States.

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

4. Respondent has set forth on its website, *http://www.justbagels.com/privacypolicy/*, 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") and by the U.S. and Switzerland ("U.S.-Swiss Safe Harbor Framework").

The 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. 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. 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.

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 and the U.S.-Swiss 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 Frameworks.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

10. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://www.justbagels.com/privacypolicy* website, including, but not limited to, the following statements:

Safe Harbor Compliance

> **Just Bagels Mfg. Inc. is in compliance with the U.S. Department of Commerce Safe Harbor requirements** regarding the transfer of personal information from the European Economic Area ("EEA") or Switzerland to the United States. The principles of Safe Harbor compliance are:
>
> **Notice** - Individuals must be informed that their data is being collected and about how it will be used;

> **Choice** - Individuals must have the ability to opt out of the collection and forward transfer of the data to third parties;
>
> **Security** - Reasonable efforts must be made to prevent loss of collected information;
>
> **Data Integrity** - Data must be relevant and reliable for the purpose for which it was collected;
>
> **Access** - Individuals must be able to access information held about them, and correct or delete it if it is inaccurate;
>
> **Enforcement** - There must be effective means of enforcing these rules.
>
> Further information regarding the Safe Harbor principles **and certification process** can be found at www.export.gov/safeharbor. In addition, the U.S. Department of Commerce maintains a list of all compliant organizations, which can be accessed at http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list. (some emphasis added)

11. Through the means described in Paragraph 10, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

12. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework. Therefore, the representations set forth in Paragraph 11 were, and are, false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 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 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 Decision and Order ("Order"):

1. Respondent Just Bagels Manufacturing, Inc., is a New York corporation with its principal office or place of business at 340 West 57th Street, Apt. 11J, New York, New York 10019.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Just Bagels Manufacturing, Inc., and its successors and assigns.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, 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 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 Just Bagels Manufacturing, Inc.*, FTC File No. 1523199.

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 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 September 29, 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 Just Bagels Manufacturing, Inc. ("Just Bagels Manufacturing").

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 Just Bagels Manufacturing made to consumers concerning its participation in the Safe Harbor privacy frameworks agreed upon by the U.S. and the European Union ("EU") and the U.S. and Switzerland (collectively, Safe Harbor Frameworks"). The Safe Harbor Frameworks allow U.S.

companies to transfer data outside the EU and Switzerland consistent with EU and Swiss 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. 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.

Just Bagels Manufacturing is a wholesale bagel manufacturer that distributes bagels to restaurants, hotels, supermarkets, retail stores, airlines, and schools around the United States. According to the Commission's complaint, since at least January 2015, Just Bagels Manufacturing set forth on its website, *http://www.justbagels.com/privacypolicy/*, privacy policies and statements about its practices, including statements related to its participation in the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

The Commission's complaint alleges that Just Bagels Manufacturing falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework when, in fact, Just Bagels Manufacturing was never a participant in the Safe Harbor Frameworks. Commerce has never included the company on its public website.

Part I of the proposed order prohibits Just Bagels Manufacturing 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 Just Bagels Manufacturing

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 the notification to the FTC of changes in corporate status. Part V mandates that Just Bagels Manufacturing 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

ONE INDUSTRIES CORP.

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

Docket C-4544; File No. 152 3201
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses One Industries Corp.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). One Industries Corp. sells of motocross-related gear, graphic kits, and clothing worldwide. The Commission's complaint alleges that One Industries Corp. falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, One Industries Corp. was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits One Industries Corp. 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. As well as, requiring One Industries Corp. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that One Industries Corp. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson*

For the *Respondent: Jeffrey McGuane, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that One Industries Corp., 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 One Industries Corp. is a Delaware corporation with its principal office or place of business at 12270 World Trade Drive, Suite 103, San Diego, California 92128.

2. Respondent is a worldwide seller of motocross-related gear, graphic kits, and clothing.

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

4. Respondent has set forth on its website, *http://oneindustries.com/privacy*, 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. 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 Frameworks.

Violations of Section 5 of the FTC Act

9. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://oneindustries.com/privacy* website, including, but not limited to, the following statements:

> **We adhere to the US-EU Safe Harbor Privacy Principles** ("EU Safe Harbor") with respect to certain personally identifiable information that we receive from customers and employees in the European Union. One Industries has various other business units, service offerings and data collections which are not covered by this Privacy Policy, nor by **One Industries' participation in the EU Safe Harbor**, and One Industries makes no EU Safe Harbor representations with respect to any data collected or used in these business units, service offerings or data collections. For further background about the EU Safe Harbor, please refer to the U.S. Department of Commerce's Website at *http://www.export.gov/safeharbor*. (emphasis added)

10. Through the means described in Paragraph 9, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor.

11. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 10 was, and is, false and misleading.

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

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 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 Decision and Order ("Order"):

1. Respondent One Industries Corp. is a Delaware Corporation with its principal office or place of business at 12270 World Trade Drive, Suite 103, San Diego, California 92128.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean One Industries, Corp., and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the FTC 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 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 One Industries, Corp*., FTC File No. 1523201.

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 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 September 29, 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 One Industries Corp. ("One Industries").

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.

Analysis to Aid Public Comment

This matter concerns alleged false or misleading representations that One Industries 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" or "Safe Harbor Framework"). The Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the 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 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 Safe Harbor Framework.

One Industries sells of motocross-related gear, graphic kits, and clothing worldwide. According to the Commission's complaint, since at least January 2015, One Industries Corp. set forth on its website, *http://oneindustries.com/privacy*, 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 One Industries Corp. falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, One Industries Corp. was never a participant in the Safe Harbor Framework. Commerce has never included the company on its public website.

Part I of the proposed order prohibits One Industries Corp. 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.

Analysis to Aid Public Comment

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires One Industries Corp. 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 the notification to the FTC of changes in corporate status. Part V mandates that One Industries Corp. 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

INBOX GROUP, LLC

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

Docket C-4546; File No. 152 3202
Complaint, September 29, 2015 – Decision, September 29, 2015

This consent order addresses Inbox Group, LLC's misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Inbox Group is a marketing agency that provides marketing programs and services for emails, social media outlets, and mobile devices. The Commission's complaint alleges that Inbox Group falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, Inbox Group was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website. The consent order prohibits Inbox Group 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. As well as, requiring Inbox Group to supply and retain documents relating to their compliance with the Order for a five-year period.

Participants

For the *Commission: James R. Golder* and *Emily B. Robinson.*

For the *Respondent: Christopher Donald, CEO; pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Inbox Group, 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 Inbox Group, LLC is a Texas limited liability company with its principal office or place of business at 2400 Crockett Court, Grapevine, Texas 76051.

2. Respondent is a marketing agency that provides email, social media, and mobile marketing programs and services.

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

4. Respondent has set forth on its website, *http://www.inboxgroup.com/company/privacy/,* 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 Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. Since at least January 2015, respondent has disseminated or caused to be disseminated privacy policies and statements on the *http://www.inboxgroup.com/company/privacy* website, including, but not limited to, the following statements:

Safe Harbor Compliance

> **Inbox Group has certified its compliance with** the standards of the Safe Harbor Principles developed by the U.S. Department of Commerce for the **regulation of data transfers between the European Union and the United States**. This Policy and Inbox Group's information handling practices described in this Policy comply with the Safe Harbor privacy Principles. (some emphasis added)

10. Through the means described in Paragraph 9, respondent has represented, expressly or by implication, that it is a "current" participant in the U.S.-EU Safe Harbor Framework.

11. In truth and in fact, respondent is not and never has been a participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 10 was, and is, false and misleading.

12. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting

commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-ninth day of September 2015, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 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 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 Decision and Order ("Order"):

1. Respondent Inbox Group, LLC is a Texas limited liability company with its principal office or place of business at 2400 Crockett Court, Grapevine, Texas 76051.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "respondent" shall mean Inbox Group, LLC, and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the FTC 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 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 Inbox Group, LLC*, FTC File No. 1523202.

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 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 September 29, 2035, or 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 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 Inbox Group, LLC ("Inbox Group").

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 Inbox Group 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" or "Safe Harbor Framework"). The Safe Harbor Framework allows U.S. companies to transfer data outside the EU consistent with EU law. To join the 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 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 Safe Harbor Framework.

Inbox Group is a marketing agency that provides email, social media, and mobile marketing programs and services. According to the Commission's complaint, since at least January 2015, Inbox Group set forth on its website, *http://www.inboxgroup.com/company/privacy/*, 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 Inbox Group falsely represented that it was a participant in the U.S.-EU Safe Harbor Framework when, in fact, Inbox Group was never a participant in the U.S.-EU Safe Harbor Framework. Commerce has never included the company on its public website.

Part I of the proposed order prohibits Inbox Group 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.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Inbox Group 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 the notification to the FTC of changes in corporate status. Part V mandates that Inbox Group submit an initial compliance report to the FTC, and make

Analysis to Aid Public Comment

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.

Opinion of the Commission

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

OPINION OF THE COMMISSION AND FINAL ORDER 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 –Decision, October 11, 2015

This Opinion and Order 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. 159 F.T.C. 676. 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, 159 F.T.C. 277, 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. *Id.* at 672. Respondent and Complaint Counsel each appealed the Initial Decision. On May 7, 2015, the Commission heard oral arguments in this Matter.

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.*

OPINION OF THE COMMISSION

By Commissioner Terrell McSweeny, for the Commission.

This is a deceptive marketing case in which the Commission has alleged that Respondent ECM BioFilms, Inc. ("ECM") made false, misleading, and unsubstantiated environmental claims about its product, a plastics additive called "MasterBatch Pellets." The scientific community widely recognizes that conventional plastic products are biodegradable only over a very long period of time. However, for many years ECM made a number of biodegradability claims for its additive, including that plastics treated with the additive ("ECM Plastics") would: biodegrade; biodegrade in some period greater than a year; and completely biodegrade in a landfill within a period of nine months to five years. It also represented that accepted scientific tests supported its claims.

Complaint Counsel asserted that the unqualified representation that ECM Plastics will biodegrade and the representation that they will biodegrade in some period greater than a year both convey an implied claim that the products will completely biodegrade in a landfill within a reasonably short period of time, or one year to five years.

In his Initial Decision, Administrative Law Judge D. Michael Chappell found agreement among all of the scientific experts in the case that ECM Plastics do not fully biodegrade within five years in a landfill, and therefore held that ECM's express claims of biodegradation within nine months to five years were false, misleading, and material, in violation of Section 5 of the FTC Act. However, the ALJ found that Complaint Counsel had failed to prove that ECM's representations that ECM Plastics are "biodegradable" and "biodegradable in some period greater than a year" imply that ECM Plastics will completely biodegrade in a landfill within one year. He did not address whether ECM's representations imply that ECM Plastics will biodegrade in a reasonably short period of time or within five years.

We affirm the ALJ's decision with respect to ECM's express claim of biodegradation in nine months to five years. However, based on our own *de novo* examination of the evidence, we find

that ECM also made implied claims that ECM Plastics will biodegrade in a reasonably short period of time, or within five years, and the implied claims are false, unsubstantiated, and material.[1] The Order we enter prohibits ECM from making such claims in the future without adequate scientific substantiation.

I. Factual Background

ECM is a small Ohio-based corporation that was started in 1998 by Patrick Riley to manufacture and sell a plastics additive he had developed which, he claimed, would render plastics made with the additive "biodegradable" in nine months to five years. IDF 152; Sinclair, Tr. 747-48, 754-55.[2] The formula for the additive (the "ECM Additive") is a trade secret and has never been patented. IDF 160. ECM licenses the technology from Micro-Tech Research, Inc., a predecessor corporation also

[1] Commissioner Ohlhausen dissents from this opinion to the extent it holds that Complaint Counsel provided evidence sufficient to prove that ECM's unqualified biodegradability claim conveyed to consumers that ECM Plastics will completely biodegrade within a landfill within a reasonably short period of time. *See* Partial Dissent of Commissioner Maureen K. Ohlhausen.

[2] This opinion uses the following abbreviations for citations to the record:

Comp.: Complaint
Answer: Answer and Affirmative Defenses of Respondent ECM BioFilms, Inc.
ID: Initial Decision of the Administrative Law Judge
IDF: Numbered Findings of Fact in the ALJ's Initial Decision
Tr.: Transcript of Trial before the ALJ
Tr. Oral Arg.: Transcript of Oral Argument before the Commission
CCX: Complaint Counsel's Exhibit
CCAppB: Complaint Counsel's Appeal Brief
CCAnsB: Complaint Counsel's Answering Brief
CCSuppB: Complaint Counsel's Amended Supplemental Brief Responding to Issues Raised by the Commission
CCSuppRB: Complaint Counsel's Response to ECM's Supplemental Brief
RX: Respondent's Exhibit
RAppB: Respondent ECM BioFilms' Brief on Appeal from the Initial Decision of Chief ALJ D. Michael Chappell
RAnsB: Respondent ECM BioFilms' Brief in Answer to Complaint Counsel's Appeal
RRB: Respondent ECM BioFilm's Brief in Reply to Complaint Counsel's Answering Brief
RSuppB: Respondent's Supplemental Brief
RSuppRB: ECM's Response to Complaint Counsel's Supplemental Brief

established by Mr. Riley. IDF 153. The ECM Additive, which ECM markets as "MasterBatch Pellets," is the only product ECM sells. IDF 156-58; 163.

In 2000 ECM hired a local lawyer, Robert Sinclair, as CEO and President. IDF 84-85; Sinclair, Tr. 745-46, 757. Mr. Sinclair had previously invested in Micro-Tech and provided legal advice to it on a possible spin-off of certain assets including the ECM Additive technology. Sinclair, Tr. 745-46; 756-57; CCX-818 (Sinclair Dep.) at 71-73. From 2000 on, Mr. Sinclair has acted as ECM's CEO and President, directing all of ECM's business operations, including the marketing and sales of the ECM Additive to customers, and determining its advertising claims. IDF 85; CCX- 818 (Sinclair Dep.) at 75-76, 194. Although Mr. Sinclair is not a scientist, he took some science courses in college and at one point taught science at the high school level. IDF 87.

The key selling point for the ECM Additive is that it is seen as helpful to the environment because it purportedly hastens the biodegradation of plastics. *See* IDF 200-01, 205, 1497, 1500, 1503, 1534; Sinclair, Tr. 767-68, 777-75; CCX-819 (Sinclair Dep.) at 321, 324. Since about 2002, ECM has issued a "Certificate of Biodegradability" to its customers attesting to the rate and extent of the biodegradability of ECM Plastics based on scientific testing. IDF 266-70. The 2007 version of the Certificate states, in part,

> 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.

IDF 269; CCX-1.

ECM's primary marketing tool is its website. ID 207. Potential customers often contact ECM through the website, and then ECM's sales manager, Tom Nealis, follows up and provides additional sales literature and other basic information. ID 211-14.

Mr. Sinclair also answers potential customers' questions as part of the sales process. IDF 214, 222.

The description of ECM Plastic's "biodegradable" attribute in its sales process has varied somewhat over time.[3] Sinclair, Tr. 1609. Initially ECM stated that ECM Plastics were biodegradable without referencing any particular time frame in which complete biodegradation would occur. However, as customers began asking about the rate of biodegradation, ECM added more specific claims, representing that ECM Plastics would "completely" biodegrade "in a landfill" in "9 months to five years." Sinclair, Tr. 1609, 1613 (time period just "crept in" as "in the market . . . people were interested in having some idea of a time period"). This "nine months to five years" claim then became ECM's standard claim in its marketing materials and other sales communications, including representations that the rate was established through scientific testing. IDF 245, 265, CCX-5, CCX-6.[4]

ECM primarily relied upon the American Society for Testing and Materials ("ASTM") D5511 test to prove to potential customers that ECM Plastics would biodegrade in nine months to five years. The ASTM D5511 protocol is an "accelerated" test designed to measure the intrinsic biodegradability of a product under certain laboratory conditions in a much shorter time frame compared to what would occur in nature. *See* IDF 717-31. ASTM specifically forbids the test to be used to market as ECM

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[3] Examples of ECM's marketing materials containing the unqualified "biodegradable" claim, the "nine months to five years" claim, and the "some period greater than a year" claim are set out in Appendix A to this opinion. The Appendix also includes examples of the express "nine months to five years" claim and the unqualified "biodegradable" claim (in the form of the "ECM Biodegradable" tree logo) that appeared on finished products that would have been seen by end-users.

[4] The record is not clear as to precisely when ECM began making the nine months to five years claim. *Compare* CCX-818 (Sinclair Dep.) at 175 (testifying that ECM began conveying the nine months to five years claim in 2009 or 2010) *with* CCX-10 (January 17, 2007 ECM Reprint of a Letter to an Interested Party representing that ECM Plastics will "fully biodegrade . . . buried in landfills" and will "completely biodegrade in a period of from 9 months to 5 years or less").

did. The test protocol states: "Claims of performance shall . . . not be used for unqualified 'biodegradable' claims." CCX-84 at 1 (ASTM D5511 § 1.4). "Furthermore," the protocol continues, "results shall not be extrapolated past the actual duration of the test." *Id.* As a member of several ASTM committees on plastics and environmental issues, Mr. Sinclair was presumably aware of this marketing prohibition. IDF 88; Sinclair, Tr. 778-80.

In October 2012, the Commission revised the FTC Guides for the Use of Environmental Marketing Claims ("Green Guides") to clarify that a reasonably short period for biodegradation implicated by an unqualified claim of biodegradability is biodegradation to completion within one year and that an unqualified biodegradability claim therefore requires substantiation of that fact.[5] The current version of the Green Guides advises that "[d]egradable claims should be qualified clearly and prominently to the extent necessary to avoid deception about: (1) [t]he product's or package's ability to degrade in the environment where it is customarily disposed; and (2) [t]he rate and extent of degradation." 16 C.F.R. § 260.8(d).

Following the issuance of the updated Green Guides, ECM revised its marketing materials and logo. It placed an asterisk next to the word "biodegradable" and 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." IDF 251-54; 256; *see also* IDF 270 (describing similar changes to ECM's Certificate of Biodegradability). It added the following explanation to its website:

> The basic concept is that biodegradation is a natural process that occurs around the world but at

[5] The Green Guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. They do not confer any rights on any person and do not operate to 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 CFR § 260.1(a).

> 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.

RX-681 at 61. However, ECM did not remove the "nine months to five years" claim from its website until the end of 2013 – more than a year later – and it also continued to disseminate some sales brochures containing the "9 months to 5 years" claim during that period. IDF 259. In communications with potential and existing customers, ECM continued to define the "window of biodegradation" as nine months to five years through January 2014, several months after this adjudicative proceeding commenced. *See, e.g.*, CCX-280 (Mr. Sinclair stated in a letter to a customer in January 2013 that the "window of biodegradation" was "9 months to 5 years"); CCX-281 (In April 2013, a customer asked about the "time span" for the decomposition progress and Mr. Nealis told him nine months to five years); CCX-282 (when asked in October 2013 if the rate of degradation varies depending on the type of soil, Mr. Nealis stated "Yes…. This is why we state the biodegradation will take place in a period of 9 months to five years."); CCX-259-259A (Mr. Nealis made the "9 months to 5 years" rate claim to a customer on January 8, 2014).

ECM sells the ECM Additive directly and through distributors to companies that manufacture plastics (or to companies that have plastics manufactured for them). IDF 164-70. ECM does not sell directly to consumers, although its website is available to the general public and end-use consumers see the "ECM Biodegradable" tree logo and other biodegradability claims on plastic items made with the ECM Additive. IDF 164, 285-86, 289-304. ECM routinely provides its customers with its marketing materials and encourages them to pass along those materials (and hence ECM's biodegradability claims) to their own customers. IDF 280. Some of those customers in turn have

included the claims, including the specific "nine months to five years" language, and/or the "ECM Biodegradable" tree logo on items provided to end-use consumers, such as plastic bags. IDF 285-86, 289-90, 293-305; CCX-819 (Sinclair Dep.) at 415 (describing inclusion of ECM logo on grocery bags as "gorgeous" advertising). Among the plastic products manufactured with the ECM Additive and bearing ECM's biodegradable claims are plastic dinnerware, straws, "clam shell" carry-out containers, restaurant and grocery bags, trash bags, plastic film, and shampoo and conditioner bottles. IDF 285-86.

II. Procedural Background

A. The Complaint

On October 18, 2013, the Commission issued a Complaint alleging that ECM's biodegradability claims were false and unsubstantiated. Specifically, the Complaint alleges that ECM, through various marketing and promotional materials, "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."

Comp. ¶ 9. The Complaint further alleges that "[i]n 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."

Id. ¶ 10. Accordingly, the Complaint alleges that ECM's representations were false and misleading. *Id.* ¶ 11.

The Complaint also charges that the representations were misleading because, at the time they were made, Respondent lacked reasonable substantiation for its representations. *Id.* ¶¶ 12-13. Furthermore, the Complaint alleges, ECM distributed the false and misleading representations through its marketing and promotional materials to its customers to use with their own customers, thereby providing those entities with the "means and instrumentalities" to deceive. *Id.* ¶ 14.

Complaint Counsel's proposed order would prohibit ECM from making any unqualified representation that any product or package is "degradable" unless ECM can substantiate with competent and reliable scientific evidence that its product or package will decompose completely in a landfill within one year. Likewise, the proposed order prohibits any "qualified" claim as to the rate and extent of biodegradation unless the claim is substantiated by such evidence. Notice Order ¶ I.

B. The Initial Decision

The administrative hearing began on August 5, 2014 and concluded on August 29, 2014. On January 28, 2015, ALJ D. Michael Chappell issued an Initial Decision in which he found that ECM had claimed that ECM Plastics would fully biodegrade in a landfill within nine months to five years, and further claimed that tests proved that they would do so. ID 6, 177; IDF 265. He determined that these claims were false and unsubstantiated. ID 245-46. In addition, he found that these claims "pertained to the central characteristics of plastics infused with the ECM Additive" and were material to the purchasing decisions of ECM customers and downstream customers. IDF 1497, 1500. He also rejected ECM's argument that its customers were sophisticated purchasers who did not necessarily believe the claims, as not supported by the evidence. ID 290-91. The ALJ concluded that by making these claims, ECM made deceptive representations and that it also provided the means for its customers and others in the supply chain to themselves engage in deception in violation of Section 5 of the FTC Act. ID 291-94, 319.

Judge Chappell found, however, that Complaint Counsel had not proven that ECM made what he refers to as an "implied one year claim" – *i.e.*, that Complaint Counsel had not proven that ECM's claims that ECM Plastics are "biodegradable" and biodegradable "in some period greater than a year" implied that they would completely biodegrade into elements found in nature in a landfill within a one-year period. ID 220-23. He concluded that "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.'" ID 182. He reasoned that "[t]he plain meaning of the word 'biodegradable' [as defined in the dictionary] 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." ID 184. He also found the three consumer surveys offered by Complaint Counsel to show that a significant minority of reasonable consumers interpret "biodegradable" to mean complete decomposition within one year – a survey conducted by Complaint Counsel's expert, Dr. Frederick, a survey previously commissioned by the American Plastics Council ("APCO"), and a survey conducted by Synovate

– were methodologically flawed and hence entitled to little evidentiary weight. ID 187-213.

By contrast, the ALJ found that the consumer survey conducted by ECM's expert, Dr. Stewart, was methodologically sound and showed that consumers interpret the term "biodegradable" as a process of decomposition and understand that it depends on the type of material involved. ID 216-17. He rejected Complaint Counsel's contentions that ECM's consumer survey results are fully consistent with the results of the other three surveys in showing that consumers believe that products labeled "biodegradable" will biodegrade within one year and that the similarity of results of all four studies, or their "convergent validity," underscores the basic validity and reliability of the survey results. ID 208-16. He therefore concluded that Complaint Counsel had failed to show by a preponderance of the evidence that a significant minority of reasonable consumers would interpret ECM's unqualified "biodegradability" claim or its qualified "some period greater than a year" claim to encompass an implied claim that ECM Plastics completely biodegrade in a landfill within one year. ID 181.

Having found ECM liable only for its claim that ECM Plastics will fully biodegrade in a landfill within nine months to five years and the related establishment claim (*i.e.*, the claim that scientific tests prove such biodegradation within nine months to five years), the ALJ recommended an order that prohibits ECM from representing that any product or package will completely biodegrade within any time period, or that tests prove such representation, unless the representation is true, not misleading, and, at the time made, substantiated by competent and reliable scientific evidence. ID 320-21.

C. The Cross-Appeals

ECM appeals the ALJ's finding of liability as to its express nine months to five years rate claim, arguing it was not material, RAppB 18-39, and urges us to affirm the ALJ's decision on the remaining claims. *Id.* at 6-7. It also argues that application to ECM of what it terms the Green Guides' "One Year Rule" would constitute *ultra vires* agency action (*id.* at 43-44); that certain discovery and evidentiary rulings by the ALJ violated its due

process rights (*id.* at 44-51); and that the order issued by the ALJ is not in the public interest because no actual consumer injury has been shown. *Id.* at 39-43.

Complaint Counsel appeal the ALJ's rulings on the implied rate claim that ECM Plastics will completely biodegrade in a landfill in a reasonably short period of time, *i.e.*, one or five years, and that scientific testing proves this. CCAppB 6-30. They also appeal his conclusion that they had not proven either the falsity or lack of adequate substantiation as to ECM's implied biodegradability claims. *Id.* at 30-47. Further, they defend their proposed order as appropriate and necessary. *Id.* at 5-6, 47-54.

With respect to the implied non-establishment rate claim, Complaint Counsel contend that the four consumer surveys in the record – including one conducted by ECM's own expert – show that a significant minority of reasonable consumers believe that products claimed to be "biodegradable" will completely biodegrade within a reasonably short period of time and specifically that some consumers believe that period to be within one year and an even larger number of consumers believe it to be within five years. CCAppB 6-27; Tr. Oral Arg. 62-63. Complaint Counsel also point to survey evidence showing that consumers interpret ECM's "some period greater than a year claim" as implying that ECM Plastics will decompose within a reasonably short period of time; they contend that that result is consistent with what consumer survey experts refer to as the "anchoring" effect, the tendency of consumer estimates to cluster around a provided reference point, such as ECM's "a year." CCAppB 27-29. With respect to the issues of falsity and substantiation, Complaint Counsel maintain that none of the scientific experts found that ECM Plastics will biodegrade in a reasonably short period of time. They argue that the laboratory tests relied upon by ECM are unreliable, and that ECM has failed to present any substantiation that would be accepted by the relevant scientific community. *Id*. at 42-47.[6]

[6] In addition, the organization Californians Against Waste has moved for leave to file an *amicus curiae* brief in support of Complaint Counsel. That motion is granted because the public interest will benefit from the Commission's consideration of the brief. Of course, the *amicus* brief does not establish any fact of record, *see Union Oil Co. of Ca.*, 138 F.T.C. 1, 72 (2004), and we have

III. Analysis

The Commission reviews the record *de novo* by considering "such parts of the record as are cited or as may be necessary to resolve the issues presented" and exercising "all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54. ECM does not dispute that the Commission has jurisdiction over the conduct at issue.[7]

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices." 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 the consumer's purchasing decision or conduct. *See Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc*., 103 F.T.C. 110 (1984)) ("*Deception Statement*"); *Kraft, Inc*., 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992). Thus, in determining whether an advertisement is deceptive, we conduct a "three- step inquiry, considering: (i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers." *POM Wonderful v. F.T.C.*, 777 F.3d 478, 490 (D.C. Cir. 2015).

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not relied on any facts drawn from exhibits appended to the brief. Nor have we relied upon the brief's reference to CX-28, which was admitted to the record only for limited purposes. Tr. 1634-36; *see also* Tr. 1617-19. In fact, no portion of our decision rests on facts or arguments presented in the *amicus* brief.

[7] Section 5 of the Federal Trade Commission Act grants the Commission 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). ECM is an Ohio corporation, Answer ¶ 1, over which the FTC has jurisdiction. Its principal office or place of business is in Ohio. *Id*. ECM is in the business of manufacturing, advertising, selling, and distributing the ECM Additive to plastic manufacturers and distributors of plastics, Answer ¶ 2, located in various states across the United States. *See* IDF 4, 9, 23, 37, 53, 64, 78. Consequently, ECM's acts and practices, as alleged in the Complaint, are and have been "in or affecting commerce," within the meaning of Sections 4 and 5 of the FTC Act.

This case involves both express and implied claims. ECM does not dispute that it expressly represented that ECM Plastics are "biodegradable" and "biodegradable in a landfill," and that scientific testing proved those claims. Nor does it dispute that it expressly represented that ECM Plastics "completely" biodegrade "in a landfill" "within nine months to five years," and that scientific tests also established[8] that claim.[9] Likewise, ECM does not dispute that it made the claim that ECM Plastics will biodegrade "in some period greater than a year" and that scientific tests proved that claim.

The first set of issues we must resolve are: (i) whether ECM's unqualified representation of biodegradability implies a claim that ECM Plastics will completely biodegrade in a landfill within a reasonably short period of time; and (ii) whether ECM's representation that ECM Plastics will biodegrade "in some period greater than a year" likewise implies complete biodegradation in a landfill within a "reasonably short period of time." *See* Complaint ¶ 9.A; CCAppB 6.

ECM vigorously disputes that a claim that ECM Plastics are "biodegradable" implies the products will biodegrade "within a reasonably short period of time." It argues that its representations regarding "biodegradability" mean only that ECM Plastics are "intrinsically" biodegradable, without implicating any reference to time. As discussed above, the ALJ found that Complaint Counsel failed to establish that the implied rate claim was conveyed from representations of "biodegradability" or biodegradability "in some period greater than a year," and thus found it unnecessary to consider the claim's alleged falsity or materiality. However, we find that both the unqualified representation of biodegradability and the representation that

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[8] *See infra* section III.B (explaining that establishment claims represent that a certain level of evidence establishes the performance or efficacy of a product).

[9] The ALJ found that ECM's claim that tests prove that ECM Plastics will fully biodegrade in a landfill within nine months to five years, while not expressly stated, is "clear and conspicuous based on the overall net impression of the marketing materials upon which the claim appeared." IDF 1499; *see also* IDF 265; ID 223. ECM has not appealed this finding. We adopt the ALJ's rulings concerning ECM's claim that tests establish the ECM Additive's efficacy.

ECM Plastics biodegrade "in some period greater than a year" imply that ECM Plastics completely biodegrade in landfills within a reasonably short period of time (*i.e.*, within five years).[10]

The next set of issues we must resolve relate to the allegation that the express and implied claims were false and unsubstantiated. ECM has not appealed the ALJ's ruling that its "nine months to five years" express biodegradation claim and associated establishment claim were both false and unsubstantiated. However, it contends that its representations that ECM Plastics are "biodegradable" and "biodegradable in a landfill" (considered without regard to any implied time frame) are true and adequately substantiated by scientific testing, in particular the ASTM D5511 gas emission testing. Similarly, it maintains that its claim that ECM Plastics biodegrade "in some period greater than a year" is true and adequately substantiated. For the reasons discussed below, we find that ECM lacks a reasonable basis for its implied biodegradable rate claims and that those claims were false and unsubstantiated.

The last liability issues we examine relate to materiality and the public interest. ECM contends that its "nine months to five years" claim was not material, and that the ALJ's proposed order, which was based only on that claim, was therefore not in the public interest. RAppB 51. For the reasons discussed below, we affirm the ALJ's ruling with respect to the materiality of ECM's "nine months to five years" claim and its related establishment claim; we find ECM's implied rate claim and its related establishment claim material; and we reject ECM's contention that an order is not in the public interest.

A. The Implied Rate Claim

In the course of its marketing to direct customers, ECM made a series of claims about the biodegradability of ECM Plastics. First, it made claims of biodegradability without reference to any specific period of time; then it switched to claims that promised biodegradation in a specific time frame of nine months to five

[10] Commissioner Ohlhausen dissents from this conclusion with regard to the unqualified biodegradable claim. *See supra* note 1.

years; and eventually it represented that ECM Plastics would biodegrade in "some period greater than a year." End-use consumers who encountered plastic products made with the ECM Additive were also exposed to unqualified biodegradation claims and to express claims of biodegradation within nine months to five years. IDF 285-86, 297. Complaint Counsel contend that "Respondent's 'biodegradable' claim and 'some period greater than a year' claim implied to reasonable consumers that plastic treated with its additive would completely break down into elements found in nature in a landfill in a reasonably short period of time (*i.e.*, within one or five years)." CCAppB 6.

1. The Legal Framework

The Commission's framework for interpreting advertising claims is well settled and is not in dispute. The Commission "will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message." *POM Wonderful, LLC*, 2013 WL 268926, at *19 (F.T.C. 2013), *aff'd*, *POM Wonderful LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *Thompson Med. Co*., 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Deception Statement*, 103 F.T.C. at 176. When 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 also possible. *POM Wonderful*, 2013 WL 268926, at *19 (citing *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).

An interpretation may be reasonable even if it is not shared by a majority of consumers in the relevant class or by particularly sophisticated consumers. *See, e.g.*, *Novartis Corp.*, 127 F.T.C. 580, 684 (1999); *Kraft*, 114 F.T.C. at 122. "An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim." *Telebrands*, 140 F.T.C. 278, 291 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006)); *see Kraft*,114 F.T.C. at 122; *Deception Statement*, 103 F.T.C. at 177 n.20.[11] In prior cases, we have found percentages ranging from

[11] While in her Partial Dissent Commissioner Ohlhausen characterizes reliance on the inferences drawn by a significant minority of reasonable consumers as

10% to 22% to be sufficient to constitute a significant minority.[12] *See, e.g.*, *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973); *Telebrands*, 140 F.T.C. at 325.

Claims may be express or implied. Express claims directly state the representation at issue; implied claims are those that are not express. *Kraft*, 114 F.T.C. at 120. The Commission reviews implied claims as if they are on a continuum, ranging from claims that are "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.*; *see also Thompson Med. Co.*, 104 F.T.C. at 789; *Novartis Corp.*, 127 F.T.C. at 680. Both express claims and implied claims can be deceptive. *Kraft*, 114 F.T.C. at 120 (citing, *e.g., Removatron Int'l Corp.*, 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989)).

"It is well established that the Commission has the common sense and expertise to determine 'what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear.'" *POM Wonderful*, 2013 WL 268926, at *20-21 (quoting *Kraft, Inc.*, 970 F.2d at 319-20); s*ee FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Stouffer Foods Corp.*, 118 F.T.C. at 798; *Daniel Chapter One*, 2009 WL 516000, at *14-15 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010 (unpublished opinion), available at 2011-1 Trade Cas. (CCH) ¶77,443 (D.C. Cir. 2010).

However, if after completing a facial analysis we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, the Commission

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an "exception" to a more rigorous rule, Partial Dissent at 8, the Commission's Deception Statement presents that approach directly and affirmatively: "A material practice that misleads a significant minority of reasonable consumers is deceptive." *Deception Statement*, 103 F.T.C. at 177 n.20.

[12] Commissioner Ohlhausen dissents from this characterization of the case law. She argues in her partial dissent that the FTC has never found a claim interpretation to be reasonable solely based on evidence that a significant minority of consumers adopt that interpretation. The dissent does not find the cases the majority cites apposite.

requires extrinsic evidence to determine how reasonable consumers actually perceive the ads. *See*, *e.g., Kraft*, 114 F.T.C. at 121; *Thompson Med. Co.*, 104 F.T.C. at 789-90. Such extrinsic evidence may include the results of consumer surveys, expert opinion as to how the ad may be interpreted by consumers, and generally accepted principles drawn from market research. *See, e.g.*, *Kraft*, 114 F.T.C. at 121. Traditionally, we have found that consumer surveys – particularly experimental surveys, if properly designed and conducted – are especially informative in assessing the actual impact of an ad on consumer perceptions. *See, e.g.*, *Kraft,* 970 F.2d at 318; *Telebrands*, 140 F.T.C. at 315-29; *Stouffer Foods Corp*., 118 F.T.C. 746, 804-11; (1994) *Thompson Med. Co.*, 104 F.T.C. at 788-89 ("The extrinsic evidence we prefer to use and which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. Such evidence will be in the form of consumer survey research. . . ."). Further, in considering consumer survey evidence, we assess the methodologies used and any asserted shortcomings in such methodologies, but we recognize that that there are typically flaws in any survey. We do not demand perfection. *See POM Wonderful*, 2013 WL 268926, at *28 ("The Commission does not require methodological perfection . . . but looks to whether such evidence is reasonably reliable and probative.").

Also, while a respondent need not intend to make a claim in order to be held liable, a showing of intent to make a particular claim is "powerful evidence that the alleged claim in fact was conveyed to consumers." *Telebrands*, 140 F.T.C. at 304; *see also POM Wonderful*, 2013 WL 268926, at *29 (statements by respondents that were never conveyed to consumers showed an intent to convey particular types of claims, which supported the Commission's interpretation of respondents' ads); *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").

2. ECM's Unqualified "Biodegradability" Representation

First, we consider Complaint Counsel's allegation that the representation that ECM Plastics are "biodegradable" conveys to reasonable consumers the claim that ECM Plastics "will

completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal." Comp. ¶ 9.A.

From the time that ECM first began marketing the ECM Additive in the late 1990s until about 2009, ECM told its customers that the ECM Additive would render conventional plastics "biodegradable" without reference to any specific time frame.[13] CCX-818 (Sinclair Dep.) at 75-78. Also, finished products made with ECM Plastics purchased by end-users have included claims – that originated with ECM – that the products were "biodegradable" without reference to time, including the "ECM Biodegradable" tree logo. IDF 285.

ECM does not dispute that it has expressly represented that ECM Plastics are "biodegradable," "biodegradable in a landfill," and "fully biodegrade," and that tests prove these assertions. Rather, the issue is whether a significant minority of reasonable consumers would likely interpret those representations to imply biodegradation "within a reasonably short period of time."

The ALJ interpreted "reasonably short period of time" to mean "within one year," *see* ID 180-81 & n.23, and found that the marketing materials and extrinsic evidence failed to establish an "implied one year rate claim." ID 182.

At the outset, we reject ECM's argument that the only implied claim properly at issue is a claim that ECM Plastics fully biodegrade in landfills within one year. *See* RAnsB 13-14. The Complaint reads more broadly: rather than stating a specific number of years, it alleges that ECM has claimed that ECM Plastics will completely break down into elements found in nature "within a reasonably short period of time" after customary

[13] To the extent that over a prolonged course of dealing, any ECM customers were exposed to both an earlier unqualified biodegradability claim and a later specific claim of biodegradation within nine months to five years, we conclude that the net impression conveyed to such customers would be the more specific claim communicating the time frame of five years or less. *See Deception Statement*, 103 F.T.C. at 179 ("the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond.").

disposal. Throughout the trial, Complaint Counsel identified a range from one to five years as the "reasonably short period of time" at issue. In their Pre-Trial Brief, Complaint Counsel asserted that ECM had impliedly claimed that "(1) ECM Plastics will completely biodegrade; (2) after customary disposal (*i.e.*, in a landfill); (3) in a period close to one year, or at least within 5 years." *Id*. at 21; *see also id*. at 40 (stating that ECM's implied claims – "that the ECM additive would make plastic biodegrade in a reasonably short period of time (*e.g.*, less than a year, or at least 5 years) after customary disposal (*i.e.*, in a landfill) – are likewise presumptively material"). Following trial, Complaint Counsel defined ECM's implied claims in the same terms: complete biodegradation in a landfill "in a period close to one year, or at least within 5 years." Complaint Counsel's Amended Post-Trial Brief 28. While Complaint Counsel focused their arguments on biodegradation within one year, they also repeatedly presented evidence using five years as the applicable benchmark. *See id*. at 31 n.27, 41 n.35, 48 n.50, 50 n.53. Given these facts, ECM was on notice that an implied claim of biodegradation within five years was at issue, and its contention that "[h]aving not presented the alleged 'five years or less' implied claim in its Complaint or at trial, Complaint Counsel are foreclosed from doing so on appeal," RAnsB 13, is unpersuasive.[14]

Further, through a facial analysis of the advertising in question, we reject ECM's argument that the word "biodegradable" means, in the context of consumer advertising, *only* that the product is "intrinsically" biodegradable, with no time element. Such an interpretation would render the term meaningless. This is because nearly all substances, including

[14] In her partial dissent, Commissioner Ohlhausen argues that we have "revised" Complaint Counsel's position by concluding that ECM impliedly claimed plastics with the ECM additive would biodegrade within five years. As support for her contention, she cites in particular Complaint Counsel's statement at oral argument confirming that their principal argument was a claim of one year. Partial Dissent at 11 n.53. But, as Commissioner Ohlhausen herself acknowledges, Complaint Counsel explained in the very next sentence that they were also pressing a claim of five years as a fallback position, as they had during trial. Parties assert alternative positions all the time in litigation. There is nothing revisionist in our concluding that at least one of Complaint Counsel's two alternative positions is amply supported by the evidence.

conventional plastics, will biodegrade if given enough time – even if that time period might be thousands or millions of years. Complaint Counsel's landfill and polymer engineering experts, Drs. Tolaymat and McCarthy, as well as ECM's own scientific expert, Dr. Sahu, have acknowledged this. *See* CCX-891 at 7 and 11, n.4 (conventional plastics will take thousands of years to biodegrade and "[o]ver time, all things will likely biodegrade"); RX-855 at 8, n.3 (Dr. Sahu estimating "conservatively (*i.e.*, on the low side) that the general time period for complete degradation of conventional plastics in the environment is, say, 1000 years," and noting agreement with Dr. Tolaymat's estimate that it could be "centuries, eons").

Even if scientific understanding regards biodegradation as a process and does not incorporate any specific time frame, this tells us nothing about *consumers' understanding*, which is the focus of our inquiry. *See, e.g., Thompson Med.Co.*, 114 F.T.C. at 809 n.33, n.35 (noting that "scientific and popular understandings are known to vary on occasion," and that "[d]efinitions are less reliable than survey research as an indicator of how consumers understand advertisements because they can only provide the meanings generally used for words, rather than the specific meaning of the words in a particular context").

ECM's contention that consumers interpret biodegradability claims solely in terms of a process, without inferring a rate, in effect means that consumers view plastic labeled "biodegradable" no differently than any other plastic, *i.e.*, that they ascribe no meaning whatsoever to the word "biodegradable." Such an interpretation is not plausible on its face. We find that the word "biodegradable" as used by ECM conveys some time element. But ECM's proffered interpretation – that biodegradation is understood merely as a process without any reference to time – is unconvincing.

Turning now to the issue of the specific rate of biodegradation that is implied by an unqualified "biodegradable" claim, we agree with the ALJ that such representations in ECM's marketing materials, including its tree logo, cannot reasonably be read to convey the alleged specific implied rate claim based on a facial analysis alone. However, for the reasons discussed below, we find that the extrinsic evidence in the record establishes that

reasonable consumers expect that plastic products labeled "biodegradable" will decompose within a reasonably short period of time (*i.e.*, within five years), and would be misled if a plastic product labeled "biodegradable" did not do so.

First, we briefly consider evidence of ECM's intent to convey a rate claim when using the term "biodegradable." Then we turn to the surveys conducted to explore the time period conveyed when consumers interpret the term "biodegradable." The central question is whether reasonable consumers would likely infer from the term "biodegradable" that a plastic product will not only eventually break down or decompose, but also that it will do so in a reasonably short period of time.

As discussed below, we find that the evidence indicates that ECM intended its unqualified biodegradability claim to convey a reasonably short period of time for ECM Plastics to biodegrade. Moreover, we find that the Frederick and Stewart consumer surveys are consistent and demonstrate that reasonable consumers would likely infer that message. The ALJ erred in his analysis of that key evidence. Accordingly, we find that Complaint Counsel have shown by a preponderance of the evidence that ECM made the implied claim that ECM Plastics will completely break down in landfills within a reasonably short period of time, *i.e.*, within five years.

a. ECM Intended that "Biodegradable" Imply a Rate

As set forth in Section I above, the core attribute of the ECM Additive was purportedly to speed up the biodegradation process of plastic products. ECM's customers were interested in just how fast their products could degrade if they added the ECM Additive, which was an important factor in determining whether to purchase it. ID 288-89; IDF 1502. ECM's intent to convey a reasonably short time period is evident in its customer communications. ECM asked its customers to sign a Certificate of Assurance that they would always incorporate ECM Additive in an amount representing at least one percent of plastic weight for the very reason that "ECM's reputation can be materially and, perhaps, irreparably damaged when products claiming to use ECM MasterBatch Pellets fail to biodegrade with[in] a reasonable

period of time." CCX-826. Also, Mr. Sinclair testified that he would tell customers to bury a stick or small piece of wood (*e.g.*, a tongue depressor) alongside plastic treated with the ECM Additive, and "by the time that stick or tongue depressor, or whatever the case may be, biodegrades, you should expect the plastic to biodegrade as well…." CCX 818 (Sinclair Dep.) at 70. Most importantly, ECM knew that its direct purchasers wanted this information so that they could assure their downstream customers that the biodegradation rate was reasonably short and that those manufacturers and retailers could comfortably label their end use products as "biodegradable." *See, e.g.*, IDF 280-81, 299, 1502-03. This evidence demonstrates that ECM intended the term "biodegradable" to convey a reasonably short time element.

b. Dr. Frederick's Google Survey

Based on our *de novo* review of all four consumer surveys in the record, we find Dr. Frederick's survey the most informative on the key issue of the impact of labeling a plastic article "biodegradable" on reasonable consumer expectations regarding time frames for biodegradation.

Dr. Frederick's survey is the only one introduced in this case that is experimental.[15] As discussed below, Dr. Frederick's survey establishes, among other things, that affixing a "biodegradable" label on a plastic product significantly increases the percentage of consumers who infer rapid decomposition of the

[15] As Dr. Frederick explains, "[o]bservational research measures but does not manipulate variables." CCSuppB, Frederick Dec. at 3. By contrast, experimental research manipulates as well as measures variables by asking "test" and "control" questions to determine what factor or factors affect the issue being addressed. *Id.* at 3-4. While observational (also referred to as "descriptive") studies are intended to measure certain aspects of survey respondents' beliefs or opinions about a given topic (in this case, biodegradability and, in particular, biodegradability rates), an experimental study is designed to explore cause and effect. *Id.* at 4. Dr. Stewart's survey, for example, was an observational study. It was intended to measure various aspects of respondents' beliefs about biodegradability, but all respondents received the same version of the survey, answered the same questions, and no variables were manipulated. By contrast, Dr. Frederick's Google Survey functions both as an observational and experimental survey.

package and provides evidence that a majority of consumers expect biodegradation to occur within five years.

Dr. Frederick used Google Consumer Surveys ("Google Surveys") to collect almost 29,000 responses for his study. Google Surveys is a relatively new, web-based research tool introduced by Google in about 2012. In a Google Survey, an internet user encounters a "pop-up" survey question when attempting to access desired content on a website; the user is blocked from access to the desired content unless he or she answers the survey question or pays for access to the desired content without answering. IDF 357, 359. Each consumer who participated in the survey was asked only a single question.

Dr. Frederick's survey consisted of approximately 60 questions. *See* CCX-860, App. A at 27-45. The first set of questions (lA through 1K) asked in various ways how much time the respondent thought it would take for a generic biodegradable product or a generic product labeled "biodegradable" to decompose. *Id.*, App. A at 27-28. A related series of questions (2A-2E) asked in various ways how long such products *should* take to decompose before the respondent would feel misled. *Id.*, App. A at 29. The responses to those questions showed that between 57% and 91% of the respondents who provided answers that included both a number and specific unit of time believe that biodegradation will occur within 5 years.[16] *Id.*, App. A at 27-28. They also suggest that, if asked the amount of time a package labeled biodegradable *should* take to biodegrade, consumers respond with even faster biodegradation rates. *See id.*, App. A at 29; CCSuppB, Frederick Dec. at 6.

A second set of questions focused specifically on *plastic* products, and it is the answers to those questions that are especially pertinent here. This portion of the survey included control questions. Question 3L asked survey respondents "If a plastic package is NOT labeled "biodegradable," how long will it take to decompose?" Similarly, without reference to

[16] As discussed further below, Dr. Frederick employed a coding methodology that classified survey responses into time categories for analysis. The survey results referenced in this section reflect the percentages of all responses to a particular question that included both a number and a temporal unit.

biodegradability, Questions 3M and 3N asked how long it takes a plastic package or a plastic water bottle, respectively, to decompose. CCX-860, App. A at 33. Questions 3A to 3K, on the other hand, asked in various ways how long respondents believed it would take for a plastic water bottle or other type of plastic package that was labeled "biodegradable" to decompose. *Id.*, App. A at 30-33. Some of these latter questions presented photoshopped images of various types of "biodegradable" logos and asked "If you saw this label on a plastic water bottle, how long would it take to decompose?" *See id.*, Questions 3D-3G, App. A at 30-31. By contrast, other questions presented images of the "ECM biodegradable" tree logo on a plastic container (Questions 3H and 3J) and on a plastic bag (Questions 3I and 3K) (as the test questions). A separate set of questions presented an image of the identical plastic container (Question 3O) and plastic bag (Question 3P) without the ECM logo as controls. Again, the respondents were asked how long they thought it would take for each of the plastic products to decompose.

A significant percentage of respondents (40-76%) expected plastic products that are labeled "biodegradable" to decompose within five years. *See id.*, Questions 3A-3K, App. A at 30-33.[17] Between 77% and 85% reported that they would feel misled if a plastic product labeled "biodegradable" did not biodegrade in 5 years or less. *See id.*, Questions 4B & 4C, App. A at 35.

Most importantly, Dr. Frederick's survey shows that labeling a plastic product "biodegradable" significantly *increased* the percentage of respondents who inferred decomposition of the plastic product within five years. In particular:

- For the plastic "Tupperware" container, the difference between the container bearing the "ECM Biodegradable" tree logo and the one

[17] As one would expect, the survey respondents provided somewhat longer biodegradation times for biodegradable *plastic* products than for biodegradable products whose composition was unspecified. *See* CCSuppB, Frederick Dec. at 6 (comparing the results for Questions 1A & 3C and 1D & 3B).

without was 35% (56% versus 21%, comparing responses to Questions 3J and 3O);[18]

- For the plastic bag, the difference between the bag bearing the "ECM Biodegradable" tree logo and the one without was 32% (57% versus 25%, comparing responses to Questions 3K and 3P);

- For the plastic water bottle, the difference between the bottles bearing a "biodegradable" logo and one without ranged from 49% to 52% (comparing responses to Question 3N to responses to Questions 3D and 3E);[19] and

- For a plastic package, the difference between a package labeled "biodegradable" and one not labeled "biodegradable" was 42% (64% versus 22%, comparing responses to Question 3C and 3M).

Frederick CCSuppB, Frederick Dec. at 7-9.[20] Dr. Frederick concluded from these results that "[b]ecause the distribution of

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[18] The comparisons in the text make use of the responses to Questions 3J and 3K, rather than 3H and 3I. The questions are identical except that Questions 3J and 3K clarify that the depicted logo says "ECM biodegradable." Dr. Frederick explains that he included that language in Questions 3J and 3K because the small font for the word "biodegradable" was not legible on many computer screens, and he wanted to help ensure that the variable he intended to manipulate (ECM's "biodegradable" claim), was, in fact, taken into consideration by survey respondents. CCSuppB, Frederick Dec. at 7 n.5; Frederick, Tr. 1151, 1154. Although ECM argues that Questions 3J and 3K are therefore biased and leading, and the results unreliable, we understand Dr. Frederick's concern with the likely illegibility of the key "biodegradable" variable in Questions 3H and 3I and do not find the clarification leading or otherwise biased as ECM contends.

[19] The percentages are 70% for Question 3D, 67% for Question 3E, and 18% for Question 3N.

[20] Indeed, Dr. Frederick's survey indicates that a "biodegradable" label on a plastic product significantly increased the percentage of respondents who inferred decomposition of the plastic product within one year; the difference was 18% for the Tupperware, 25% for the plastic bag, 34-41% for a plastic

beliefs regarding products with biodegradable claims differs markedly from those lacking such claims," "the biodegradable claim is *causing* that difference." *Id.* at 10.

The interpretation of the word "biodegradable" on a plastic product as implying a biodegradation time within five years is reasonable. It makes sense that consumers read some time period into the word "biodegradable," because otherwise the term ceases to have any significance. In this context, the finding of an implied time period of five years is not "outlandish" or indicative that the respondents are unreasonable outliers. *See Deception Statement*, 103 F.T.C. at 178, citing *Kirchner*, 63 F.T.C. at 1290.[21] Moreover, while we discuss the demographics of the respondents to Dr. Frederick's survey in further detail below, the respondents certainly "fall within the range of persons who would be average or ordinary members of the adult population and, as such, are reasonable consumers." *Thompson Med. Co.*, 104 F.T.C. at 810.

We recognize that many of the respondents to Dr. Frederick's survey may appear to hold incorrect underlying beliefs about the biodegradability of conventional plastic items. *See, e.g.*, CCX-860, Questions 3O & 3P, App. A at 34 (indicating that 21% of respondents stated that a plastic "Tupperware" container would degrade in five years or less, and 25% of respondents stated that a plastic bag would degrade in five years or less, when neither item was marked as "biodegradable." However, the fact that the survey respondents are confused or mistaken about biodegradation does not make them unreasonable and does not mean that they are acting unreasonably.[22] Biodegradation claims

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water bottle, and 30% for a plastic package. CCSuppB, Frederick Dec. at 7-9; CCX-860, App A at 30, 33

[21] Accordingly, we find no substance to Commissioner Ohlhausen's varying suggestions, Partial Dissent at 8-10 & n.46, that we have not considered whether the interpretation of the label "biodegradable" on a plastic product to imply biodegradation within five years is reasonable, or that we have based consideration of that issue solely on the finding that a significant minority of consumers hold that interpretation.

[22] One of the Commission's major areas of advertising enforcement activity relates to weight loss products, and despite the scientific consensus that successful weight-loss efforts require changes to diet and/or exercise, consumers often will believe implausible weight-loss claims. However, the

– like most environmental benefit claims in general – are credence claims; consumers are unable to verify for themselves whether they are true. It is not unreasonable for consumers to have mistaken ideas about a biological process that they almost certainly have never directly observed.

Therefore, Dr. Frederick's survey demonstrates that attaching a "biodegradable" label to a plastic product leads reasonable consumers to believe that the product will biodegrade within five years.

ECM, however, argues that the methodology of Dr. Frederick's survey was seriously flawed, and that the ALJ correctly decided it was entitled to little if any evidentiary weight. It argues that the survey does not qualify as experimental, and that the only reliable survey in the record is the observational survey of its own expert, Dr. Stewart. RSuppB 1-6. In particular, ECM accuses Dr. Frederick of using a less expensive Google Survey only because he could then pocket more of his fixed fee. RAnsB 26. It argues that Dr. Frederick's survey methodology and design are fatally flawed because Dr. Frederick failed to define a relevant population or use an appropriate sampling methodology, failed to ask appropriate questions, and failed to code and analyze the data correctly. RAnsB 25-32. Finally, ECM contends that the Google Survey "suffers from disinterest bias." RAnsB 32-34.

Commission still finds deception and does not consider such consumers unreasonable because they believe an advertiser's claims – against the weight of science – that a miracle pill will enable them to lose weight effortlessly. *See, e.g., FTC v. 7734956 Canada Inc.*, No. 1:14-cv-02267-CCB (D. Md. Jul. 16, 2014) (complaint) (challenging, *inter alia*, claims that a dietary supplement could cause a minimum of 20 pounds of weight loss per week, without the need to diet or exercise); *Wacoal America, Inc.*, FTC Docket No. C-4496 (Nov. 10, 2014) (complaint) (challenging claims that undergarments made with fabric containing microcapsules of caffeine eliminate cellulite, destroy fat cells, and cause substantial slimming); *see also Deception Statement*, 103 F.T.C. at 179 n.30 (to some consumers "the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster.") (quoting *Porter v. Dietsch*, 90 F.T.C. 770, 864-65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert denied*, 445 U.S. 950 (1980)).

ECM's arguments are unpersuasive. First, we find no basis for impugning Dr. Frederick's motives in using a Google Survey rather than a more traditional approach, such as Dr. Stewart's landline telephone survey. While the record shows that Dr. Frederick chose Google Surveys in part because of its lower cost, *see, e.g*., Frederick, Tr. 1086, he explained that Google Surveys has substantive benefits that contributed to his selection of the methodology and that he has used Google Surveys in many other research projects. CCX-860 at 13; Frederick, Tr. 1104. For example, Google Surveys enable the use of substantially larger sample sizes,[23] reaching a broader spectrum of American consumers than surveys limited to landline telephone users. *See id*.; CCX-865 (Frederick Rebuttal Report) at 4; Frederick, Tr. 1087 (testifying that landline telephone surveys such as Dr. Stewart's are skewed toward older Americans). Also, with a Google Survey, a researcher can present visual images of a product with and without the challenged advertising and more nearly replicate the experience of a consumer in encountering a "biodegradable" claim. Frederick, Tr. 1091-92.

Second, we disagree with ECM's contentions that Dr. Frederick failed to define the relevant population and that the demographics of his sample are "unknowable." RAnsB 27-29. Dr. Frederick appropriately defined the relevant population as "American consumers," Frederick, Tr. 1066-67, and further explained why the data collected through Google Surveys is "highly representative both demographically and psychographically" of that population. Frederick, Tr. 1410; *see also id*. at 1067-75. As Dr. Frederick explained, Google Surveys pays approximately 340 mainstream Internet content providers to present survey questions to Internet users. Google Surveys then uses dynamic imputation algorithms to infer the demographic representativeness of each survey sample based on five data

[23] As mentioned above, Dr. Frederick's survey included approximately 60 questions and collected a total of nearly 29,000 responses. *See, e.g.*, CCX-860 at 12; Frederick, Tr. 1059. However, because each respondent was asked only one question, the sample size for any particular question in the survey ranged from 72 to 1,704. *See* CCX-860 at 12. For each of Questions 3A-3P discussed above (which all related to the biodegradation of plastic containers, bags, water bottles, and packages), the sample size ranged between 200 and 268. *See id.*, App. A at 30-34.

points: IP addresses provide information about geographic region and urban density, and browsing history provides information about gender, age, and income. Google Surveys reports this demographic information, along with the survey results, to the researcher. *See* CCX 865 at 3-4; Frederick, Tr. 1076-77; CCX-863 (spreadsheet showing demographic data for Dr. Frederick's survey respondents).

ECM argues that Google's inferred demographics "can be wrong" and that screening questions are essential to ensure a survey sample is representative. RAnsB 27-28. For example, ECM says, if the respondent has disabled the "cookies" on his or her computer, Google cannot use the respondent's browsing history to infer gender or age. RAnsB 28. Likewise, Google's inferences about gender, age, or income could be incorrect if one family member used another's computer in responding to the survey. *Id.*

Dr. Frederick acknowledges that Google's inferred demographics may not always be accurate or complete as to individual respondents. As he observes, however, even if there are some imperfections as to individual respondents, those imperfections would not compromise the representativeness of the total pool of 29,000 respondents as a whole.[24] *See* CCX-865 at 4 ("Based on my understanding of how [Google Surveys] operates, I can conclude that it assesses demographics in the aggregate with accuracy"); *id*. at 3-4 (although Google Surveys "cannot ascertain every demographic characteristic of every respondent, every time, with perfect accuracy, any moderately large sample is highly likely to be demographically representative"); Frederick, Tr. 1079; *see also* Stewart, Tr. 2745 (opining as to his own survey that individual imperfections do not matter if the overall sample is representative). In addition, Dr. Frederick testified that he had confidence in Google's sampling approach in part because various studies – including one by the highly-regarded Pew Research

[24] While the sample size for any particular question in the survey was a subset of these 29,000 respondents, ranging in number from 72 to 1,704, *see supra* note 23, if the total pool of respondents is representative of the general population, a randomly selected and smaller but still moderately-sized subset of respondents from that pool who responded to a particular question is also likely to be representative. *See* Frederick, Tr. 1360-61; CCX-865 at 4.

Center – indicate that the Google sampling approach compares favorably to other survey approaches, including internet panels. Frederick, Tr. 1068-76.[25]

We likewise are not persuaded that screening questions are "essential" for Dr. Frederick's survey as ECM maintains. At least when the population at issue is all American consumers rather than a particular subset, drawing a large sample through mainstream internet content providers and inferring demographics using Google's techniques is adequate. Indeed, as we discuss *infra*, Dr. Stewart's screening questions had significant problems of their own.

Third, ECM faults Dr. Frederick's survey for failing to ask appropriate questions. To begin with, ECM argues that his questions are leading – they "assume[ ] that the representation of 'biodegradable' communicates a biodegradation rate," thereby "injecting a bias" into the questions. RAnsB 29-30. To avoid this, ECM suggests, a proper question must be open-ended, *e.g.*, "What does the term biodegradable mean to you?" *See id.* at 29. But that merely asks the survey respondent to provide his or her definition of "biodegradable," and a definitional question is unlikely to elicit a response sufficiently focused to analyze or quantify a specific attribute. Asking about a specific attribute may be necessary to focus the answer, and if neutrally phrased, need not be deemed inappropriately leading. In this case, we find nothing biased in Dr. Frederick's questions asking about the respondents' views on how long it takes for plastic items to biodegrade. Indeed, this was the key question the survey was

[25] S*ee* CCX-874 (Pew study comparing the results of its own telephone survey of internet users with Google Survey respondents and finding little difference); CCX-872 (*New York Times* article concluding that Google Surveys outperformed established pollsters including CCN, Gallup, and Reuters in predicting the 2012 presidential election results); CCX-868 (Google-commissioned study showing that Google Surveys performed as well as or better than internet panel surveys and deviated only 4% from established benchmarks). The Pew Research study, for example, found that Google Surveys "achieved a representative sample of internet users on gender, age, race/ethnicity, marital status and home ownership when compared with internet users in Pew Research Center," CCX-874 at 5, and found a median difference of three percentage points in responses to 43 questions about a wide range of policy and political questions, CCX-874 at 2.

intended to address, and Dr. Frederick, by asking it in numerous different ways, sought to control for any bias from the manner in which a particular question was phrased.[26]

ECM further argues that Dr. Frederick's single-question design cannot provide reliable results and that multiple questions must be asked to sufficiently probe consumers' understanding of the term "biodegradable." We again disagree. The single-question design used by Dr. Frederick had multiple benefits. For instance, respondents' answers to questions were not influenced by the phrasing of earlier questions. *See* Stewart, Tr. 2689 (acknowledging that information conveyed to respondents earlier in a survey can affect their answers to later questions). Moreover, it allowed the survey to mimic the various ways "biodegradable" claims reach consumers by presenting, to random samples of the same population, visual images of different types of plastic products, some containing different biodegradable labels. *See* CCSuppB, Frederick Dec. at 4, 7. Furthermore, asking questions in varying ways provides greater confidence in the results. As Dr. Frederick explained, arriving at "the same result despite asking questions in different ways" is a good indication that the results are "robust." Frederick, Tr. 1061-62. In short, although multi-question, "funnel" designs (that progress from more general to more narrow questions on a topic) are often used in observational studies such as Dr. Stewart's, we find nothing inherently inferior in the single-question design used by Dr. Frederick.

Fourth, ECM faults Dr. Frederick's survey for "disinterest bias," suggesting that respondents might not have given serious consideration to the Google Survey questions because they wanted to access internet-based content, not answer a survey question. As evidence, ECM points to selected responses in Dr. Frederick's data base that it describes as nonsensical or obviously made in protest (*e.g.*, "go away"). RAnsB 33. However, as Dr.

[26] Dr. Frederick asked 12 open-ended questions, phrased in slightly different ways, about the respondents' expected time frames for biodegradation of plastic items. Although ECM suggests that these are "closed-ended" questions of the type we criticize in the APCO and Synovate surveys, discussed *infra*, they are not. Whereas the APCO and Synovate questions provided a limited set of options from which the respondents could select answers, Dr. Frederick's questions allowed respondents to state their own answers.

Frederick points out, the number of obviously disinterested protest responses in the Google Survey was *de minimis* – less than 1% of a 29,000 respondent sample (Frederick, Tr. 1123-24, 1136, 1138; CCX-865 at 5). Moreover, there is no reason to believe that "disinterest bias" is of any greater concern in a Google Survey than in a telephone survey, a mall intercept survey, or any of the other more traditional survey methods, some of which may be more invasive and require more time. Finally, Google itself takes steps to validate respondents' willingness to provide meaningful responses by asking questions with obvious answers and ensuring that those who respond incorrectly do not receive future Google Surveys. Frederick, Tr. 1099-1100. Thus, we find this criticism to be unpersuasive.

Finally, ECM faults Dr. Frederick's coding and analysis of the data collected by Google. In particular, it contends that Dr. Frederick used a "bright-line" coding rule that biased the results. That rule specified that, for questions asking for a numeric response, only responses with both a number and a unit of time (*e.g.*, one year) were to be coded.[27] ECM contends that this biased the results by excluding truthful answers such as "it depends" and "I don't know," on the one hand, and including nonsensical responses such as "one nanosecond" on the other. RAnsB 31. ECM accuses Dr. Frederick of using the rule to "force fit" the responses into preconceived time categories, and argues that this was tantamount to turning open-ended questions into closed-ended questions. RAnsB 32. ECM labels Dr. Frederick's coding methodology "particularly egregious" because it reduces the denominator of the ratios, "which has the effect of inflating the reported percentages." *Id*. It also contends that "the coding

[27] Dr. Frederick did not include several categories of responses in his calculation of time-frame percentages, namely: (i) numeric responses lacking a temporal unit (e.g., a response of "7"); (ii) responses containing a temporal unit, but no specification of quantity (*e.g.*, a response of "months" or "years"); (iii) responses indicating unwillingness to answer without further clarification (*e.g.*, "it depends"); (4) responses indicating unwillingness to respond because of uncertainty *(e.g.,* "I don't know"), and (5) "other responses" (including protest responses or responses designed to bypass the survey wall (*e.g.*, "asdf" or "blah")). CCX-865 at 6. Dr. Frederick and his assistants coded 21,453 of the responses (including the responses to the binary questions, which did not require a numeric response). CCX-860 at 12 n.7.

was invalid because it was performed by individuals who were not "blinded." *Id.*

We find none of these criticisms convincing. First, Dr. Frederick's "bright-line rule" was designed precisely to prevent the coding process from introducing bias through the coders' interpretation of responses that were vague or otherwise unclear.[28] *See, e.g.*, CCX-865 at 6; Frederick, Tr. 1131; CCSuppRB, Exh. A (Frederick Dec.) at 17. The bright line served to ensure that uniform rules were followed. Frederick, Tr. 1133. Although certain categories of responses were not included in his calculation of time-frame percentages for each question calling for a numerical response, Dr. Frederick reported both the coded numerical responses and the total number of uncoded responses. *See* CCX-860 at 12 n.7 & App. A. Additionally, he provided the raw data in an Excel spreadsheet. *See* CCX-863. This was both transparent and reasonable.

Second, ECM has provided no basis for believing that Dr. Frederick's omission of uncoded responses from his calculations significantly affected the results. Omitting the uncoded responses would only affect the results if the respondents whose answers were not coded as a group held different views on biodegradation times than the remainder of the population; however, there is no reason to believe that is the case here. *See* CCX-865 at 6; Frederick, Tr. 1123-28.

Moreover, ECM's contention that omitting responses from the denominator of the calculations was particularly "egregious," does not hold up under scrutiny. Indeed, even if *all* of the responses excluded by Dr. Frederick's coding rule were included in the denominator with no adjustment to the numerator – an unrealistic assumption that every uncertain, ambiguous, or unclear response should be counted as stating an expectation that biodegradation will take more than five years – the results still support Dr. Frederick's findings. The percentage of respondents who believe that a "biodegradable" plastic product biodegrades or decomposes within five years remains quite significant – ranging

[28] As is common in academic research, Dr. Frederick hired several research assistants to assist him in coding the responses.

from 30% to 65% in responses to Questions 3A through 3K.[29] For instance, after adding all the uncoded responses to the denominator, the percentage of survey respondents answering Question 3N, "How long would it take a plastic water bottle to decompose" with a response of less than or equal to five years is 13%; the percentages answering Questions 3D and 3E – asking the same question about plastic water bottles with different "biodegradable" labels – are 49% and 44%, respectively. The increase of 31-36% shows that the biodegradable label leads a significant minority of reasonable consumers to believe that the plastic bottle will biodegrade within five years, even after inclusion of the uncodeable responses in the document. Similarly, adding all uncoded responses to the denominators in the comparisons of plastic "Tupperware" containers and plastic bags with and without the "biodegradable" label shows that adding the label increases the percentage of those offering responses of less than five years by 28% and 20%, respectively.[30] In each case, adding the "biodegradable" label continues to lead a significant minority of reasonable consumers to believe that the plastic product will biodegrade within five years, even after inclusion of the uncodeable responses in the denominator.

Finally, ECM's criticism about Dr. Frederick and his coders not being "blinded" – meaning that at the time they were analyzing the survey responses, they were aware that the survey pertained to litigation brought by the FTC against ECM – is likewise unpersuasive. Of course, Dr. Frederick knew the source of funding for his survey; he had to, just as Dr. Stewart knew that ECM was the source of funding for his survey. However, ECM has cited no evidence even suggesting that the Google Survey

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[29] The number of responses of five years or less is calculated by multiplying the total number of coded responses by the percentage of coded responses that estimated periods of five years or less. The number of responses of five years or less can then be divided by a denominator consisting of the sum of coded and uncoded responses. Dr. Frederick's report provides all the necessary information. *See* CX-860 at 12 n.7.

[30] After adding in the uncoded responses, the percentages answering Questions 3O and 3J with responses of less or equal to five years are 16% and 44%, respectively; the percentages providing that response to Questions 3P and 3K are 21% and 41%, respectively.

coding – under the "bright-line rule" – was compromised as a result of not being "blinded."

In sum, ECM's criticisms of Dr. Frederick's Google survey are not well founded. The Google survey asked the key questions at issue of a large and representative sample of U.S. consumers; the questions were clear and not improperly leading; and the responses were coded and analyzed in an acceptable and transparent manner. Of the four surveys in the record, we find the Google Survey the most informative regarding the consumer takeaways from unqualified "biodegradable" claims, and we give it substantial weight.

Commissioner Ohlhausen agrees with the Commission's decision in this case except for one issue: how to interpret ECM's unqualified "biodegradable" claim. She opines in a separate statement that Dr. Frederick's survey does not offer sufficiently reliable extrinsic evidence to draw any conclusions about consumer interpretations of the word "biodegradable."[31] As noted above, consumer surveys and in particular experimental surveys are highly informative on questions of consumer interpretations, as surveys constitute "direct evidence of what consumers actually thought upon reading the advertisement in question," *Thompson Med. Co.*, 104 F.T.C. at 788-89. The methodological design of such research varies significantly and the Commission does not demand perfection, "but looks to whether such evidence is reasonably reliable and probative." *POM Wonderful*, 2013 WL 268926, at *45. For the reasons explained in detail above, we find that Dr. Frederick's experimental results showing the effect of the unqualified "biodegradable" claim are reasonably reliable and probative.

In her statement, Commissioner Ohlhausen questions the reliability of Dr. Frederick's survey based on an alleged disparity in consumer perception depending upon whether respondents who were shown a plastic product bearing an ECM biodegradable logo were presented with a question that specifically called out the

[31] Commissioner Ohlhausen's statement does not address the other extrinsic evidence supporting our finding about the unqualified claim, which is the evidence proving ECM's intent that the word "biodegradable" should convey a reasonably short rate of degradation. *See* Section III.A.2.a, *supra*.

content of that logo or not. Partial Dissent at 5-6. In fact, to us this disparity just confirms that the logos on the labels used for two particular questions were indeed illegible. The decision in *Thompson Medical* is instructive. There, the Commission found that consumer survey results from "unaided" recall questions were not persuasive in determining whether consumers thought Aspercreme contained aspirin, as they showed that only 2.9% to 5% thought it did. Yet, the responses to the "aided" recall questions showed that 22.2% believed the product contained aspirin compared to only 4.8% and 6.3% for two comparative products, which allowed the Commission to conclude with confidence that consumers thought the product contained aspirin based on respondent's ad. 104 F.T.C. at 805. In the case of Dr. Frederick's survey data, the only disparity in the responses that Commissioner Ohlhausen cites are those relating to the question pairings in which the label stating "biodegradable" is difficult to read. Five other question pairings show a consistently high differential, ranging from 32-52%.

Commissioner Ohlhausen also finds it problematic that the majority does not defer to the ALJ's findings regarding the relative credibility of opinions expressed by Drs. Frederick and Stewart.[32] She notes that, unlike the ALJ, the Commissioners have not observed "the manner and tone" of the experts' explanations and answers to questions. Partial Dissent at 3 (citing IDF 324; ID 188). The ALJ, however, does not suggest that the witnesses' manner or tone had any bearing on his findings. Rather, the ALJ's findings rest on his assessment of the reasoning, credibility, and persuasiveness of the experts' "opinions." IDF 324; ID 188. We are well situated to give *de novo* review to the experts' opposing opinions and to draw our own assessments thereof. *See generally*, *POM Wonderful*, 2013 WL 268926, at *45 n.23 (disagreeing with an ALJ's assessment that was not based on "observation of [the expert's] courtroom demeanor").

[32] We note that Commissioner Ohlhausen is herself willing to discount Dr. Stewart's survey findings, concluding that "[t]he consumer surveys all have significant methodological flaws." Partial Dissent at 3.

c. Dr. Stewart's Survey

ECM's expert, Dr. Stewart, conducted a telephone survey in connection with this litigation in the spring of 2014. IDF 498. This survey likewise shows that at least a significant minority of reasonable consumers believe that an item labeled "biodegradable" will decompose within five years. Dr. Stewart's survey is a traditional, "funnel" type, observational consumer survey.[33] In contrast to Dr. Frederick's Google Survey that included a total of 29,000 respondents,[34] Dr. Stewart included the responses of only 400 landline telephone users, who were selected based on seven screening questions. RX-856 at 21 (referencing RX856 Page 21), & App. B.[35]

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[33] Commissioner Ohlhausen argues that the Stewart study cannot shed light on how ECM's claims affected consumers' preexisting beliefs because it lacks an experimental control. Yet testing with open-ended responses is an appropriate methodology to understand consumer takeaway from an ad claim, which is the issue at hand. "There is nothing in Commission precedent that requires the use of a control ad for open-ended questions." *Stouffer Foods Corp.*, 118 F.T.C. at 808; *see also Telebrands*, 140 F.T.C. at 318 ("it is appropriate to consider the open-ended responses without netting out any controls").

[34] As explained above, the sample size for any given question in Dr. Frederick's survey was a subset of the 29,000 total pool of respondents, *see supra* note 23.

[35] Dr. Stewart defined the relevant population as "men and women over the age of 18 in the United States who reported that they had personally purchased any product in the past month that came in a plastic container or was made of plastic." RX-856 at 19-20. "In addition, respondents must have indicated that they have a general understanding of what the term 'biodegradable' means." *Id.* at 20; s*ee also id*. n.13 (explaining that Dr. Stewart "disqualified" 68 respondents because they had not purchased a plastic product within the last month, and 39 because they did not have an acceptable understanding of the term "biodegradable."). Dr. Stewart extols his respondents as being particularly "sophisticated" and criticizes Dr. Frederick for not including questions to screen for "knowledgeable" consumers. RSuppB, Exh. A (Stewart Dec.) ¶ 17. ("In contrast to the results of the APCO, Synovate, and Frederick surveys, my survey offers a picture of knowledgeable consumers with very sophisticated views of what biodegradation means."). We do not share Dr. Stewart's view. The relevant population is not limited to especially knowledgeable, "sophisticated" consumers; reasonable consumers who do not properly understand the biodegradation process – or who have not recently purchased a plastic product – may also be deceived by marketing materials, and we are concerned when that occurs. *See Deception Statement*, 103 F.T.C. at

The initial questions were general. Question 1 asked, "When you hear the term 'biodegradable' what does that mean to you?" RX-856 at 23 & App. B (RX-847). Question 2 asked, "Is the fact that a product or package is biodegradable important to you?" *Id.* And Question 3 asked, "Is the fact that a product is biodegradable helpful to the environment or not?" *Id.* at 24. The results were as follows:

- 82% of the respondents reported that they interpreted "biodegradable" to mean something about disintegration, decomposition or breakdown;

- 71% reported that the biodegradability of a product or package is important to them; and

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177 n.20 ("An interpretation may be reasonable even though it is not shared . . . by particularly sophisticated consumers."). Accordingly, it is Dr. Stewart's conception of the relevant population – not that of Dr. Frederick – that we find problematic.

For the same reason, we reject ECM's argument that those respondents who reported low time frames for biodegradation are simply uninformed and therefore "unreasonable," and hence cannot be counted toward the significant minority of reasonable consumers who believe that products labeled "biodegradable" biodegrade within a reasonably short period of time. *See, e.g.*, RX-856 at 11 ("This is just what one might expect when consumers are asked factual questions about which they have little or no knowledge"); RSuppB, Exh. A (Stewart Dec.) at ¶ 21 (attributing low time frames reported by consumers to their non-scientific beliefs as to fast biodegradation); RSuppB 13 & n.6 (arguing that "Complaint Counsel has not shown that at least a significant minority of *reasonable* consumers interpret the claim 'biodegradable' to mean complete decomposition into elements found in nature within one year" because "believing that a plastic product will biodegrade completely within one year without qualification is unreasonable because it is scientifically invalid") (emphasis original). This is not a case in which an "outlandish" belief is held by "a few misguided souls," as ECM suggests. *See* RAnsB 16 (quoting *Kirchner*, 63 F.T.C. 1282, at *6.). Rather, as shown below, Dr. Stewart's own study likewise establishes that at least a significant minority of his "sophisticated" consumers believe that a product denoted "biodegradable" will biodegrade within a reasonably short period of time, *i.e.*, within five years.

- 95% reported their belief that the biodegradability of a package is helpful to the environment.

RX-856 at 27 & App. D (RX-846 at 8-9, 14-15).

More pertinent to the issue here, Question 4 asked, "If something is biodegradable, how long do you think it would take for it to decompose or decay?" Those who answered this question were then asked two subquestions. Subquestion 4a asked for a yes/no response, "Do you think there are differences in the amount of time it takes for different types of products to biodegrade, decompose or decay?" Those who answered "yes" were then asked Question 4b, "What differences exist in the time for different types of products to biodegrade, decompose or decay?" RX-856 at 24 & App. B (RX-847).

Although the form of Question 4 – *i.e.*, referring to "something" rather than to plastic in particular – is more vague and less worthy of weight than Dr. Frederick's many questions focused on plastic products, it is still noteworthy that 64% of those who provided answers to Question 4 with both a number and a unit of time reported their belief that biodegradation would occur in five years or less. CCSuppB, Frederick Dec. at 14.[36] Even if all responses are taken into account (including those that did not include a specific time frame), 23% answered with time frames of five years or less, by Dr. Stewart's own calculations. *See* RX-856 at 28.[37] We find that the respondents to Dr. Stewart's survey are at least "average or ordinary members of the adult population" and, as with the consumers that responded to

[36] A table prepared by Dr. Stewart suggests a similar result. *See* RX-846 at 20-21. It reports 119 responses in categories falling in the interval of five years or less. It reports 64 responses in categories exceeding five years, including one category designated "Forever/takes a long time/100 years." Even if we were to treat all of the latter 64 responses as providing both a number and a unit, 65% (119 of 183) of the responses named a period of five years or less. Our analysis accepts the smaller figure cited in the text.

[37] Summing the nine entries in Dr. Stewart's table for periods of five years or less yields 119 responses, or 30% of the total sample size. RX-846 at 20-21. Again, to be conservative, we rely only on the smaller figure cited in the text and validated by Dr. Stewart.

Dr. Frederick's survey, in the absence of any evidence to the contrary we conclude that they are "reasonable." *See Thompson Med. Co.*, 104 F.T.C. at 810. Thus, Dr. Stewart's own calculations drawn from his own survey, which the ALJ praised for its adherence to traditional survey methods, likewise show that at least a significant minority of reasonable consumers believe that a product denoted "biodegradable" will decompose within a reasonably short period of time.

ECM contends that such reliance on Question 4 data is improper, and urges us to focus instead on responses to the first question and to Subquestions 4(a) and (b). *See* RAnsB 20; RSuppB 10-11. It argues that the answers to Question 1 show that consumers do not define "biodegradable" to encompass any message as to the rate of biodegradation – in particular, that only 3% of the respondents answered Question 1 with a specific time frame. RSuppB 11. It further argues that the responses to Subquestions 4(a) and (b) show that consumers do not understand "biodegradable" to mean any "uniform," "set," or "fixed" time frame for biodegradation, but rather realize that the time frames for biodegradation are highly variable depending on what the item is and how it is disposed of. *See, e.g.*, RAnsB 14, 20; RSuppB 1-2, 13. From this ECM argues that Complaint Counsel have not met their burden of showing that consumers have any "fixed" rate of biodegradation in mind when they see a product labeled "biodegradable," and that the implied rate claim therefore fails. *See, e.g.*, RSuppB 13.

We disagree. First, ECM's assertion that only 3% of the respondents to Question 1 explicitly mentioned a "time" or "rate" is incorrect. In addition to respondents who provided a specific time period (*e.g.*, "a year or two") or comparative rate (*e.g.*, "faster than a normal plastic product") in their answers, we note that 18% of respondents specifically used the word "time" in their response to this question, with seven respondents providing an answer that referenced a "reasonable" amount or period of time, three referencing a "relatively short" amount of time, and another ten referencing a "certain" amount or period of time. *See* RX-606. We think it is clear that these particular responses all incorporated the concepts of both time and rate. The vast majority of the other references to "time" expressed the belief that biodegradation occurs "over time," suggesting that respondents

believe there is a time element to the process of biodegradation. *Accord* RX-605 at 7 (stating that 22% of responses to Question 1 referenced disintegration, breaking down, rotting, or decomposing "over time"). Another 7% of respondents stated that biodegradable items will "eventually" decompose or break down, suggesting that there is an outer boundary to the expected time period relevant to biodegradation. *Id*.

Second, we do not find it at all surprising that most of the respondents did not volunteer a specific time frame when asked a general question, like Question 1, about what biodegradability means to them. To illustrate this point, as noted above, when asked directly in Question 3 whether a biodegradable product is helpful to the environment, 95% of respondents answered "yes." Yet in response to Question 1 asking what the term "biodegradable" means to them, a far lower percentage provided an answer referencing any sort of environmental benefit or impact. *See* RX-846 at 8 (reporting that 26% of respondents to Question 3 gave an answer referencing safety, the environment, not harming the earth, or pollution); RX-856 at 27, 28 & App. E (RX-606). Following ECM's logic, we would be forced to conclude that if a consumer did not reference an environmental benefit in response to Question 1, it would be improper to conclude that the term "biodegradable" implied an environmental benefit, regardless of the consumer's answer to Question 3.

As Dr. Frederick persuasively points out, ECM's argument is analogous to claiming that "only 7% of people have an expectation of how long it would take an ice cube to melt if only 7% happened to use the word 'time' or 'rate' when asked, 'When you hear the term melt, what does that mean to you?'" CCSuppRB, Frederick Dec. at 8. Question 1 inquired about biodegradation's meaning, not its specific attributes, and the fact that survey respondents did not volunteer answers about a specific time frame does not mean that they do not have some idea of how long it takes for a product labeled biodegradable to biodegrade, in contrast to an unlabeled version of the same product. Rather, a more focused question is required to elicit this information. In Dr. Stewart's survey, that is Question 4.

ECM also places great weight on the response to Subquestion 4a, RX-846 at 21, repeatedly highlighting the fact that 98% of

survey respondents answered "yes" to the subquestion "Do you think there are differences in the amount of time it takes for different types of products to biodegrade, decompose or decay?"[38] ECM's reliance on this result is misplaced.

The result is hardly surprising: would we expect survey respondents to believe that banana peels, plastic bottles, and steel girders all biodegrade at the same rate? Moreover, the responses to Question 4 and Subquestion 4a are not inconsistent with the results of Dr. Frederick's Google Survey. There is no contradiction between, on the one hand, consumers in Dr. Stewart's study stating that the length of time an unspecified "something" takes to biodegrade "depends," and believing that different products might take different amounts of time to degrade, and, on the other hand, respondents in Dr. Fredrick's Google Survey providing a specific time period for degradation *when presented with a question about a specific object* (*e.g.*, a plastic bottle, container, or bag).

Moreover, the responses to Subquestion 4a are no basis for ignoring responses to other questions in the Stewart survey – such as Question 4, which conveys the perception of many consumers that biodegradable products, in general, will biodegrade within five years – or responses to questions in other surveys that probed consumers' perceptions of biodegradation rates specific to plastic products. Contrary to ECM's contentions (*see, e.g.*, RSuppB 6), Complaint Counsel need not show that there is one "set," "fixed" or "uniform" time period in which consumers believe that all types of products will biodegrade. Rather, they must show that consumers acting reasonably would likely infer from ECM's claim of biodegradability that ECM products will biodegrade within a reasonably short period of time. As discussed above, Dr. Frederick's survey, which is experimental as well as observational, provides the clearest and most comprehensive

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[38] *See, e.g.*, RSuppB 11; Tr. Oral Arg. 10, 15 (ECM Counsel stating, "Then when you add in the fact that 98 percent – that's the extraordinary figure 98 percent. Rarely do you ever see that in a survey – 98 percent recognized variance in the rate based on the environment and based on the type of plastic . . . ."). Despite ECM Counsel's statement, the 98 percent figure was a response to Dr. Stewart's question about "different types of products," not different types of plastic.

insights into that key issue. However, Dr. Stewart's observational survey also supports Complaint Counsel's position that at least a significant minority of reasonable consumers believe that a product labeled "biodegradable" will decompose within a reasonably short period of time, and we also take that evidence into consideration in our analysis.

d. The APCO Survey

Complaint Counsel also introduced the results of a 2006 telephone survey commissioned by the American Plastics Council ("APCO"). Among other things, the survey asked approximately 1,000 respondents about their perception of the term "biodegradable." IDF 455. They responded as follows to Question 4:

> If a package is labeled "biodegradable," what should be the maximum amount of time that it should take for that package to decompose?
>
> | | |
> |---|---|
> | 1 month or less | 19% |
> | 3 months | 7% |
> | 6 months | 8% |
> | 1 year | 26% |
> | 2 to 4 years | 5% |
> | Five years or more | 16% |
> | Unsure | 17% |

CCX-860 App. at 53. Thus, 65% of the respondents indicated that the maximum amount of time a package labeled "biodegradable" should take to decompose was four years or less.

The ALJ, however, found Question 4 to be seriously flawed, primarily because it was closed-ended and offered choices that "predisposed people to select a short time frame rather than a

longer time frame." ID 204-05.[39] He also found that the APCO survey failed to address "the material factual issue in this case" which, in his view, "is what message was implied by the term "biodegradable," including "*whether* the term 'biodegradable' communicates to the consumer *any* message as to a rate for complete biodegradation." ID 204. ECM urges us to conclude that the APCO survey is invalid on these grounds. RAnsB 24-25. In addition, the ALJ noted that the use of the word "should" could be interpreted by survey respondents as referring to what would be desirable as opposed how long decomposition would actually take. ID 206.

We recognize that APCO Question 4 is a closed-ended question in which most of the available choices are clustered around a year or less, and that this may have biased the responses toward lower time frames and led to more homogeneity in the responses than would otherwise have been the case. Indeed, we have previously identified this as a flaw in the APCO survey.[40] And we also recognize that use of the word "should" could be construed by some survey respondents as asking what would be desirable, although we think a reasonable reading in the context of the question as a whole would be that it is asking for the maximum amount of time consistent with the label biodegradable – another way of asking how long it takes a biodegradable package to biodegrade.[41]

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[39] Both Dr. Stewart and Dr. Frederick likewise agreed that this was a flaw. ID 204, *see also* IDF 489, 492-93.

[40] As the ALJ correctly noted, ID 206-07, we identified the use of closed-end questions as a shortcoming in both the APCO and Synovate surveys in connection with our consideration of revisions to the Green Guides in 2012. *See* Statement of Basis and Purpose, Revised Green Guides 121 n.409, available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf. At that time we also faulted the APCO and Synovate surveys for lacking control groups. *Id*. As discussed above, Dr. Frederick has addressed both of these shortcomings by using largely open-end questions to probe consumer expectations of biodegradation rates and by using control groups. *See supra* Section III.A.2.b.

[41] Dr. Frederick's survey provides a rough estimate of the potential impact of this ambiguity. Question 1G, an exact duplicate of the APCO survey question, asked, "If a package is labeled 'biodegradable,' what should be the maximum amount of time that it should take for that package to decompose." Eighty-nine

However, aside from concerns regarding the survey's methodology, we do not believe that the APCO survey is properly designed to answer the central question at issue, which is what time period, if any, do consumers infer from a label of "biodegradable" on a plastic product. Question 4 of the APCO survey asks about biodegradation time for a "package" of unspecified material: consumers responding to the closed-ended question could have been providing answers pertaining to different types of material, such as paper, cardboard, styrofoam, or plastic. Further, there is no control question in the survey that sheds light on consumer belief regarding degradation times for packages not marked as "biodegradable." Because of the lack of specificity in the question, in combination with the other concerns highlighted above, we do not consider the results of the APCO survey in deciding this case.

e. The Synovate Survey

Finally, a 2010 consumer survey conducted by the research firm Synovate included 2000 internet panel respondents and was commissioned by EcoLogic, a competitor of ECM, in connection with the Commission's proposed revisions to the Green Guides. IDF 480-81. Like the APCO survey it was an observational study designed to probe consumer beliefs about biodegradation, including the time frames it requires.

In particular, Question 19 of the survey asked:

> 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%

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percent of codeable responses (64% of all responses) were five years or less. Question 1H, which changed the question by substituting "would" for "should," asked, "If a package is labeled 'biodegradable," what would be the maximum amount of time that it would take for that package to biodegrade.?" Seventy-nine percent of codeable responses (53% of all responses) were five years or less. The difference is 10 or 11%. A deduction of this magnitude from the APCO result would still leave a majority of responses of four years or less.

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%

IDF 485-86.

Thus, 70% of respondents indicated that a reasonable amount of time for a *plastic* package labeled "biodegradable" to decompose in a landfill was less than 5 years. *See* CCX-860 App. at 50.

The ALJ found the Synovate survey flawed for many of the same reasons as the APCO survey, again objecting to the closed-ended format, finding bias in the choice selection, and questioning whether the survey adequately probed whether the term "biodegradable" conveyed a message as to biodegradation rates. And he found fault with Question 19's wording, suggesting that asking about a "reasonable amount of time" might have been interpreted as asking the respondent what he or she would like to happen rather than what he or she believed would occur. The ALJ also noted that, when it amended the Green Guides in 2012, the Commission had concluded that "reliable real-world conclusions cannot be drawn from the Synovate survey." ID 204-08 (quoting Statement of Basis and Purpose, Revised Green Guides at 121). The ALJ therefore concluded that the Synovate survey, like the APCO survey, was of little if any probative value.

ECM urges us to reject the Synovate survey as invalid and unreliable. *See* RAnsB 24-25; RSuppB 1-2 & Exh. A (Stewart Dec.) ¶¶ 24-27.

For the purposes of assessing whether the term "biodegradable" implies a time period to consumers, we find the survey unreliable. The answers to Question 19 of the survey are potentially biased not only because of the closed-ended nature of the question (although the closed-ended options provided to

respondents would actually favor longer periods of time), but also because of certain framing statements that were presented to participants. For instance, at the beginning of the survey, participants were informed that, "We are conducting a survey on behalf of a company that is striving to develop products that they believe will be helpful to the environment and will improve the ways that plastic products are disposed." CCX-94 at 11. More importantly, Question 11 of the survey asked, "Did you know that traditional (non-biodegradable) plastic products take hundreds of years to decompose, if they do so at all?" *Id.* at 14. By providing a specific time period anchor for traditional plastic degradation and presenting the survey as sponsored by a company interested in improving plastic disposal and helping the environment, the survey design likely influenced answers to Question 19.

Therefore, we do not rely on the results of the Synovate survey to decide this case.

f. Summary of Consumer Survey Evidence

In determining how a significant minority of reasonable consumers would interpret the representation that ECM Plastics are "biodegradable," we rely upon two consumer surveys, conducted at different times, by different parties, using different methodologies. Neither of the surveys is perfect. Because it specifically addresses plastic products, we find the Google Survey most useful, but the Stewart survey also contributes to our understanding. While ECM maintains that the survey results vary, *see, e.g.*, RSuppB 12, RSuppRB 8, both in fact point to the same bottom-line conclusion, that labeling a plastic product biodegradable conveys a message to at least a significant minority of reasonable consumers (and likely substantially more) that the item will decompose within five years.

In her statement, Commissioner Ohlhausen argues that the "key question … is whether ECM's unqualified claim *caused* reasonable consumers to believe that plastics treated" with the ECM Additive would biodegrade within a particular time period, and seems to imply that a claim may only be found deceptive if the ad meaning has been separated from consumers' prior beliefs. Partial Dissent at 2, 6. That is not the law. Indeed, the purpose of the Green Guides has been to alert marketers that consumers are

reasonably confused about complicated scientific processes such as "biodegradability," and that marketers can avoid liability by properly qualifying their claims to minimize misleading interpretations that stem from the use of unqualified environmental terms of art. In this case, ECM failed to properly qualify its claims. Regarding the narrow methodological question of how to analyze responses to consumer surveys, in some limited circumstances it is necessary to use control questions to account for preexisting consumer beliefs.[42] This is what the Commission has been able to do in its examination of experimental evidence from Dr. Frederick's survey. Of course the Commission may consider many different types of evidence in determining ad meaning,[43] and there is no case law supporting Commissioner Ohlhausen's suggestion that we must separate ad meaning from preexisting beliefs as a general matter.

Finally, Commissioner Ohlhausen incorrectly states that "[t]he FTC has never used extrinsic evidence of a 'significant minority' as a stand-alone basis to determine that a claim interpretation is reasonable." Partial Dissent at 9. In fact, our analysis of Dr. Frederick's survey results to determine the message reasonably conveyed to consumers by the term "biodegradable" is closely analogous to the approach the Commission used to determine the net impression of advertising in *Thompson Medical*, 104 F.T.C. at 802-08. In that case, the Commission could not conclude from facial analysis whether a certain set of ads conveyed an implied

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[42] *See Kraft*, 114 F.T.C. at 131 n.19 (rejecting evidence from a survey that used closed-ended questions because "no measures were used … to correct for pre-existing or inherent survey bias"); *but see Stouffer*, 118 F.T.C. at 809-11 (where any preexisting beliefs cut against the advertiser's claim, there is no need to control for them, even in the case of closed-ended questions); *Telebrands Corp.*, 140 F.T.C. at 326 (because respondent's intent was to exploit preexisting beliefs "deliberately by inviting consumers to recall the claims in other ads to help convey a message," the results of controlled copy tests "likely understate the extent to which the challenged claims were communicated"); *cf. id.* at 318-19 (controls are unnecessary for open-ended questions).

[43] *See, e.g., Thompson Medical Co.*, 104 F.T.C. at 811-12 (discussing express claims); *Telebrands*, 140 F.T.C. at 304 (discussing intent evidence); *POM Wonderful*, 2013 WL 268926 at *22-27 (discussing facial analysis); *Thompson Medical Co.*, 104 F.T.C. at 789-90 (discussing empirical evidence).

claim that Aspercreme contains aspirin. *Id*. at 803. The Commission then proceeded to examine the results of several consumer surveys. As we discussed above, in one survey where consumers were shown an Aspercreme television ad, 22.2% of respondents stated that Aspercreme contained aspirin, compared to only 6.3% and 4.8% who stated that aspirin was an ingredient in two competing products. *Id.* at 805; *see also supra* pp. 23-24. Based on these results, the Commission concluded that the ad shown to consumers "did, in fact, cause average viewers to believe that the product being described contains aspirin," and that the survey results "clearly support[] the conclusion that [the ad at issue] generated a net impression of aspirin content among its viewers." *Id.* at 805-06. The Commission also examined the results of another survey, where consumers were shown either an ad for Aspercreme or an ad for a competing product. *Id.*, at 806-08. When consumers who saw the Aspercreme ad were asked what ingredients the product contained according to the ad, a significantly larger number answered aspirin (17%) than salycin (4%), when the latter was the actual active ingredient in the product. *Id.* at 807. Further, 38% of respondents who saw the Aspercreme ad believed that the advertised product contained aspirin, compared to 5% who viewed an ad for a competing product. *Id.* Based on these survey results, the Commission concluded that "the net impression conveyed by [the ad at issue] to at least one group of average listeners was that Aspercreme contains aspirin." *Id.* at 808.[44]

Whether an ad conveys an implied claim is a question of fact, *POM Wonderful*, 2013 WL 268926, at *27, citing *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989); *Nat'l Urological Grp.,* 645 F.Supp. 2d at 1189, and we have examined all of the evidence pertinent to that question. For the reasons explained above, based on our weighing of all the evidence, we

[44] In *Thompson Medical*, a significant minority reasonably took away a deceptive message – Aspercreme contains aspirin – but a clear majority took away a non-deceptive message – it does not contain aspirin. Here, there is even more reason for concern. As generally reflected in the responses to the Frederick survey, the majority of consumers shown a plastic product labeled "biodegradable" think the product will degrade within five years. In other words, this is not a case in which most consumers understand the claim to convey a true attribute of the product.

find that at least a significant minority of reasonable consumers would interpret ECM's unqualified representation that ECM Plastics are "biodegradable" to convey the claim that ECM Plastics fully biodegrade in landfills within a reasonably short period of time, *i.e.*, five years.[45]

3. ECM's "Some Period Greater than a Year" Representation

As discussed above, after the Commission issued its revised Green Guides in October 2012, ECM began to omit the "9 months to 5 years" claim from its marketing materials, IDF 251-52, and utilize a "some period greater than a year" qualifier for its unqualified biodegradable claims:[46]

> "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."

IDF 253; *see, e.g.*, CCX-20. ECM inserted this purported disclaimer where the word "biodegradable" appeared in its advertising. At this time, ECM also changed its logo, placing similar text beneath the word "Biodegradable" on its tree logo, IDF 256; *see* CCX-13, and its Certificate of Biodegradability. *See*

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[45] Our determination about ECM's implied claim relating to the biodegradability of plastics may raise certain broader issues about the Commission's Green Guides. However, our sole role here is to address the limited issues presented by the parties' respective appeals of the ALJ's decision. The Commission will address any broader implications of our ruling at an appropriate, later time.

[46] As with the discussion of the unqualified biodegradable claim above, this analysis focuses on direct customers who were exposed *only* to the "some period greater than a year" claim and not the more specific nine months to five years claim. Many direct purchasers were provided with the express rate claim of nine months to five years, in addition to the "some period greater than a year" assertion, at some point prior to purchase. For those customers who saw the nine months to five years claim at any point in time, the net impression clearly would be that ECM Plastics would degrade within five years. *See supra* note 13.

IDF 270; CCX-14 (retaining the claim that ECM Plastics' biodegradability had been "tested," and the rate and extent of degradation determined, by "independent laboratories in accordance with standard test methods").

In October 2012, ECM also notified its customers that they needed to qualify their "biodegradable" claims if the time frame of a year or less set out in the revised Green Guides did not "fit" their products. *See* IDF 261. For example, ECM sent its customers an e-mail that 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.

IDF 262; *see also* RX-35 through RX-37.

The ALJ found that ECM's "some period greater than a year" claim would not convey to consumers the message that ECM Plastics biodegrade within a year. He did not consider more generally whether the claim would convey biodegradation within a reasonably short period of time.

Based on our own facial analysis of the marketing materials, in combination with the extrinsic evidence discussed below, we find that a reasonable interpretation of ECM's representation that ECM Plastics biodegrade "in some period greater than a year" is that ECM Plastics biodegrade within a reasonably short period of time, *i.e.*, five years or less.[47]

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[47] Commissioner Ohlhausen agrees that ECM's "in some period greater than a year" representation conveyed that ECM Plastics biodegrade within a reasonably short period of time. She bases this conclusion on the Commission's facial analysis of that representation and on expert testimony regarding the anchoring effect. She finds the extrinsic consumer survey evidence too unreliable to be helpful in interpreting this claim, and does not rely on it.

a. Facial Analysis

The first step in our analysis is to determine what message the phrase would convey to a reasonable consumer based on the face of the representation. Taken literally, ECM's claim would encompass any time period from one year and a day to thousands or even millions of years. However, if so interpreted, the claim would be essentially meaningless because almost everything degrades into elements found in nature given enough time.

We view the specific reference to "a year" as critical to interpreting the message that a reasonable consumer would likely take away from ECM's claim. That is because of what is known as the "anchoring" effect of the one-year reference point. Anchoring effects have long been recognized by behavioral psychologists.[48] An anchor can be described as

> an arbitrary value that the subject is caused to consider before making a numerical estimate. An anchoring effect is demonstrated by showing that the estimates of groups shown different anchors tend to remain close to these anchors.[49]

Anchoring effects have been observed in a variety of contexts – they have been highlighted by legal scholars,[50] acknowledged

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[48] *See, e.g.*, Gretchen B. Chapmen & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 115 (1999); Karen E. Jacowitz & Daniel Kahneman, *Measures of Anchoring in Estimation Tasks*, 21 PERSONALITY AND SOC. PSYCHOL. BULL. 1161 (1995); Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974).

[49] Jacowitz & Kahneman, *supra* note 48, at 1161.

[50] *See, e.g.*, Jeffrey J. Rachlinski *et al*., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L. J. 695 (2015); Debra Pogrund Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L, 85, 100 (2010); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation,* 74 N.Y.U. L. REV. 630, 667-69 (1999).

by courts and jurists,[51] and studied by the FTC.[52] As Dr. Frederick, Complaint Counsel's consumer survey expert explained, in this case the "one year" functions as a numeric referent so that when consumers see "one year" they focus on that term and rely on it when making judgments of the overall message being conveyed. CCX-860 at 18 ¶ 41. Thus, for example, if ECM had stated "some period greater than a hundred years" the message conveyed would be far different than that conveyed by "some period greater than a year." Whereas a reasonable consumer would focus on the "hundred years" as suggesting that biodegradation would take a long period of time, the reference to "a year" conveys the message that the time for biodegradation will be reasonably short – perhaps longer than a year, but not a lot longer.

Dr. Frederick is an authority on the effects of "anchoring" on consumer perceptions, having authored a number of peer-reviewed articles on the subject. *See* CCX-860 at 22-24. Yet the ALJ dismissed the anchoring concept out-of-hand. Instead, he relied on his own literal reading of ECM's representation, without giving any consideration to the anchoring effect of the one-year reference on the net impression ECM's representation would convey to a reasonable consumer. That was error.

Here we find that the net impression created by ECM's representation is that ECM Plastics will biodegrade within a reasonably short period of time, anchored around one year. *See,*

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[51] *See, e.g., United States v. Ingram*, 721 F.3d 35, 40-41(2d Cir. 2013) (Calabresi, J., concurring); *Diaz-Pena v. Warden, Federal Correctional Institution, Fort Dix, New Jersey*, 586 F.Supp. 2d 1, 3-4 (D. Mass. 2008); Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014) (article by Federal District Court Judge for the Northern District of Iowa).

[52] *See generally* Manaj Hastok & Dennis Murphy, Effects of Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Beliefs (May 2012) (FTC-commissioned study indicating that when marketers use the phrase "up to" in claims about their products, many consumers are likely to believe that they will achieve the maximum "up to" benefits), *at* https://www.ftc.gov/sites/default/files/documents/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs/120629bristolwindowsreport.pdf.

e.g., FTC v. Cyberspace.com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."); *FTC v. AMG Services, Inc.*, 29 F. Supp.3d 1338, 1349 (D. Nev. 2014) ("[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."); *National Urological Grp.*, 645 F. Supp. 2d at 1189 ("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."). Our interpretation of the claim does not contradict the plain text of the representation. The anchoring effect means that the "some period greater than a year" representation conveyed to consumers that biodegradation will be reasonably short – perhaps longer than a year, but not a lot longer.

b. The Extrinsic Evidence

Extrinsic evidence – namely, the Frederick and Stewart surveys – corroborates our interpretation.[53] Although the two surveys employed different methodologies and posed different questions, both point to the same conclusion as to how consumers would interpret the "some period greater than a year" language.

Question 5b of Dr. Stewart's survey asked:

> "Plastic products manufactured with our additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year." In your own words, what does this claim mean to you?

RX-856 App. B at 20 (RX-847). Twenty-four percent of the respondents to this question answered that the plastic product would be "Gone/decomposed/biodegrade in one year." RX-856

[53] As noted above, Commissioner Ohlhausen does not find the extrinsic evidence reliable enough to provide any useful information about consumer interpretations of this claim.

App. D (RX-846) at 26. This supports our analysis that when viewing ECM's representation that a plastic product will biodegrade in some period greater than a year, a significant minority of reasonable consumers will focus on the numerical reference point – the one year – and ignore or discount the "greater than" language. In other words, the answers to Question 5b provide corroborating empirical evidence of an anchoring effect.[54]

Dr. Frederick's Google Survey also asked respondents to react to a plastic package's claim of biodegradability in "some period greater than a year." Specifically, Question 3R 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?

CCX-860 App. at 35. Fifty-four percent of the survey respondents who provided a codeable time period in response believed that a plastic package bearing the claim "in some period greater than a year" will biodegrade in five years or less. CCX-860 at 1 & App. at 35. Twenty-three percent of these respondents provided answers that clustered close to the one-year point of reference – *i.e.*, one year to two years.[55] Dr. Frederick's survey also asked in four different ways whether the respondents believed a package claimed to biodegrade "in 9 months to 5 years" would biodegrade in a longer or shorter time period than one claimed to biodegrade "in some period greater than a year." The survey respondents understood both phrases to imply much

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[54] ECM argues that reliance on responses to individual questions in Dr. Stewart's survey is "selective" and "improper." RAnsB 20-21; *see also* RSuppB 11. ECM also made this point with reference to responses to a different question in the Stewart survey, and we addressed this criticism *supra* in Section III.A.2.c.

[55] *Cf.* CCX-860 at 18 (reporting the number as 20 percent, an apparent typographical error). Either figure, however, would suggest an anchoring effect. *See id.* ECM takes issue with the methodology of Dr. Frederick's survey and challenges its validity. We discussed these issues *supra* in Section III.A.2.b.

the same thing about the amount of time needed for biodegradation. *See* CCX-860, App. at 45.[56]

In sum, both Dr. Stewart's survey and Dr. Frederick's survey point in the same direction: at least a significant minority of respondents in the Stewart survey and a majority of respondents in the Frederick survey stated that if a plastic product was claimed to biodegrade "in some period greater than a year," they believed the product would decompose in less than five years.

Our facial analysis and this extrinsic evidence support the finding that ECM's representation – that ECM Plastics biodegrade "in some period greater than a year" – conveys the implied claim to reasonable consumers that ECM Plastics fully biodegrade in landfills within a reasonably short period of time, *i.e.*, a period close to a year and no more than five years.

B. ECM's Claims are False and Unsubstantiated

Having established that the language in ECM's materials conveys the claims that ECM Plastics are fully biodegradable in landfills in nine months to five years; that ECM Plastics will completely decompose within a reasonably short period of time, *i.e.*, within five years, including within a landfill; and that scientific tests, including ASTM D5511, show ECM's claims of efficacy, we turn to whether such claims are false or likely to mislead. In doing so, we distinguish between efficacy claims and establishment claims. *See*, *e.g.*, *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986). Efficacy claims suggest that a product successfully performs the advertised function or yields the advertised benefit, but do not include a suggestion regarding the level or type of proof of the product's effectiveness. *See id.*; *Removatron Int'l Corp.*, 884 F.2d at 1492 n.3. Establishment

[56] Questions 14A and 14B asked "Which package do you think will take longer to biodegrade?" Sixty percent of respondents chose the package that biodegrades in "some period greater than a year" rather than the package that biodegrades in "9 months to 5 years" when the former choice was listed first; forty percent chose that package when that choice appeared second. Questions 14C and 14D asked "Which package do you think will biodegrade more quickly?" Fifty percent chose the package that biodegrades in "some period greater than a year" when that choice was listed first; forty percent chose that package when the choice appeared second.

claims suggest a certain type or level of support for the advertised function or effectiveness. *See Thompson Med. Co.*, 791 F.2d at 194. Here, as described above, ECM made both efficacy and establishment claims.

Claims may be found misleading under either of two distinct analytical routes. Claims may be misleading if they lack a reasonable basis or if they are false. Because an objective claim about a product's performance or efficacy carries with it the express or implied representation that the advertiser had a reasonable basis to substantiate the claim, failure to have a reasonable basis is misleading. *See POM Wonderful*, 777 F.3d at 490 ("If an ad conveys an efficacy claim, the advertiser must possess a 'reasonable basis' for the claim."); *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984) ("*Substantiation Statement*"); *Thompson Med. Co.*, 104 F.T.C. at 813 n.37, 819. For establishment claims, when an advertiser represents that there is a particular level of support, the absence of that support makes the claim false.

1. Unappealed Findings and Consensus Among Experts

Evaluating substantiation usually requires that we determine whether the tests that a respondent identifies meet the level or standard of substantiation required to support the claims. Here, however, even without a detailed evaluation of the tests, the unappealed findings of the Initial Decision and the clear consensus among both parties' experts enables us to conclude that ECM lacks substantiation for its express and implied claims that ECM Plastics fully biodegrade in landfills within 5 years.

The ALJ ruled that ECM's express efficacy and establishment claims that ECM Plastics fully biodegrade in a landfill in nine months to five years "are both false and unsubstantiated." ID 246, 318. Although ECM has appealed whether these claims are material, ECM has not appealed the ALJ's conclusion that the claims are both false and unsubstantiated.[57] Because ECM's

[57] Commission Rule 3.51(b) provides, "Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the

implied claims similarly convey that ECM Plastics biodegrade completely in a landfill within 5 years,[58] a finding that these implied claims are false and unsubstantiated follows directly from the ALJ's unappealed ruling.

Moreover, as the ALJ explained, "All of the experts in this case agreed that ECM Plastics do not fully biodegrade in 9 month to 5 years in a landfill." ID 246. Complaint Counsel's polymer engineering expert, Dr. McCarthy, opined that ECM Plastics will not fully biodegrade in nine months to five years in a landfill. IDF 698 (citing CCX-891 at 26 (McCarthy Expert Report) ("claims that ECM Plastic will completely biodegrade in periods of time as short as five years cannot be true")). Similarly, Dr. Michel stated that "it has not been demonstrated that ECM amended conventional plastics will biodegrade in a landfill in 1 to 5 years." CCX-895 at 12; IDF 700. Even ECM's expert admits that "the 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 at 8 (Sahu Expert Report); IDF 701.

Similarly, landfill experts for both parties explained that ECM Plastics would not biodegrade fully in landfills within five years. Dr. Tolaymat, Complaint Counsel's expert, testified that ECM Plastics would not biodegrade fully in nine months to five years. IDF 699 (citing Tolaymat, Tr. 121-22 (explaining that even the most biodegradable material would not completely biodegrade in a landfill within five years even under optimum conditions); *see also* CCX-893 at 6 (even "leaves and food scraps take many years" to degrade in landfills), 16, 23-24. ECM's landfill expert had a similar opinion. Dr. Barlaz explained that "the 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 [municipal solid

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order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived." 16 C.F.R. § 3.51(b).

[58] Commissioner Ohlhausen dissents from this finding with regard to the unqualified biodegradable claim. *See supra* note 1. As such, she offers no opinion as to the truthfulness or substantiation of that alleged implied claim.

waste]." RX-853 at 3 (Barlaz Expert Report); *see also* IDF 702; Barlaz, Tr. 2292-97 (even food waste takes slightly under five years for 87.5% biodegradation under "accelerated" conditions). Dr. Barlaz also testified that he had not seen any data that demonstrates that ECM Plastics will fully biodegrade in nine months to five years. CCX-943 at 46 (Barlaz Dep. at 180).

The ALJ's unappealed findings and the substantial agreement among the expert witnesses provide sufficient basis for finding that ECM lacks a reasonable basis for its express and implied efficacy and establishment claims and for deeming its claims false and unsubstantiated.

2. Analysis of Tests Offered as Substantiation Confirms the Experts' Conclusions

Review of the specific substantiation evidence in the record confirms these conclusions. In this section we apply a traditional analysis of the substantiation issues presented and conclude, again, that ECM lacks a reasonable basis for its claims and that those claims are false and unsubstantiated. The inquiry is much more detailed, but the result is the same.

a. Factual Background

Many of the substantiation issues here involve laboratory tests and their relationship to landfill conditions. Landfills provide the principal option for addressing municipal solid waste (MSW) in the United States. IDF 566. Most landfills in the United States are required by federal regulations to operate with oxygen content below 5%; thus, landfill environments are predominantly anaerobic. IDF 579. Temperatures in MSW landfills in the United States range between 20 and 40 degrees Celsius (between 68 and 104 degrees Fahrenheit), but average around 37 degrees Celsius. CCX-893 at 12 (Tolaymat Expert Report); Barlaz, Tr. 2208-09 (37 to 40 degrees Celsius is typical). Without the active addition of moisture, the typical moisture content of U.S. landfills is limited, between 15% and 30%. IDF 590.

Biodegradation is a biological process by which microorganisms such as bacteria and fungi use the carbon found in organic material as a food source. ID 226. As a result of that

biological process, the organic material undergoes a change in chemical structure and loses some properties. *Id.* at 228. Biodegradation in an anaerobic environment, *i.e.*, a landfill, produces methane and carbon dioxide as end products. RX-853 at 4 (Barlaz Expert Report).

Many of the tests at issue for substantiation purposes analyze biodegradation issues in terms of the end products produced in a laboratory setting. In gas evolution tests, the end-products of biodegradation are detected and measured to provide evidence that biodegradation has occurred. The basic methodology of an anaerobic gas evolution test is to expose a sample of the test material to a source of bacteria ("inoculum," such as well-decomposed refuse), and the resulting biogases (methane and carbon dioxide) are measured. The test article, a positive control (such as cellulose that is known to be biodegradable), a negative control (such as conventional plastic, which is generally considered a product known to biodegrade, only over very long periods of time), and an inoculum blank are simultaneously tested and the resulting biogases for each are collected. The lab compares the gases produced by the inoculum blank to the gases produced by the test article and the negative control to determine if the test article biodegrades. The lab can calculate the percentage of biodegradation of the test article by comparing the net level of gases attributable to the test sample with the theoretical maximum yield of gases from the sample, calculated from the known chemical makeup and amount of the product. IDF 743-49, 763-68.

One type of gas evolution test uses the ASTM D5511 methodology, the Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions. *See* CCX-84. The method is a laboratory-scale reactor test performed in a high-solids environment, which is more representative of the matrix in landfills than some other test methods. IDF 760-62. However, water is added to the system and the pH of the liquids is monitored and adjusted, IDF 763, so these particular conditions differ from a typical landfill. The ASTM D5511 test is incubated at a temperature of 52 degrees Celsius, IDF 781-84, whereas the average temperature of a typical landfill in the United States is 37 degrees Celsius. IDF 577. The increased moisture content,

adjusted pH, and increased temperature relative to typical landfill conditions are intended to accelerate in a lab the natural process of biodegradation. IDF 717-20, 731.[59]

b. Legal Framework

To determine whether challenged claims are false or misleading, we conduct two inquiries. First, we determine what level of substantiation respondents were required to have for their advertising claims. This is a question of fact, based on the evidence adduced at trial. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). For efficacy claims, the appropriate level of substantiation is determined by weighing the *Pfizer* factors. *See Pfizer Inc.*, 81 F.T.C. 23 (1972). *Pfizer* requires weighing the following factors: (1) the product involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable. *See Substantiation Statement*, 104 F.T.C. at 840; *Removatron Int'l Corp.*, 111 F.T.C. at 306 n.20; *Thompson Med. Co.*, 104 F.T.C. at 821. The analysis is not a simple tallying of the number of factors that demand higher or lower levels of substantiation; rather, it is a flexible application that considers the interplay of the identified factors. *See Pfizer*, 81 F.T.C. at 64. For establishment claims, the *Pfizer* factors are unnecessary; the advertiser is held to whatever level of substantiation is represented in the materials. *See, e.g.*, *POM Wonderful*, 777 F.3d at 491.

After determining the level of substantiation the advertiser must have, the second inquiry asks whether respondents possessed that level of substantiation. Respondents have the

[59] Biochemical methane potential (BMP) tests are also gas evolution tests, but they are performed in small vials (rather than laboratory-scale reactors) and conducted at much higher moisture levels than those in ASTM D5511 tests. There are no standards for BMP tests, and individual laboratories modify the tests, at times adding vitamins and minerals, changing temperatures, or changing the test's duration. IDF 750-54. BMP tests may be used for screening purposes to determine whether biodegradation of the material is possible, but BMP tests are not used to establish rate data, and the actual volume of methane generated in a landfill may well be less than what is shown by a BMP test. IDF 755-57.

burden of establishing on what substantiation they relied. Complaint Counsel have the burden of proving that respondents' purported substantiation was inadequate. *See, e.g.*, *QT*, 448 F. Supp. 2d at 959.

c. The Required Level of Substantiation

ECM must provide substantiation for the claims that it makes. Here, we have found that ECM has made representations that convey the claims that ECM Plastics will completely biodegrade in a landfill within 5 years and that scientific tests show this. ECM must have substantiation for its claims. *See Substantiation Statement*, 104 F.T.C. at 840 (stating that firms "should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims"). The ALJ's analysis of substantiation for a different claim – that ECM Plastics are "intrinsically biodegradable," a view of biodegradability in which time is irrelevant – does not dispose of the question before us. Similarly, evidence that the scientific community expects the material to fully decompose in some less clearly defined time period beyond five years is unavailing.

Our first step is to determine the level of substantiation ECM is required to have. We perform separate inquiries for establishment claims and efficacy claims.

i. Establishment Claims

When "ads contain express or implied statements regarding the amount of support the advertiser has for the product claim . . ., the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers." *Substantiation Statement*, 104 F.T.C. at 839. "If an establishment claim 'states a specific type of substantiation,' the 'advertiser must possess the specific substantiation.'" *POM Wonderful*, 777 F.3d at 491 (quoting *Removatron*, 884 F.2d at 1492 n.3). If an ad instead conveys a nonspecific establishment claim, such as a suggestion that the claim is based on scientific evidence, then "the advertiser 'must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth.'" *POM Wonderful*, 777 F.3d at 491 (quoting *Bristol-Myers Co.*, 102 F.T.C. 21, 321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984)); *see also Removatron Int'l Corp.*,

111 F.T.C. at 297; *Thompson Med. Co.*, 104 F.T.C. at 821-22 n.59.

Here, ECM represents that ECM Plastics have been shown to be fully biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified time frame under various scientific tests including, but not limited to ASTM D5511. Thus, ECM makes both specific establishment claims, which identify tests using the ASTM D5511 methodology,[60] and nonspecific establishment claims. For the specific establishment claims, ASTM D5511 tests must prove ECM's claims. For the nonspecific claims, ECM must possess evidence that would satisfy the relevant scientific community of the claim's truth. As Judge Chappell found, the scientific community would "require[] the results of appropriately analyzed, independent, well-designed, well-conducted, and well-controlled testing." IDF 705; *see also* IDF 704; CCX-891 at 13 ("The testing should use the appropriate plastic application, load rate, inoculum, test conditions, and sample weight, over an appropriate duration of time."), 14-18.

ii. Efficacy Claims

For ECM's efficacy claims, we apply the *Pfizer* factors to determine the level of substantiation that ECM must possess. Applying those factors leads us to conclude that the efficacy claims regarding the biodegradability of ECM Plastics demand competent and reliable scientific evidence, which is similar to the

[60] *See*, *e.g.*, CCX-14 (ECM Certificate of Biodegradability stating that ECM Plastics have been "tested by independent laboratories in accordance with standard test methods approved by ASTM" and other standardization bodies "to determine the rate and extent of biodegradation of plastic materials"; that the results of such testing are contained in an ecological assessment report that "certifies that plastic products manufactured with ECM additives can be marketed as biodegradable"; and that ECM Plastics will biodegrade in "most landfills" "in some period greater than a year"); CCX-20 at 14 (ECM website stating "Material treated with ECM has been tested and proved as biodegradable . . . by using . . . ASTM 5511," explaining that this means that "[p]lastic products made with our ECM BioFilm's additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year," and adding, "This process continues until all the plastic is fully biodegraded").

level of substantiation necessary to substantiate ECM's nonspecific establishment claims.[61]

The first factor is the type of claim. ECM made claims regarding the biodegradability of ECM Plastic. The Commission has previously stated in general terms that the substantiation standard for environmental marketing claims, including biodegradability claims, often requires "competent and reliable scientific evidence." FTC Green Guides, 16 C.F.R. § 260.2 (2012). Competent and reliable scientific evidence "consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results." *Id.* Such a standard is consistent with prior cases that have determined that "claims whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves" require a high level of substantiation. *See Removatron Int'l Corp.*, 111 F.T.C. at 306 n.20; *Thompson Med. Co.*, 104 F.T.C. at 822.

The second *Pfizer* factor is the type of product. Plastics are used by all consumers and also comprise a significant portion of municipal solid waste. Consequently, for consumers who are concerned about the environment, claims about plastic would be of particular importance, which suggests a need for a high level of substantiation.

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[61] Although we conclude that ECM's efficacy and establishment claims require the same level of substantiation, we do not adopt the ALJ's analysis that led him to a similar conclusion. The ALJ concluded that all of ECM's materials make establishment claims: he found that "[t]he net impression of ECM's [materials] . . . is that ECM Plastics are biodegradable and that testing by independent laboratories proves that ECM Plastics are biodegradable." ID 237. We disagree. Some of ECM's materials make its biodegradable claims from presentations as simple as a logo consisting of a tree and the words "ECM Biodegradable." We do not find that such materials convey a claim that testing by independent labs prove that ECM Plastics are biodegradable. Not "every reference to a test necessarily gives rise to an establishment claim," *Bristol-Myers Co.*, 102 F.T.C. at 321 n.7, and ads in this case that make no reference to any level of support do not convey establishment claims. In fact, in *Thompson Medical*, the Commission expressly recognized the need to conduct a separate analysis for a subset of ads that did not specify the level of support for the claims. *Thompson Med. Co.*, 104 F.T.C. at 821 n.59.

The third factor is the benefit of a truthful claim. The fourth factor is the ease of developing substantiation for the claim. We often consider these factors in tandem. Our concern in analyzing these factors is to ensure that the level of substantiation we require is not likely to prevent consumers from receiving potentially valuable information about product characteristics. *See Thompson Med. Co.*, 104 F.T.C. at 823.

Here, the benefit of truthful claims is that consumers would act on appropriate and accurate information, choosing products destined for landfill disposal rather than recycling, in keeping with their environmental concerns. Although precise information linking laboratory tests to landfill biodegradation rates is not easily acquired, the science of biodegradation testing is clear, and information, within laboratory testing's limitations, can be gathered without great expense. These factors inject a modest note of caution against undue substantiation requirements. Nonetheless, difficulty developing substantiation does not excuse claims that go beyond what can be substantiated; the claims should be qualified or limited to reflect the limitations of the testing. *See POM Wonderful*, 2013 WL 268926, at *50.

The fifth factor involves the consequences of a false claim. Here, false claims are likely to harm consumers by inducing purchases of higher-priced plastics that purportedly are biodegradable instead of conventional plastic. *See Thompson Med. Co.*, 104 F.T.C. at 824 (significant economic harm "result[s] from the repeated purchase of an ineffective product by consumers who are unable to evaluate" the efficacy claims). And, again, the choice between directing products to landfills and recycling will be distorted by false biodegradation claims. These considerations support a high level of substantiation.

The sixth and final factor is the amount of substantiation experts in the field would agree is reasonable. As noted above, experts in the field would expect competent and reliable scientific evidence to support claims regarding biodegradability. Moreover, they would expect well-designed, well-conducted tests with statistically significant, well-analyzed results.

Based upon our review of the six *Pfizer* factors, we conclude that the proper level of substantiation for ECM's biodegradable

efficacy claims is competent and reliable scientific evidence. This is consistent with the expectations of both parties. *See* ID 237 ("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.'"). As the ALJ explained, such 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.'" *Id.* at 238 (quoting *POM Wonderful*, 2013 WL 268926, at *48).

d. The Substantiation Possessed by ECM

Having determined the levels of substantiation required for ECM's claims – ASTM D5511 substantiation for its specific establishment claims and competent and reliable scientific evidence for its non-specific claims – the remaining step is to inquire whether ECM possesses those levels of substantiation. We examine each issue in turn.

i. ECM's Specific Establishment Claims – that ATSM D5511 Tests Prove ECM Plastics Biodegrade Completely in Landfills within Five Years – are False

Although ECM asserts that ASTM D5511 tests substantiate its claims, ASTM, the organization that established the test methodology, instructs that ASTM D5511 test results should not be used in the manner that ECM employs. ASTM advises that an ASTM D5511 test does not substantiate an unqualified biodegradability claim. The test protocol expressly states: "Claims of performance shall . . . not be used for unqualified 'biodegradable' claims." CCX-84 at 1 (ASTM D5511 §1.4). Results may not be supplemented or adapted to better suit marketing strategies or applied generally to landfills;[62] rather,

[62]ASTM's protocol suggests potential applicability only to "some conditions in biologically active landfills where . . . biogas production is actively promoted by inoculation (for example, codeposition of anaerobic sewage sludge, anaerobic leachate recirculation), moisture control (for example, leachate

"Claims of performance shall be limited to the numerical result obtained in the test . . . ." *Id*. "Furthermore," the protocol continues, "results shall not be extrapolated past the actual duration of the test." *Id.* If ECM's ASTM D5511 test results are not extrapolated, *e.g.,* using test results that show 2% biodegradation in 30 days to imply 100% biodegradation in 1500 days, the tests do not support a claim that ECM Plastics fully biodegrade.

ECM personnel have suggested that the limitations ASTM places on the use of ASTM D5511 test results apply only to scientific test reports and that results can be extrapolated when they are presented to purchasers. *See* Sinclair, Tr. 1683-84. We disagree. The ASTM protocol addresses "[c]laims of performance," a limitation much more suggestive of marketing efforts than laboratory presentations to test sponsors. Moreover, the experts in this case do not believe the limitations of the ASTM D5511 protocol can be ignored. Dr. McCarthy explained that ASTM D5511 tests can be used as a screening level test, but cannot provide support that a biodegradable plastic will biodegrade to completion. CCX-891 at 21. Similarly, ECM's expert, Dr. Barlaz, opined that ASTM D5511 is designed only to measure "intrinsic biodegradability," RX-853 at 8; *see also id*. at 10 ("there is not a uniformly utilized method to extrapolate rate data as measured at laboratory-scale to field-scale landfills"). Dr. Sahu, another ECM expert, also testified that from his review of peer-reviewed literature and his experience, he had not seen a study that extrapolated a rate from a test to determine a time for complete biodegradation. IDF 714-15. Indeed, at oral argument, counsel for ECM agreed that ASTM D5511 tests do not permit extrapolations on biodegradation rates. Tr. Oral Arg. 20.

ECM argues that Complaint Counsel have not identified a test methodology that would provide scientific evidence sufficient to support claims that ECM Plastics biodegrade fully in landfills within a specific period of time. RAnsB 51; Tr. Oral Arg. 20. Similarly, the ALJ concludes that no one test can support a rate of biodegradation of plastics in landfills. ID 239-40. This misses

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recirculation), and temperature control (for example, short-term injection of oxygen, heating of recirculated leachate)." CCX-84 at 1.

the point. Substantiation requirements are not static; they are driven by the specific claim that an advertiser chooses to make. Here, ECM tells its customers that the ASTM D5511 test (and particular aerobic tests) "determine the rate and extent of biodegradation of plastic materials" and show ECM Plastics will biodegrade in most landfills. *See*, *e.g.*, CCX-14. ECM is presenting tests and test results that do not support its claims. An advertiser is not given license to make particular claims that go beyond the substantiation it possesses and then ask the Commission to excuse the inadequacy of its support by asserting that the advertiser did the best it could because the proper substantiation for the actual claim would be unavailable. *See POM Wonderful*, 777 F.3d at 496-97 (rejecting argument that substantiation requirement of randomized clinical trials for disease claims was "too onerous" because of "practical, ethical, and economic constraints" and recognizing that the level of required substantiation required was driven by the nature of the claims the advertiser chose to make). Rather, where there are constraints on the available substantiation, "the advertiser must generally limit the claims it makes for its data or make appropriate disclosures to insure proper consumer understanding." *Kroger Co.*, 98 F.T.C. 639, 737 (1981).

ii. ECM Does Not Possess the Competent and Reliable Scientific Evidence Needed to Substantiate its Claims

To support its position that its claims are substantiated with the requisite science, ECM first describes the mechanism through which its additive purportedly alters conventional plastic and accelerates biodegradation. Then ECM identifies test results that it contends substantiate its claims.

Mechanism of Operation: ECM argues that the ECM Additive attracts microbes and other microorganisms to areas on and within the plastic where the additive is located. RX-855 at 27-28 (Sahu Expert Report); RX-854 at 21-23 (Burnette Expert Report). According to ECM, this fosters the formation of biofilms (a group of microorganisms that stick together on a surface) near the additive sites, which promote the growth of bacteria that metabolize both the additive and the conventional plastic into which it is integrated. *Id.* ECM maintains that the

additive may weaken the carbon-carbon bonds of the plastic, RX-854 at 22, or introduce additional weak points, thereby enabling the microorganisms to break down the high-molecular-weight conventional plastic. RX-855 at 17-18, 27. Based on this analysis, the ALJ found that inclusion of the ECM Additive contributes to the acceleration of biodegradation. *See* IDF 910-11, 917-18, 935.

However, there are important limits on ECM's presentation and considerable contrary evidence. Evidence of the ECM Additive's mechanism of action comes from ECM's expert, Dr. Sahu. Yet, by his own admission, Dr. Sahu did not analyze or conduct tests on ECM Plastic. Sahu, Tr. 1952.[63] Dr. Sahu's opinion about the mechanism of action for the ECM Additive is based only on a review of the published literature. See RX-855 at 28 ("Some variant of this overall mechanism . . . is widely reported in the literature . . . ."); *see also id*. at 24-40. But that literature does not address the ECM Additive, and the only peer-reviewed article discussing plastic amended with the ECM Additive,[64] is not cited in this portion of Dr. Sahu's opinion. Indeed, the literature that Dr. Sahu claims to describe ECM's method of action only describes the formation of biofilms and the ingestion of the material by microbes that occurs whenever *any* product biodegrades. Moreover, the particular articles cited by Dr. Sahu to support his opinion that conventional plastic can be biodegradable only discuss plastics with structural types known to be biodegradable or that have been pretreated or that are treated in specialized environments. *See* CCX-892 (McCarthy Rebuttal Expert Report) at 5 n.3 (1978 study by Albertson was conducted in a super-oxygenated environment, which is unlike landfills), 6 (articles by Tilstra & Johnsonbaugh and Shah discuss plastics with molecular structures known to be similar to biodegradable polymers), 6-7 (Tokiwa article discusses biodegradability of low-molecular-weight plastic), 7 (Shah article concludes polyethylene can be degraded only following "photodegradation and/or

[63] Similarly, Dr. Burnette, ECM's microbiology expert, did not specifically study or analyze the ECM Additive or ECM Plastic. Burnette, Tr. 2448-49.

[64] *See* CCX-895 at 13 (Michel Expert Report) (stating that an article by E.F. Gomez and F.C. Michel is the only peer-reviewed scientific publication to report on the biodegradation of ECM amended plastic).

chemical degradation"). In short, the articles cited by Dr. Sahu do not address, under customary disposal conditions, the conventional, high-molecular-weight plastics that resist biodegradation and that are the plastics ECM claims its additive will alter to become biodegradable.

Moreover, other evidence raises troubling questions regarding the purported mechanism of action. While the experts agreed that the ECM Additive is biodegradable and that microorganisms gather and ingest the additive when an ECM Plastic is disposed of, questions remain regarding the subsequent steps. Formation of a biofilm – a key step in ECM's claimed mechanism of action – is not necessarily an indication of degradation of the plastic.[65] Even ECM expert, Dr. Burnette, distinguished between forming a biofilm and degrading the material. *See* Burnette, Tr. 2453-57 (explaining that his references only address biofilm formation and do not address whether the microorganisms are using the plastic as a food source). The ALJ accepted that the formation of biofilms resulted in biodegradation of the plastic, *see* IDF 913, but formation of biofilms does not amount to competent scientific evidence that the ECM Additive actually promotes biodegradation of conventional plastics.

Laboratory Tests: Experts testified that gas evolution tests are the most practical and widely used scientific tests of biodegradation. If they are appropriately designed, conducted, and controlled, they can provide competent and reliable evidence of biodegradation. IDF 743, 748.

The record in this case includes reports or descriptions of 44 tests of plastic containing the ECM Additive. ECM identifies a subset of these 44 tests that it contends provides support for its

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[65] *See* CCX 895 at 16 (Michel Rebuttal Expert Report) ("The presence of a biofilm on a surface does not necessarily lead to the biodegradation of the surface upon which it is attached.") (citing N. Cerca, G.B. Pier, M. Vilanova, *Quantitative Analysis of Adhesion and Biofilm Formation on Hydrophilic and Hydrophobic Surfaces of Clinical Isolates of Staphylococcus Epidermidis*, 156 RES. MICROBIOL. 506, (2005); J.C. Araujo, R. Mortara, JR Campos, & RF Vazoller, *Development and Analysis of Anaerobic Biofilms onto Hydrophobic and Hydrophilic Surfaces*, 25 ENVTL. TECH. 809 (2004)); Michel, Tr. 2865 (explaining that biofilms form inside bathroom pipes but do not degrade the pipe).

claims. Complaint Counsel and their experts challenge whether the methodology and results of those tests provide adequate substantiation. Complaint Counsel also assert that a different subset of the 44 tests affirmatively shows that ECM's biodegradability claims are false.

Tests Relied Upon by ECM as Showing Biodegradation: In accord with the ALJ's analysis, we limit our review to anaerobic tests; aerobic tests are not competent and reliable evidence of biodegradation in landfills, which are anaerobic environments. *See* IDF 1045 (citing Barlaz, Tr. 2300, RX-853 at 7 (Barlaz Expert Report)); ID 240-41 & 241 n.43. We also do not consider tests that rely on methods such as weight loss or informal backyard experiments that scientists in the field would not consider sufficient to determine biodegradation. *See* IDF 741; ID 240. After excluding these tests, ECM's support comprises eight tests conducted by Eden Research Laboratories ("Eden"), IDF 1080-1216, ten tests conducted by Northeast Laboratories (NE Labs), IDF 1267-1424, and a BMP test conducted at North Carolina State University. IDF 1437-47.

Our review of these tests and the testimony by Dr. Barlaz regarding the test results leads us to conclude that ECM has not provided adequate substantiation for its claims. None of the tests even purports to demonstrate complete biodegradation in landfills within five years. Moreover, the tests often fall short of the well-designed, well-conducted, well-controlled, and appropriately analyzed testing that would satisfy the relevant scientific community. ECM's evidence is fraught with gaps and methodological inadequacies that lead us to question any assertion that the ECM Additive enhances the biodegradation of plastic products. Indeed, taking account of the contrary evidence presented by Complaint Counsel as well, we find it as likely that the ECM Additive has no meaningful effect on the biodegradation of plastic products as that it does.

To begin with, test procedures often were problematic because many of the tests diverged from accepted methodologies. For instance, in conducting long-term extension testing, NE Labs employs a unique methodology that refreshes the inoculum after the generation of biogases for the positive control has plateaued. *See* Johnson, Tr. 1583 (ASTM protocol does not allow for

extended testing up to 365 days). In these tests, NE Labs removes the test material from the testing environment and places it in new canisters with fresh inoculum. IDF 1252. During this transition, however, the test material is exposed to oxygen, even if the new canisters are sparged with nitrogen to remove excess atmospheric gases. Johnson, Tr. 1574. Thus, these long-duration extension tests are not strictly anaerobic. *See* Barlaz, Tr. 2334 (explaining that test results would be "questionable" if there was continuous variation between anaerobic and aerobic conditions). The test results and reports do not indicate when inoculum is refreshed and the test material is exposed to oxygen, Johnson, Tr. 1594, so results for the extension testing cannot be appropriately interpreted.

Moreover, although ECM asserts that Dr. Barlaz's analysis establishes that the plastic generated a statistically significant amount of methane, RAnsB 42, 45, ECM failed to present evidence sufficient to allow confident conclusions that methane was generated from the plastic at issue rather than from the ECM Additive. The chemical content of ECM's additive is protected as a trade secret, but it nonetheless is acknowledged to be biodegradable. IDF 159-60. Thus, tests of the efficacy of ECM's additive must consider whether evidence of biodegradation of the test sample (*i.e.*, methane produced in a gas evolution test) shows more than biodegradation of the additive. CCX-891 at 15-16 (McCarthy Expert Report). In other words, the tests must identify biodegradation from the plastic, not just from the ECM Additive.

For roughly half of the studies (three tests by Eden and six tests by NE Labs), however, the test reports do not reveal the percentage of ECM Additive in the test article.[66] Dr. Barlaz nonetheless concludes that the underlying plastic is biodegrading in these nine tests because the quantity of methane generated by the sample exceeds the quantity that he calculates could have been

[66] *See* IDF 1159 (RX-859, Eden FP International), 1188 (RX-861, Eden MicroTek), 1205 (RX-862, Eden EcoLab), 1344 (RX-396, NE Labs 1048819 (EcoSmart Plastics II)), 1360 (RX-395, NE Labs 1150851 (Sweet Tape Enterprise)), 1376 (RX-394, NE Labs 1150851 (TycoPlas Sdn. Bhd.)), 1399 (RX-393, NE Labs 1253020 (National Tree Co.)), 1414 (RX-392, NE Labs 1048036 (Transilwrap Co.)), 1421 (RX-399, NE Labs N0843980 (Bio-Tec Environmental, LLC)).

attributable to biodegradation of the additive. Yet, because the percentage of ECM Additive in the sample is unknown, the calculated quantity of methane attributable to the additive is only a guess, and any conclusions that some portion of the methane is attributable to the underlying plastic are based only on assumptions.

Beyond this, because the necessary underlying data often were not reported, Dr. Barlaz was unable in most instances to calculate t-statistics that might show that the methane generated was statistically significant.[67] In those instances, Dr. Barlaz instead relied on the ratio of methane generated by the test article to the methane generated by the inoculum to confirm that the test article was biodegrading. Barlaz, Tr. 2248-49, 2261. But this ratio only tends to demonstrate that the test article – the plastic/additive mix – is biodegrading; it does not distinguish between biodegradation of the ECM Additive and biodegradation of the underlying plastic.[68]

In six instances Dr. Barlaz calculated t-statistics to show that the measures of methane were statistically significant.[69] Here

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[67] Dr. Barlaz reported t-statistics for only six of ECM's laboratory tests. RX-472 at column N.

[68] ECM also has cited the 1999 McLaren/Hart Report, CCX-266E, to its customers. IDF 277. That report relied on one anaerobic gas evolution test, conducted by Organic Waste Systems Inc. *Id*. at 6-7; *see* RX-265. The substance tested was the ECM pellets themselves, not a separate plastic product treated with the ECM Additive. IDF 1451. The test found the pellets had experienced 24 percent biodegradation after fifteen days, at which point the test was terminated. IDF 1456-57; CCX-266E at 6; RX-265 at 17. Because the pellets consisted of at least [redacted] percent ECM Additive, which was biodegradable, CCX-818 (Sinclair Dep.) at 163-64, the test provides no basis for concluding that anything other than the ECM Additive had biodegraded.

[69] Dr. Barlaz's calculations were needed because the test reports generally do not report the statistical significance of the level of methane generated, although this is generally required by the ASTM D5511 protocol. *See* Poth, Tr.1512-14 (Eden reports do not include reports of statistical significance except on special request); *see also* RX-248, RX-839, RX-403, RX-402, RX-859, RX-860, RX-861, RX-862; Johnson, Tr. 1535-36 (NE Labs conducts statistical analysis only on special request),1538, 1587-88 (NE Labs does not report confidence limits or standard errors and has no way of knowing whether the results are statistically significant).

again the record lacks analysis of the significance of the methane generated by the plastic alone. Dr. Barlaz's t-statistics establish only that biodegradation of the test article – the combination of plastic *plus* the additive – was statistically significant, *i.e.*, that the additional methane generated by the plastic/additive mix over the methane generated by the inoculum was statistically significant. He subtracts the methane potentially derivable from the ECM Additive, but only *after* performing his t-test analysis. *See* IDF 1012; Barlaz, Tr. 2255 (calculations based on methane produced from the additive do not affect his statistical analysis, but rather, affect what comes after that analysis); *see also id*. at 2247-49, 2252-60. So even for the minority of tests that ECM claims present a statistically significant showing, ECM presents no calculations to establish the statistical significance of methane generated from the plastic itself.

Most importantly, not one of ECM's tests shows complete biodegradation of plastics in landfills within five years. The other deficiencies are significant, but even if they were not present, the tests relied upon by ECM entirely fail to substantiate the claims at issue.

Tests that Show No Biodegradation: We view ECM's test results in light of the complete record, which includes gas evolution testing that yields contrary results. Competent and reliable scientific evidence in support of efficacy claims "should be 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 each of the marketing claims is true." FTC Green Guides, 16 C.F.R. § 260.2. Similarly, for nonspecific establishment claims, the advertiser "must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth." *POM Wonderful*, 777 F.3d at 491 (quoting *Bristol-Myers*, 102 F.T.C. at 321). Certainly, experts in the field would interpret particular test results in the context of other relevant evidence.

Again, limiting our review to tests that investigated anaerobic biodegradation, the record includes three BMP tests conducted at North Carolina State University (CCX-946, CCX-951, CCX-954), three tests by Stevens Ecology (CCX-174, CCX-175, CCX-176),

a test by Advance Material Center (CCX-173), tests by Organic Waste Systems, Inc. (OWS) (CCX-156, CCX-157, CCX-163, CCX-169, CCX-171), and a test conducted at Ohio State University by Eddie Gomez and Dr. Michel (CCX-164). As the ALJ explained, test reports for several of these tests were admitted into the record without explanation or discussion by a fact or expert witness. ID 256-62. Consequently, the ALJ gave them little weight. *Id.* We examine the tests more closely.

Many of the test reports showing no biodegradation fall short of the standard that experts in the field expect. As the ALJ explained, in two of the tests conducted by Stevens Ecology and one test by OWS, the positive control did not biodegrade sufficiently to establish that the test environment was suitable. *See* ID 256-57, 259. There is evidence that the third Stevens Ecology test did not permit continuous contact between the test article and the inoculum. *Id.* at 256-57. Several of the OWS reports do not disclose the underlying data, such as the amount of methane generated or the percentage of ECM Additive. *Id.* at 258-61; *see* CCX-156, CCX-157, CCX-169, CCX-171. In addition, two of the OWS tests did not include appropriate controls. ID at 260-61; *see* CCX-163, CCX-171.

Other tests, however, meet the standards that experts in the field would accept to support conclusions regarding biodegradability. One of the NCSU BMP tests showed no methane production, and two tests produced only negligible amounts of methane. IDF 1434 (citing CCX-951), 1435 (citing CCX-946, CCX-954). Although these BMP tests were conducted in a liquid environment, Dr. Barlaz, who supervised the tests, explained that a BMP test is a screening test that would determine if any biodegradability is possible and that the actual volume of methane generated in a landfill may be less than the amount shown in the BMP test. CCX-952 at 1.

The test conducted by Gomez and Michel at Ohio State University is the only published, peer-reviewed study to address whether ECM Plastic is biodegradable. ID 254; *see* CCX-164 (E.F. Gomez & F.C. Michel, Jr., *Biodegradation of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation*, 98 J. POLYMER DEGRADATION & STABILITY 2583

(2013)). The study ran an ASTM D5511 test on two plastics treated with the ECM Additive and also ran a soil test on the materials. The study found, based on statistical analysis, "There was no significant difference in the carbon conversion of the negative control (PP) and the plastic containing the additive." CCX-164 at 8. The study found that "[c]onventional plastics and those containing additives did not degrade at all under any of the three conditions." *Id.* The study concludes, "[P]lastics containing additives that supposedly confer biodegradability to polymers such as polyethylene and polypropylene did not improve the biodegradability of these recalcitrant polymers." *Id.*

ECM argues that the study by Gomez and Michel should not be credited for several reasons. First, the study was funded by Myers Industries, which ECM contends is a competitor because it sells compostable gardening pots. Myers provided the ECM Plastic that was used in the test, and ECM suggests that Myers might have improperly incorporated the ECM Additive when it prepared the plastic sample. ECM also critiques the value of the publication because peer reviewers did not see the raw test data and, contrary to the conflict of interest standards of the publisher, the authors did not disclose the study's funding. RAnsB 9, 36. ECM's arguments, however, do not undermine the significance of the study. The record indicates that Myers Industries wished to sell biodegradable gardening pots in addition to compostable pots. *See* Michel, Tr. 2934; CCX-417 (log summarizing ECM/Myers communications regarding possible sales of the ECM Additive to Myers). Unless we assume that Myers' stated objectives in sponsoring the test were a ruse – and that a gardening pot seller sponsored and biased a scientific study for the purpose of undermining the credibility of an upstream producer of plastic additives – Myers had reason to prepare the sample properly. Moreover, the record shows that ECM advised Myers on proper preparation of ECM Plastics. *See* CCX-417 at 2-4. Although the raw data were not provided to reviewers when the article was submitted for publication, the data appear in the article in a graphical format. Michel, Tr. 2940-41. ECM has not shown that the failure to disclose funding of the study, while contrary to the publication's requirements, was likely to have created a conflict of interest that would have influenced peer reviewers.

More generally, ECM argues that the tests that show no evidence of biodegradability of ECM Plastics are merely inconclusive, not affirmative evidence that the ECM Additive does not work. *See* RAnsB 8-9. ECM's experts identified reasons why a gas evolution test performed on ECM Plastics might not show positive results, including a problem with the pH in the test environment; an inoculum that is not viable for extended testing in a closed system; another additive in the plastic that is antimicrobial; or improper preparation of the amended plastic (*i.e.*, scorching when the plastic was melted) that rendered the ECM Additive inefficacious. *See* Sahu, Tr. 1939-40; Barlaz, Tr. 2232, 2273. Although we acknowledge the possibilities, we also recognize the limits of ECM's argument. When ECM's expert indicated that pH problems or unsuitable inoculum could explain test results that showed no biodegradability, the expert also testified that he was only suggesting theoretical possibilities; he did not see any reason to believe these issues affected any tests in the record. Barlaz, Tr. 2335-37 (adding that biodegradation of the tests' positive controls indicated that the inoculum was viable). As to the hypothetical presence of antimicrobial additives, we observe that ECM's claims that its additive renders plastic biodegradable do not disclaim efficacy if other additives are also included. Finally, we find the possibility that the test material was improperly prepared in ways that undermined the ECM Additive's performance too speculative. The tests were conducted for potential ECM customers with a business interest in accurate results, and these potential customers had been advised by ECM about the proper process to ensure that the additive was properly distributed throughout the plastic and that it was not scorched. IDF 216-18, 230.

We find that ECM's efficacy claims – that ECM Plastics will fully biodegrade in a landfill within 5 years – are unsubstantiated, and therefore, misleading. Our conclusion is based on ECM's failure to appeal the ALJ's finding that ECM lacked substantiation for its 9 month to 5 year claim, agreement among the scientific experts in this proceeding that they have not seen evidence that ECM Plastics fully biodegrade in a landfill in less than 5 years, and our review of the gas evolution and other tests in the record. We also find that ECM's establishment claims – that scientific testing, including ASTM D5511 tests, demonstrate that

ECM Plastics will fully biodegrade in less than 5 years – are false. As ECM readily acknowledges, the ASTM D5511 test methodology does not support the claims alleged in the Complaint.

C. ECM's Rate Claims Are Material.

Thus far we have found that ECM made the express claim that ECM Plastics will completely biodegrade in a landfill within nine months to five years; ECM made the implied rate claim that ECM Plastics will fully biodegrade in landfills in a reasonably short period of time; ECM made the claim that scientific tests prove its rate claims; and ECM's claims are false and unsubstantiated. The remaining liability issue is whether the express and implied claims are material – whether they would likely be important to a reasonable purchaser and affect his/her purchasing decision or other conduct.[70] *Deception Statement*, 103 F.T.C. at 175-76; *see, e.g.*, *Kraft*, 970 F.2d at 322 ("a claim 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'") (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165).

In most cases, the very existence of an express claim is sufficient to demonstrate that the claim is material. Accordingly, we typically apply a presumption of materiality to express claims. We also typically apply the presumption to implied claims when there is evidence that the seller intended to make the claim, as

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[70] In most false advertising cases the "consumer" is synonymous with the "purchaser" of the product at issue. Here, however, the consumer typically does not "purchase" the final plastic product (such as a grocery bag or plastic packaging material) made with the ECM Additive. Rather, the purchasing decision is made by plastics manufacturers, who are motivated to produce and sell environmentally-friendly products based on perceived demand for such products by their own customers, who in turn are motivated to provide such products because of end-use consumer preference for environmentally-friendly products. *See* IDF 205. Thus, the appropriate focus of the materiality inquiry in this case is on the importance of the rate claim to ECM's customers and to others in the supply chain who purchase the ECM Additive and the plastics made with it, which reflects the importance to the end-use consumer. *See, e.g.*, *FTC* v. *Wash. Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012) ("A representation is material if likely relied upon by a reasonable prospective purchaser.").

well as to claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Cliffdale*, 103 F.T.C. at 182; *Deception Statement*, 103 F.T.C. at 182. The presumption also applies when the claim pertains to the central characteristics of the product, such as those relating to its purpose, efficacy, or cost. *See, e.g.*, *Telebrands*, 140 F.T.C. at 292; *Thompson Med. Co.*, 104 F.T.C. at 816-17. However, a respondent may rebut this presumption 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. *Novartis*, 127 F.T.C. at 686 (adding, "[t]his is not a high hurdle"); *see also Jerk, LLC*, 2015 WL 1518891, at *12 (F.T.C. Mar. 13, 2015). If the respondent does so, we proceed to weigh all of the evidence provided by the parties, including, where appropriate, the predicate facts that gave rise to the presumption. *Novartis*, 127 F.T.C. at 686-87.[71]

In his Initial Decision, the ALJ concluded that "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 nine months to five years, and that tests prove such claim, are material to the purchasing decisions of ECM customers, and to downstream customers." ID 288 (internal quotation omitted). He cited abundant evidence in support of his conclusion that the express claim was material to direct and indirect customers, and concluded that evidence of the materiality of that claim to end-use consumers was not required. ID 288-91 & n.55. With relevance to the implied claim, he noted "there is no dispute between the parties that ECM Customers buy the ECM

[71] ECM contends that all of the evidence the ALJ cited was insufficient to show materiality because Complaint Counsel failed to present direct testimony or other evidence that any plastic company or end-use consumer altered a purchasing decision based on the nine months to five years claim and that such evidence is required for finding the rate claim material. RAppB 21, 24-25, 39. While direct evidence of actual reliance or injury may be probative on the issue of materiality, it is not required. *See Novartis*, 127 F.T.C. at 685; *Kraft*, 114 F.T.C. at 134. Rather, the materiality inquiry focuses on whether the claim is *likely* to affect the consumer's choice of, or conduct regarding, a product and therefore *likely* to cause injury if it is false. *See Cliffdale*, 103 F.T.C. at 165-66.

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." ID 285; see also IDF 1503-07. We agree and affirm the ALJ's rulings.

All of ECM's claims are presumptively material. The claim that ECM Plastics will biodegrade in nine months to five years was express. Both the express and implied claims were an important, intended feature of ECM's marketing. Indeed, the sole purpose of the ECM Additive is to hasten the biodegradation of plastic and the claims announce the product's effectiveness in achieving that purpose. The express claim, the implied claims, and the contention that tests prove these claims all relate to this central characteristic of the ECM Additive.

Even apart from any presumption, however, the evidence clearly demonstrates materiality. We noted at the outset of our opinion the importance of the time element to potential customers that is reflected in contemporaneous ECM business documents, where ECM acknowledged the importance of its being able to certify that ECM Plastics biodegrade within "a reasonable period of time." CCX-826. Indeed, ECM asked its customers to sign a Certificate of Assurance that they would always use ECM Additive in an amount representing at least one percent of weight for the very reason that "ECM's reputation can be materially and, perhaps, irreparably damaged when products claiming to use ECM MasterBatch Pellets fail to biodegrade with[in] a reasonable period of time." *Id*. In short, ECM for many years touted the short period of time it would take for ECM Plastic to biodegrade, handed out certificates to its customers certifying that scientific testing proved both the "rate and extent" of biodegradation, and stressed to its customers the importance to its reputation that biodegradation occur within a reasonable amount of time.

Further, ECM's litigation contention – that rate claims were not material because customers cared only about "intrinsic" biodegradability – is belied by its contemporaneous business conduct, and we find the argument unpersuasive.[72] ECM made

[72] ECM also argues that features of the ECM Additive other than the rate of biodegradation (*e.g.*, cost, adaptability to manufacturing process) were

the rate claims in a wide variety of its marketing materials and then often repeated the express claims in one-on-one communications with potential customers. IDF 245-47, 253, 256, 1498, 1501.[73] As the ALJ explained, "[i]t is logical to conclude . . . that [ECM] would not promote the ECM Additive with these claims unless it was likely to have an effect on the purchasing decisions of its Customers." ID 288 (referencing the "9 months to 5 years" claim); *see* IDF 1500 (same). We agree.

Many of ECM's customers and potential customers asked ECM specific questions about the rate claims, which, as the ALJ explained, "is further proof that this claimed characteristic of ECM Plastics was an important factor to ECM Customers in determining whether to purchase the ECM Additive." ID 288-89 (referencing the "9 months to 5 years" claim); *see* IDF 1502 (same).[74] Indeed, Mr. Sinclair, ECM's President, acknowledged

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important to customers. However, rate need not be the only factor or even the most important factor in the customer's purchasing decision; all that is required is that it be *an* important factor, which it clearly is. *Novartis*, 127 F.T.C. at 695.

[73] Similarly, ECM disseminated its claim that tests prove its rate claims. The Certificate of Biodegradabilty that ECM issued to its customers states that "numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test measures approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic materials." IDF 266, 269.

[74] ECM argues that the ALJ referenced only four such inquiries in his opinion, and that "only four such party queries out of a universe of 300 proves . . . that the matter was not material . . . ." RAppB 23. However, as Complaint Counsel point out, the four inquiries referenced by the ALJ were only examples, and the record contains evidence of many additional inquiries from customers and potential customers about the rate claims. CCAnsB 8 & n.7; *see, e.g.*, CCX-283 at 2 (asking if ECM can provide a "statement of certainty" that ECM Plastic will "break down in approximately 9 months to 5 years"); CCX-275 at 3 ("Do you have any literature explaining the time (5 years or less) process?? [sic] I know you told me 9 months – 5 years . . . we are trying to use the proper language in our company literature."); CCX-307 at 2 (asking ECM to review "a statement explaining the attributes of interest to consumers," *i.e.*, that ECM Plastic would "fully biodegrade in 9 months to 5 years"); CCX-378 at 1 (expressing concern about evidence "to support a claim that the material will biodegrade in 9 months to 5 years"); CCX-423 at 9 (asking whether [redacted]); CCX-452 at 1 ("Where do you derive the 9 months to 5 years time frame for biodegradation?"); CCX-277 at 5 (asking ECM to advise on

that potential customers frequently asked about the rate claim. CCX-423 at 9 (stating, in advising purchaser regarding the nine month to five year time frame, [redacted]). ECM's CFO, Mr. Sullivan, likewise testified that potential customers "often ask[ed] how quickly" ECM Plastics would biodegrade. Sullivan, Tr. 721, 738-39.[75]

The record also shows that ECM not only provided its customers with the ECM marketing materials, including those containing the rate claims, but also encouraged those customers to use the materials for marketing ECM Plastics to their own customers. IDF 280. ECM also offered to provide, and often did provide, guidance to both direct and indirect customers on their advertising, including the rate claims. IDF 281; *see, e.g.*, CCX-397 at 1 (approving customer's claim that bags will decompose in nine months to five years). In some cases, ECM customers

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what "claims can be made" such as "plastic breaking down in 5 years or whatever?"); CCX-397 at 1 (asking ECM to confirm the accuracy of the statement: "Full Circle bags will decompose anywhere that natural organic material will in nine mo[]nths to five years"); RX-135 at ECM-097628 ("Please provide your synopsis supporting the 9 month to 5 years claim for degradation ASAP"); RX-135 at ECM-011174 ("How quickly will film using the ECM additive fully biodegrade? Your flyer states 9 months to 5 years. That seems pretty broad. Have you been able to narrow that down?"); RX-135 at ECM-027525 ("[O]ur customer is requesting . . . information regarding the actual timeline or lifeline of the biodegradable material."); RX-135 at ECM-057836 ("[W]hat time and condition . . . [for] the degradation?").

[75] ECM argues that its customers were sophisticated firms that decided to purchase the ECM Additive only after extended discussions, in which they discussed with ECM "the fact of environmental variability," and, in some cases, also did their own testing. RAppB 15, 28-29. The record, however, shows that many of ECM's customers have no expertise in biodegradation and relied on ECM precisely because they lacked both the facilities and expertise required to evaluate biodegradability. *See* ID 290. Even firms with substantial *plastics* expertise often lack expertise or facilities pertinent to *biodegradability* issues. IDF 1513-15, 1518, 1520-22, 1524-29. Further, even if ECM sometimes "softened" the rate claims in lengthy negotiations with customers, as it now asserts, the fact remains that ECM expressly, repeatedly, and prominently made the rate claims to potential customers over a long period of time. It is well-established that an advertiser cannot "cure the deception" in one advertisement with different statements in another. *See, e.g.*, *In re Chrysler Corp.*, 87 F.T.C. 719, 751-52 (1976); *Removatron Int'l Corp.,* 884 F.2d at 1496-97.

forwarded the ECM marketing materials to their own customers, and directed them to contact ECM directly to answer any questions they might have. IDF 287-88. In other cases, the ECM customer would direct its own customers to the ECM website, which also contained the rate claims. IDF 291, 293.

Likewise, there is evidence showing that ECM customers actually used the rate claim in advertising to their own customers, often in the same language as that used by ECM. IDF 286, 1512.[76] For example, Island Plastic Bags ("Island"), one of ECM's customers, stated in its advertisement for its "Bio Ultra Blend" trash liners, that it was using "ECM BioFilms' technology" which will cause the liners to "completely degrade . . . in 9 months to 5 years depending on conditions." IDF 292. Island and one of its distributors met with Down to Earth, a grocery store chain in Hawaii, and told Down to Earth that ECM Plastics would biodegrade within nine months to five years. IDF 293.

Beginning on April 22, 2009, Down to Earth featured ECM's logo, along with a claim of complete biodegradation within nine months to five years in a landfill, on its grocery bags, which were placed at the checkout counter for use by its customers in packing their groceries. IDF 297. Before doing so, Down to Earth advised ECM of the text that it intended to have printed on the 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

[76] ECM argues that because the Initial Decision lists only 7 of its 300 customers as placing the 9 years to 5 months claim on their own advertising or products, the claim was not material to its other customers. RAppB 22, 33. However, there are many examples of customers passing along ECM rate claims to their own customers and end-use consumers in addition to the seven cited by the ALJ. *See., e.g.*, CCX-33 at 1 (repeating "nine months to five years" in marketing literature for air pillows); CCX-34 at 1 (same in memorandum to distributors for plastic film); CCX-37 at 1, 2 (same on website advertising rigid cards such as credit cards); CCX-38 at 1, 2 (same on brochure for packaging); CCX-40 at 2 (claiming biodegradation "up to 5 years" for packaging); CCX-44 at 1 (same on grocery bag); CCX-102 at 1 (stating on marketing card that product is biodegradable in 1-5 years); CCX-961 at 1 (repeating "Fully biodegrade in 9 months to 5 years" claim on website's "Going Green" advertisement for plastic shopping bags).

months to 5 years, depending on the amount of oxygen they are exposed to," and asked for ECM's comments. IDF 299. Down to Earth also used language from the ECM marketing materials to prepare a press release for the "roll out" of its biodegradable plastic grocery bags on Earth Day, 2009, and provided a draft of the press release to both ECM and Island for prior review. IDF 303. Down to Earth prepared the press release because it wanted people to know it was doing its part to contribute to a more "environmentally sound operation." IDF 303.

Down to Earth purchased about 700,000 bags reflecting the nine months to five years claim, each year, for approximately five years, for a total of 3.5 million bags. IDF 301. Down to Earth has approximately 50,000-100,000 customers who, it is reasonable to infer, were exposed to the Down to Earth plastic bags containing the nine months to five years claim. IDF 301-02. Overall, Island manufactured ECM Plastic bags reflecting the rate claim for 50 to 100 different customers – in total approximately 10 million such bags. ID 300. Island explained that the rate claim was important because it helped to convey the message that "this is an actual technology . . . it's for real." CCX-811 at 54-55 (Island Dep.).

Interestingly, ECM argues that the nine months to five years rate claim could not have been material because ECM did not suffer any loss of business after finally discontinuing that claim in 2013. RAppB 5, 25, 29. However, we have found that the "some period greater than a year" representation with which ECM replaced the nine months to five years language was also likely to deceive consumers into believing that ECM Plastics would biodegrade in a reasonably short period of time (*i.e.*, within five years). *See supra* Section III.A.3. Indeed, survey evidence suggests that consumers viewed the two representations similarly. *See supra* Section III.A.3.b. Thus the fact that ECM did not lose business likely can be attributed to its substitution of one claim for another with similar deceptive content.

All of this evidence strongly supports the inference that ECM's rate claims were important to the purchasing decisions of those in its commercial supply chain because they knew their customers cared about products that could help the environment. *See, e.g.,* IDF 280, 299, 1503. By contrast, ECM's rebuttal

arguments, all of which the ALJ rejected, are unsupported by the record, contrary to applicable law, and unpersuasive. ID 288-91. In sum, Complaint Counsel have shown that ECM's rate claims were material to ECM's customers and to those customers' own downstream customers.

D. Means and Instrumentalities Liability

The Initial Decision determined that ECM was also liable under the "means and instrumentalities" doctrine[77] for providing the means for its customers and others in the supply chain to themselves engage in deception. ID 292-94, 319. That doctrine provides 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). The 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). ECM has not separately appealed the ALJ's means and instrumentalities ruling.

As the ALJ found, ECM provided its customers with marketing materials containing the claims that ECM Plastics will fully biodegrade in landfills in nine months to five years and that tests prove this and encouraged its customers to use those materials in advertising to their own customers. *See* IDF 280, 284, 290, 305, 312. ECM's customers did so, thereby passing the deceptive claim along the supply chain. *See* IDF 285-86, 289-90, 292-93, 305, 307-10, 312. This record amply establishes ECM's liability under the means and instrumentalities doctrine.

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[77] While ECM is liable for its direct dissemination of deceptive marketing materials to its customers, it may also be held vicariously liable for the conduct of others in passing along the deceptive claim. ID 292 & n.56.

E. Defenses

1. First Amendment

ECM contends that the Order, which prohibits unqualified claims that ECM Plastics are degradable unless ECM possesses competent and reliable scientific evidence that shows complete decomposition in a landfill within five years, would violate the First Amendment by imposing a prospective ban on truthful commercial speech. RAnsB 49, 51-52. ECM contends that because "nothing reliably biodegrades within one year in a landfill" and because no expert could explain how to reliably substantiate a claim concerning the "time to complete decomposition" or the "rate and extent of decomposition," the Order effectively creates "a categorical bar on biodegradable claims." *Id*. at 51; *see also* RRB 20-21. It "would impose a prior restraint on truthful speech without reliance on obvious, less speech restrictive alternatives (such as a qualification that there is no known precise rate of biodegradation)." RAnsB 51 (citing *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999)). And it would lack a reasonable relationship to the harm found, in violation of the Supreme Court's ruling in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Tr. Oral Arg. at 80. According to ECM, rather than prohibiting unsubstantiated claims, any remedy must allow a disclaimer that there is no scientific test for biodegradation rates. *Id*. at 80-81, 85-86.

We disagree. Commercial speech must at least "concern lawful activity and not be misleading" to qualify for constitutional protection. *Central Hudson*, 447 U.S. at 566; *see also, e.g.*, *In re R.M.J.*, 455 U.S. 191, 200 (1982) ("False, deceptive or misleading advertising remains subject to restraint."). The governmental "interest in ensuring the accuracy of commercial information in the marketplace is substantial." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). In this case, following an adjudication that examined the details and facts regarding ECM's representations, we found ECM's efficacy and establishment claims misleading because they were unsubstantiated by the science demanded by experts in the field. An Order that requires comparable substantiation

> as a forward-looking remedy is perfectly commensurate with the Commission's assessment

> of liability for [ECM's] past conduct: if past claims were deceptive in the absence of [particular] substantiation, requiring [that level of substantiation] for future claims is tightly tethered to the goal of preventing deception. . . . For purposes of *Central Hudson* scrutiny, then, the injunctive order's requirement of *some* [accepted] substantiation . . . directly advances, and is not more extensive than necessary to serve, the interest in preventing misleading commercial speech.

POM Wonderful, 777 F.3d at 501-02. Similarly, a forward-looking order that requires qualifications of the type needed to prevent ECM's prior unqualified biodegradability claims from being misleading is directly related to preventing misleading commercial speech and not more extensive than necessary.

We reject ECM's contention that the Order effectively prohibits all biodegradable claims because we reject ECM's contention that there is no scientific means to provide a rate or extent qualification. In fact, the ASTM D5511 methodology, which ECM explicitly references in some of its claims and which ECM provides as substantiation in this case, expressly describes an appropriate means to qualify biodegradable claims. ASTM D5511 states: "Claims of performance shall be limited to the numerical result obtained in the test . . . and not be used for unqualified 'biodegradable' claims. Reports shall clearly state the percentage of net gaseous carbon generation for both the test and reference samples at the completion of the test. Furthermore, results shall not be extrapolated past the actual duration of the test." CCX-84 at 1 (ASTM D5511 § 1.4). Consistent with this instruction from ASTM, and despite ECM's argument that such descriptions are impossible, products offered to consumers in the marketplace can include descriptions such as "3% biodegradable in 90 days," provided that the descriptions are truthful and are accompanied by warnings making it clear that test results do not support extrapolations.

We similarly reject ECM's contention that we must accept its proposed qualifier – that there is no known precise rate of biodegradation – rather than prohibit ECM from making unsubstantiated claims. ECM's proposal is inadequate to prevent

consumers from receiving the misleading impression that ECM Plastics will completely biodegrade in landfills within a reasonably short period of time, as substantiated by scientific tests. It addresses neither the rate nor extent of biodegradation that consumers perceive in ECM's representations. It offers only a vague allusion to variations in conditions and/or the imprecision of available substantiation techniques, which is information consumers would not understand or find useful, rather than acknowledging ECM's lack of substantiation.[78] Having found that ECM's claims violated the FTC Act, we will not accept remedial language that does not address the deception.

2. ECM's Contentions that an Order is Not in the Public Interest and FTC Action is *Ultra Vires*

ECM repackages its argument regarding materiality to claim that a remedial order is not in the public interest because there is no showing of harm or injury. Relying on cases such as *FTC v. Klesner*, 280 U.S. 19 (1929), ECM claims that mere deception, without a showing of actual injury, does not satisfy the public interest requirement for an order. *See* RRB at 18; RAppB 39-41. We reject ECM's contention on both factual and legal grounds.

We have already explained that biodegradation rate claims shaped the purchasing decisions of ECM customers and downstream purchasers. *See supra* Section III.C. To the extent they bought a product they otherwise would not have purchased, they were harmed by ECM's deception. Moreover, the record shows that purchasers paid a premium for ECM Plastics, making injury clear. S*ee* CCX-35 at 1 (describing a "small" premium charged for ECM Plastics); CCX-487 at 3 (describing a 40% premium price for biodegradable plastic relative to standard products); *cf*. RAppB 44 (implicitly conceding that customers pay higher prices for what they perceive to be biodegradable products by asserting the need for "market incentives for paying higher

[78] Indeed, ECM's proposal even falls far short of the qualifiers suggested in *Pearson* as disclosures that might prevent claims from being misleading. *See Pearson*, 164 F.3d at 658-59 (explaining that the FDA's concern regarding the absence of substantiation for efficacy claims could be effectively remedied by prominent disclaimers stating that "the evidence in support of this claim is inconclusive").

costs associated with producing those [biodegradable] plastics"). Thus, we reject the factual basis for ECM's claim that injury is absent.

As a matter of legal analysis, ECM's reliance on *Klesner* is inapposite. The Supreme Court has explicitly explained that *Klesner* does not hold that there is no public interest in preventing deception about a product's characteristics. Rather, when "a large number of buyers, comprising consumers and dealers, believe" a characteristic of a product is advantageous and

> such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to [that characteristic, then] [w]e are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial. There is nothing in the *Klesner* Case to the contrary.

FTC. v. Royal Milling Co., 288 U.S. 212, 216-17 (1933) (citations omitted). ECM's rate claims affect purchasing decisions in the manner described in *Royal Milling*, and ECM's reliance on *Klesner* is consequently misplaced.[79]

Additionally, ECM suggests that the proposed Order's prohibition on unqualified biodegradability claims unless items completely decompose within five years after customary disposal dictates rapid biodegradation and constitutes *ultra vires* agency action by interfering with national environmental policy over which the Environmental Protection Agency has exclusive authority. RAppB 43-44. The proposed Order does not regulate, or create any mandate regarding, the physical properties of any products that are asserted to be biodegradable; we are not

[79] *Klesner* was decided in 1929, before the 1938 Wheeler-Lea Amendments to the FTC Act added a proscription of "unfair or deceptive acts or practices" to the Act's original prohibition of "unfair methods of competition." *Klesner* thus reflects the thinking of an era when the Court was hesitant to prohibit deceptive practices without a demonstration of adverse effects on competition, *see id.*, 280 U.S. at 28, and ECM errs by disregarding the statutory revision.

requiring that products rapidly biodegrade. All that we are insisting upon is a truthful qualification to the pertinent marketing or advertising. Nonetheless, ECM maintains that our remedy would remove market incentives for paying higher costs associated with producing biodegradable plastics and will result in landfills receiving either non-biodegradable plastics or rapidly biodegrading products that undermine EPA's initiatives to collect methane. *Id*. at 44. As to the first concern, we have already explained that truthful qualifications are possible, and ECM provides no reason to conclude that truthful qualifications will render biodegradable products uneconomic. The other hypothesis – that our remedy will somehow fill landfills with products whose rapid biodegradation would outpace the installation of methane collection facilities – also is contrary to the facts.[80] In sum, the proposed order prohibits deceptive advertising; it does not create environmental policy.[81]

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[80] ECM relies on testimony that the EPA requires installation of gas collection facilities within five years after waste burial and that installation is typical within two years. RAppB 44 (citing Barlaz, Tr. 2285). But ECM Plastics take longer than five years to biodegrade. *See* ID 246 ("both parties' landfill experts agree that landfill conditions do not support the biodegradation times of less than five years"); *cf*. RAnsB 51 ("nothing reliably biodegrades completely within one year in a landfill, not even a tree trunk, a banana, or an orange"). The testimony of ECM's – that "if a polyethylene . . . were to completely biodegrade in a landfill within one year after customary disposal" "that material would be a net contributor to global methane emissions at the typical landfill," Barlaz, Tr. 2289, thus employs an unrealistic hypothetical.

[81] ECM's companion argument – that if its nine months to five years rate claim were deceptive because ECM Plastics take more than that time to biodegrade, the salutary effect on the environment from increased capture of emissions would render the deception a claim without any injury – fallaciously suggests a trade-off between the deception and environmental benefit. But whether or not ECM made a deceptive rate claim, the rate of biodegradation of the ECM Plastics, and the corresponding pace of methane generation are unaffected; there is no environmental benefit. More importantly, even if there *were* an actual environmental benefit, that would not justify deceptively marketing the ECM Additive. *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934) (rejecting an argument that "the public interest will be promoted by increasing the demand for pinus ponderosa, though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east," *i.e.*, that environmental benefits could justify deceptive marketing). Though "[t]he conservation of our forests" was "a good of large importance," the Court

3. Due Process

ECM contends that various pre-hearing discovery and evidentiary rulings by the ALJ violate ECM's due process rights. RAppB 44-51. Throughout discovery, ECM raised various complaints with the ALJ. Judge Chappell considered the complaints and, when he deemed them meritorious, provided relief. *See, e.g.*, Order Granting in Part and Denying in Part Respondent's Motion for Sanctions (Mar. 21, 2014). ECM then re-argued the same discovery disputes in its post-trial briefs, asserting that their resolution denied ECM due process. Considering the arguments anew, the ALJ concluded, "The notion that these same discovery disputes amount to a denial of due process is without merit." ID 296. ECM now "renews and restates" those same objections on appeal. RAppB 44.

The courts and the Commission apply an "abuse of discretion" standard when reviewing errors allegedly made in evidentiary rulings at the trial or initial hearing level. *See, e.g*., *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) and cases cited therein; *Olin Corp.*, 113 F.T.C. 400, 601 (1990) (exclusion of expert testimony); *Bristol-Myers Co.*, 102 F.T.C. 21, 363-64 n.89 (1983) (exclusion of expert studies); *Missouri Portland Cement Co.*, 77 F.T.C. 1643 (1970). While this means that the Commission will not routinely disturb an ALJ's denial of discovery or exclusion of evidence, it may reverse such a procedural decision and reopen the record, as necessary or appropriate when the ALJ's ruling is found to have been "unduly restrictive" or otherwise prejudicial or improper. *See*, *e.g.*, *Foster-Milburn Co.*, 51 F.T.C. 369, 371 (1954) (hearing examiner improperly denied complaint counsel's request to present scientific rebuttal witnesses); *cf. Modern Methods, Inc.*, 60 F.T.C. 309, 339 (1962) (hearing examiner erred in denying respondents' request to present surrebuttal testimony); *see also* Commission Rule 3.54, 16 C.F.R. § 3.54 (reserving the Commission's discretion to exercise all of the powers it could have exercised if it had made the initial decision).

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explained, "the end will have to be attained by methods other than" deception. *Id*.

ECM's complaints fit within five groupings, four of which are efforts to exclude Dr. Michel's study and rebuttal testimony. As discussed below, we find that ECM's characterizations are not supported by the facts, and we concur with the ALJ's conclusion that none of the discovery rulings denies ECM's due process rights.

First, ECM argues that the ALJ applied the "rules in a way that permits surprise rebuttal witnesses (who have not previously been identified) [, which] violates Due Process." RAppB 47. In particular, ECM contends that the ALJ improperly permitted Dr. Michel to appear as a rebuttal expert witness after Complaint Counsel and ECM agreed he would not be called as a fact witness and after Complaint Counsel had failed to include Dr. Michel on the initial April 2014 expert witness list. *Id.* at 45. ECM complains that Complaint Counsel first identified Dr. Michel as a rebuttal expert when "Complaint Counsel emailed ECM with Dr. Michel's report on June 30, 2014 at 11:46 PM," *id.* at 49, which ECM explains was only two days before the close of expert discovery.

Commission Rule 3.31A(a) provides: "Complaint Counsel shall serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 10 days after the deadline for service of respondent's expert reports." 16 C.F.R. § 3.31A(a). Implementing this rule, the last day for service of the report from any Complaint Counsel rebuttal expert witness was June 30, 2014, as specified in the ALJ's Third Revised Scheduling Order. Complaint Counsel e-mailed Dr. Michel's expert report to ECM on June 30, and were not obligated to disclose that Dr. Michel would be a rebuttal expert any earlier than that date.[82] Although Complaint Counsel failed to provide, along with the rebuttal report, a separate list identifying Dr. Michel as a rebuttal expert, the failure does not appear prejudicial to ECM, particularly given that the ALJ extended the period for ECM to depose Dr. Michel up to "at least three (3) business days

[82] *See* ALJ's Order on Respondent's Combined Motion for Sanctions, to Exclude Expert Witness, and for Leave at 4 (July 23, 2014) ("Order on Respondent's Combined Motion"). Nor does ECM explain how an agreement not to call Dr. Michel as a *fact* witness changes the deadline for identifying him as an *expert* witness.

in advance of the expected date of Dr. Michel's testimony." Order on Respondent's Combined Motion at 4. Consequently, we find no denial of due process from failure to exclude Dr. Michel's testimony as that of an improperly identified rebuttal expert witness.

Second, ECM argues that Dr. Michel's testimony was designed to buttress initial expert testimony and to address issues that should have been part of Complaint Counsel's affirmative case and therefore should have been barred as rebuttal. RAppB 46-48. The ALJ disagreed:

> An examination of the rebuttal report shows a point by point response to assertions in the reports of [ECM's] designated experts. That Dr. Michel, in drawing his conclusions, may rely on certain methodologies that are also used by Complaint Counsel's designated expert witnesses, as argued by Respondent, does not take Dr. Michel's opinions out of the realm of fair rebuttal.

Order on Respondent's Combined Motion at 3.[83]

Our review of Dr. Michel's expert report, CCX 895, and corresponding testimony confirms that Dr. Michel's opinions are proper expert rebuttal. The expert report quotes excerpts from ECM's expert reports and then provides rebuttal testimony directly applicable to those excerpts. Similarly, Dr. Michel's testimony responded only to the opinions introduced by ECM's experts.

Third, ECM asserts that the FTC interfered with a subpoena that was issued to Dr. Michel, which delayed evidence requested by ECM for weeks. RAppB 47. ECM criticizes the ALJ's refusal

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[83] When ECM subsequently raised the same argument two more times, the ALJ rejected it with similar rulings. *See* Order Denying Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses and Respondent's Request to Bar Rebuttal Expert Witness at 5-6 (Sept. 5, 2014) ("Dr. Michel's testimony was limited to matters within the scope of his report and to rebutting testimony offered by Respondent's experts.") (citing Tr. 2489-91); ID 297 ("Dr. Michel's rebuttal opinions constituted fair rebuttal.").

to impose ECM's requested sanctions, which included censure of Complaint Counsel, referral of Complaint Counsel to the DC Bar, and the exclusion of Dr. Michel's article from evidence.

Our review of the facts shows that ECM issued a subpoena *duces tecum* to Dr. Michel on February 28, 2014. The subpoena directed that the requested documents – including all documents responsive to Document Request 20, which sought all correspondence between Dr. Michel and the FTC – be provided to ECM by March 17, 2014. At the time Dr. Michel received the subpoena, he had not been retained by the FTC in the present case involving ECM, but he had been retained as a consultant since December 2012 on two other FTC environmental marketing investigations. *See* Order Denying Respondent's Motion for Sanctions for Unauthorized Dissuasion of Response to Subpoena *Duces Tecum* at 2 (Apr. 9, 2014).

On March 12, Dr. Michel contacted an FTC attorney working on the other matters to report that he received the subpoena in the present case and that some responsive documents in his possession had been submitted to the FTC by third parties in the other matters and had been provided to him as part of his consulting work. It was only when Dr. Michel contacted the other FTC attorney that Complaint Counsel in this case learned that anyone at the FTC had had contact with Dr. Michel. *Id.* On March 14, the FTC attorney investigating the other matters sent a letter to Dr. Michel, with copies to Complaint Counsel and ECM's counsel, explaining that certain third-party documents received by Dr. Michel were governed by a non-disclosure agreement that Dr. Michel had signed and Dr. Michel should not divulge those materials before March 28 to give the third-party submitters of confidential material an opportunity to seek an appropriate protective or *in camera* order consistent with FTC Rules of Practice. Also on March 14, the attorney investigating the other matters sent notices to counsel for the third parties to inform them of their rights to protect confidential information.

On March 17, Dr. Michel provided ECM's counsel with responsive documents, including material responsive to Document Request 20, but the accompanying transmittal letter explained that responsive third-party documents provided to the FTC for the other matters would be produced on March 28, to

allow the third parties their opportunity to object to disclosure. On March 24 and again on March 28, the FTC attorney handling the other matters informed Dr. Michel that particular third parties did not object, and the attorney instructed Dr. Michel that he should produce the materials. "There is nothing in the record to indicate that [Dr.] Michel failed to provide the Third Party Submissions on or before March 28, 2014." *Id.* at 4.

Judge Chappell did not deny due process by rejecting ECM's motion for sanctions. As the ALJ explained, there is no evidence that Complaint Counsel or other FTC attorneys acted for the purpose of interfering with ECM's rights and no showing that ECM was deprived of relevant discovery. *Id*. at 8. Regarding the personal sanctions, Respondent either erroneously equates all FTC attorneys with Complaint Counsel for this case or asserts a conspiracy between Complaint Counsel and other FTC attorneys without any facts. As to the evidentiary sanction, ECM fails to connect the exclusion of Dr. Michel's study with the alleged improper conduct; Dr. Michel's study was not obtained from a third-party submitter, so its production to ECM was not delayed. We conclude that ECM's due process rights were not infringed by the denial of its motion for sanctions.

Fourth, ECM claims a denial of due process from the ALJ's refusal to exclude Dr. Michel's study and testimony as sanctions for Complaint Counsel's failure to timely disclose the study in discovery responses. RAppB 44-45. ECM alleges that Complaint Counsel and the FTC knew of Dr. Michel's study since 2012, but improperly withheld the information in discovery responses and first revealed the study on February 19, 2014, as a surprise tactic during the deposition of an ECM designee. *Id.* The ALJ, however, found that, while other attorneys at the FTC had engaged Dr. Michel as a consultant on other matters and received a draft of his article in 2012, s*ee* Order Denying Respondent's Motion to Sanction Complaint Counsel for Violation of Discovery Rules at 3 (Apr. 7, 2014), ECM "failed to demonstrate that, contrary to the sworn declarations submitted, Complaint Counsel [in this case] was aware of the Article prior to February 14, 2014." *Id*. at 5.

ECM alleges that, even after learning of Dr. Michel's study, Complaint Counsel failed to timely disclose it in supplemental

discovery responses, so as to create a "gotcha" moment during a deposition. RAppB 50-51. Complaint Counsel contend that they obtained the study on Friday, February 14, 2014 after 8 p.m. Explaining that Monday was the President's Day holiday, Complaint Counsel acknowledge that they used the study on Wednesday, February 19 during the second day of a deposition of ECM's designated witness. *See* CCAnsB 18. Complaint Counsel also argue that the Scheduling Order required a supplemental response within three business days, which Complaint Counsel contend is consistent with their actions. *Id.* at n.14.

The ALJ determined that by delaying production for five days and "presenting the article to Respondent for the first time in the midst of the second day of the deposition, when Complaint Counsel had clearly determined the relevance and possible use of the Article before the start of the deposition, Complaint Counsel did not supplement in a timely manner," as required by Commission Rule 3.31(e). Order Granting in Part and Denying in Part Respondent's Motion for Sanctions at 4 (Mar. 21, 2014). The ALJ imposed sanctions and prohibited Complaint Counsel from "using or in any way relying upon any of [the ECM designee's] deposition testimony regarding the [a]rticle." *Id.* at 6. The ALJ determined that excluding the article from the trial was not warranted because fact discovery was still ongoing, expert discovery continued for an additional two months, and the trial was scheduled to begin about a month later. *Id.*

Commission Rule 3.38(b) states the ALJ "may take such action in regard [to a failure to comply with a discovery obligation] as is just." 16 C.F.R. § 3.38(b). As the Second Circuit has indicated, "a judge should inquire more fully into the actual difficulties which the violations [of discovery supplementation] causes, and must consider less drastic responses [than preclusion of the evidence]." *Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988); *see also* 16 C.F.R. § 3.38(b) (instructing the ALJ to grant relief "sufficient to compensate for withheld testimony, documents or other evidence"). Here, ECM's claim of a "gotcha" moment in a deposition was addressed directly by the ALJ's relief. Without a showing of further prejudice caused by Complaint Counsel's delay in complying with discovery obligations, the ALJ's choice of sanctions did not deny due process to ECM.

Finally, ECM claims the ALJ erroneously denied its motion to call Dr. Paul Grossman as a surrebuttal expert to challenge the testimony of Dr. McCarthy, and that "[t]he relative importance of [Dr. Grossman's] testimony renders the denial . . . a material violation of rights." RAppB 49. ECM argues that "the ALJ denied ECM's motion for leave to present Dr. Grossman's testimony in pertinent part on a miscalculation of the motion due date," because the ALJ erred when computing the due date for the motion by not excluding the July 4 holiday and incorrectly beginning the count before service of Complaint Counsel's rebuttal expert's report was complete. *Id.* at 50. ECM maintains that "denial of a motion as 'untimely' without any evidence of prejudice in the record is an abuse of discretion and clearly erroneous." *Id.* at 49.

The ALJ, however, did not deny ECM's motion for Dr. Grossman's testimony solely, or even primarily, because of the purported late filing. Commission Rules provide that surrebuttal experts may be called only when "material outside the scope of fair rebuttal is presented" by a rebuttal report. 16 C.F.R § 3.31A(a). In rejecting ECM's motion to call Dr. Grossman, the ALJ's primary finding was that ECM had failed to show that any material in Dr. Michel's report was outside the scope of fair rebuttal. *See* Order on Respondent's Combined Motion at 4; *see also* ID 298 ("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."). Irrespective of any issue of timeliness, ECM's failure to establish the essential predicate for calling a surrebuttal witness was a sound basis for denying its motion.[84] Thus, the ALJ did not deny ECM's due process rights when he denied ECM's motion.

[84] Moreover, the subjects that Dr. Grossman would have addressed, see RAppB 48-49, do not rebut the opinion of Dr. Michel, Complaint Counsel's rebuttal witness, but instead seek to undermine the credibility of Dr. McCarthy, who presented expert testimony in support of Complaint Counsel's case in chief. To testify on these topics, Dr. Grossman should have been called as an identified expert witness, rather than a surrebuttal expert.

IV. The Order

The Commission's Order has five principal features. First, it prohibits any unqualified representation that a plastic product or package is degradable (or that any product, package, or service affects its degradability) unless (i) such representation is true, not misleading, and, at the time it is made, ECM possesses and relies upon competent and reliable scientific evidence that substantiates the representation; and (ii) the entire item will completely decompose into elements found in nature within five years after customary disposal.[85]

The limitation on unqualified representations that a plastic product is degradable is necessary to prevent deception of reasonable consumers who understand an unqualified representation of biodegradability to convey the message that a plastic product or package will biodegrade completely into elements found in nature within five years after customary disposal. It is tailored to the deceptive practices that the Commission has found.

Second, the Commission's Order allows qualified representations about degradation of plastic products if the representations are: (i) true, not misleading, and substantiated by competent and reliable scientific evidence possessed by ECM at the time they are made; and (ii) qualified by: the time to complete decomposition into elements found in nature, or the rate and extent of decomposition into elements found in nature; and, if the product will not decompose by a customary method of disposal, information about the type of non-customary disposal method and its availability where the product is sold. Such qualifications must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose. The Order prohibits qualified representations such as that a product biodegrades in nine months to five years or in some period greater than a year, which we have found to be deceptive if unsubstantiated.

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[85] Commissioner Ohlhausen dissents from the Order to the extent it requires that ECM assure complete decomposition within five years of any plastic product for which it makes unqualified biodegradable claims or qualified biodegradable claims that do not mention a time frame.

This provision permits ECM to promote the benefit of its products, in ways that are not misleading, to the extent, but not beyond, what can be scientifically substantiated. For example, ECM could represent that an ECM Plastic exhibits "2% biodegradation in 30 days, under ASTM D5511 laboratory conditions," provided that that representation is truthful and substantiated and that ECM states that "decomposition may not continue after 30 days." Similarly, subject to the same provisos, ECM could report findings that tests prove "x percent of biodegradation in y days" as opposed to "z percent of biodegradation" over the same period for untreated samples of the same plastic. Among other things, any protocol (or combination of protocols) substantiating such claims must 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. And, most importantly, the qualifier must not be misleading to consumers.

Third, as fencing-in relief, the Commission's Order prohibits representations that any product, package, or service offers any environmental benefit unless the representation is true, not misleading, and properly substantiated at the time it is made, including with competent and reliable scientific evidence where appropriate. The ALJ deleted this relief from his order, opining that Complaint Counsel have not shown that ECM misrepresented any "environmental benefit" and finding that term vague and overly broad. ID 308-09. The record, however, demonstrates that biodegradability mattered to consumers because of their desire for environmental benefits.[86] And the breadth of the term "environmental benefit" is what prevents ECM from repeating its deceptive conduct by wording around specific, prohibited language.

ECM's violations were serious, repeated, and deliberate, and they warrant fencing-in relief to prevent the company from engaging in deceptive practices that are "like and related" to the

[86] Survey evidence shows that consumers saw biodegradation as an environmental benefit. S*ee, e.g.*, RX-846 at 15 (95% of Stewart survey respondents answered "yes" to Question 3, "Is the fact that a product is biodegradable helpful to the environment?"). *See generally supra* Section III.C (discussing the importance of biodegradation rates to purchasers).

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) (FTC orders may prohibit the use of "related and similar practices"). "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." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). Rather, the Commission is permitted "to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future." *FTC v. Colgate-Palmolive*, 380 U.S. 374, 395 (1965). "[I]t cannot be required to confine its road block to the narrow lane the transgressor has traveled," but "must be allowed effectively to close all roads to the prohibited goal." *Ruberoid*, 343 U.S. at 473. Here, the Order prevents ECM from pursuing different avenues to the same end-point by deceptively citing general or alternative environmental benefits rather than using the label "biodegradable."

The seriousness of ECM's deceptive conduct is evidenced by both the duration and pervasiveness of the biodegradation claims that permeated the company's marketing efforts,and was enhanced by ECM customers' inability to "readily judge for themselves the truth or falsity" of ECM's claims. *Stouffer Foods Corp.*, 118 F.T.C. at 812. Further, ECM's violations were deliberate. After using unqualified biodegradation claims at the outset, the company began using a "nine months to five years" claim after its customers indicated interest in knowing the time frame for degradation. Sinclair, Tr. 1613. But then the express "nine months to five years" claim came to be questioned by customers who were taking it "literally" and "trying to hold [ECM] to . . . certain time frames," and the company realized it could not revert to the use of an unqualified claim under 2012 Green Guides. Sinclair, Tr. 770-71. So ECM decided to use the "some period greater than a year" language. *See* IDF 251-53; Sinclair, Tr. 770-71 (discussing ECM's shift in marketing language). ECM's awareness of concern with its rate representations and the Green Guides' revision, and its calculated choice of a new representation that literally conformed to the new FTC guidance but conveyed essentially the same deceptive, implied claim, suggests a deliberateness of conduct that warrants fencing-in. *See Stouffer Foods Corp.*, 118 F.T.C. at 813-14

(awareness of the potential inappropriateness of a claim and that "characterization . . . was a delicate matter" suggests deliberateness of conduct that supports fencing-in). Moreover, the limitations on use of ASTM testing were express and available for everyone to see, so that ECM knew or should have known that it was misusing the ASTM results in certifying that tests proved its claims. Under these circumstances, the modest fencing-in described above is appropriate.[87]

Fourth, the Commission's Order prohibits ECM from providing to others the means and instrumentalities with which to make any false, unsubstantiated, or otherwise misleading representation of material fact regarding any environmental benefit. This provision is needed to bar future conduct of the type through which ECM has transmitted the means to make deceptive biodegradation claims to others.

Finally, the Commission's Order prohibits ECM from misrepresenting the existence, contents, validity, results, conclusions, extrapolations, or interpretations of any test, study, or research. This provision specifically prohibits ECM from misrepresenting the results of testing protocols, such as those from ASTM, in ways prohibited by the testing organization. As discussed in Section III.B.2.d.i, ECM has departed from ASTM's express limitations in ways that have contributed to its deceptive practices: it has gone beyond the numerical results by making performance claims about biodegradation in most landfills; it has used ASTM testing for unqualified biodegradable clams; and it has extrapolated test results to make claims about complete biodegradation. Barring ECM from repeating its misuse of ASTM D5511 or similarly misusing other testing protocols prevents ECM from using the same or similar avenues to repeat its deceptive conduct.

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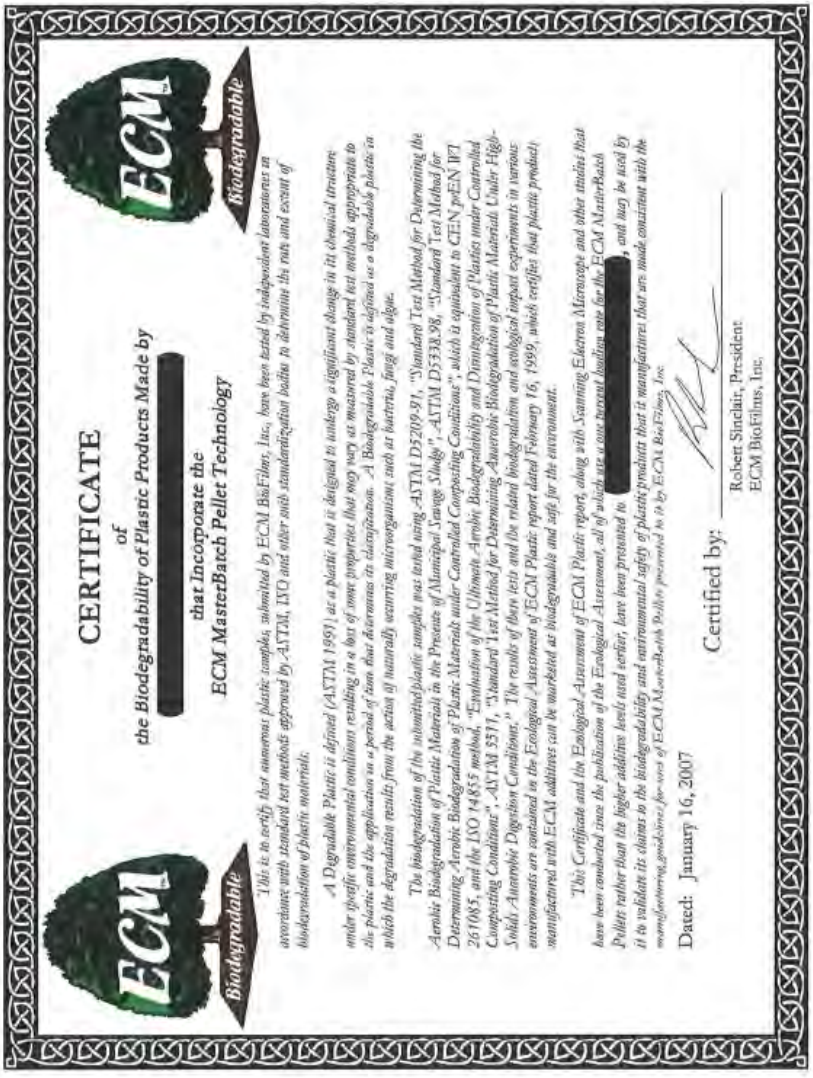
[87] The ease of transferring a violative claim to other products supports fencing-in. *See, e.g., Thompson Med. Co.*, 104 F.T.C. at 837. Transferability exists when "other products could be sold utilizing similar techniques." *Jerk, LLC*, 2015 WL 1518891, at *29; s*ee also Colgate-Palmolive*, 380 U.S. at 394-95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-96 (9th Cir. 1982). Here, the fencing-in addresses the possibility that similarly deceptive environmental claims could be raised with regard to other products.

Opinion of the Commission

APPENDIX A

Examples of ECM's Marketing Materials



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 13 7 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 product 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 additives 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 use 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

Opinion of the Commission

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

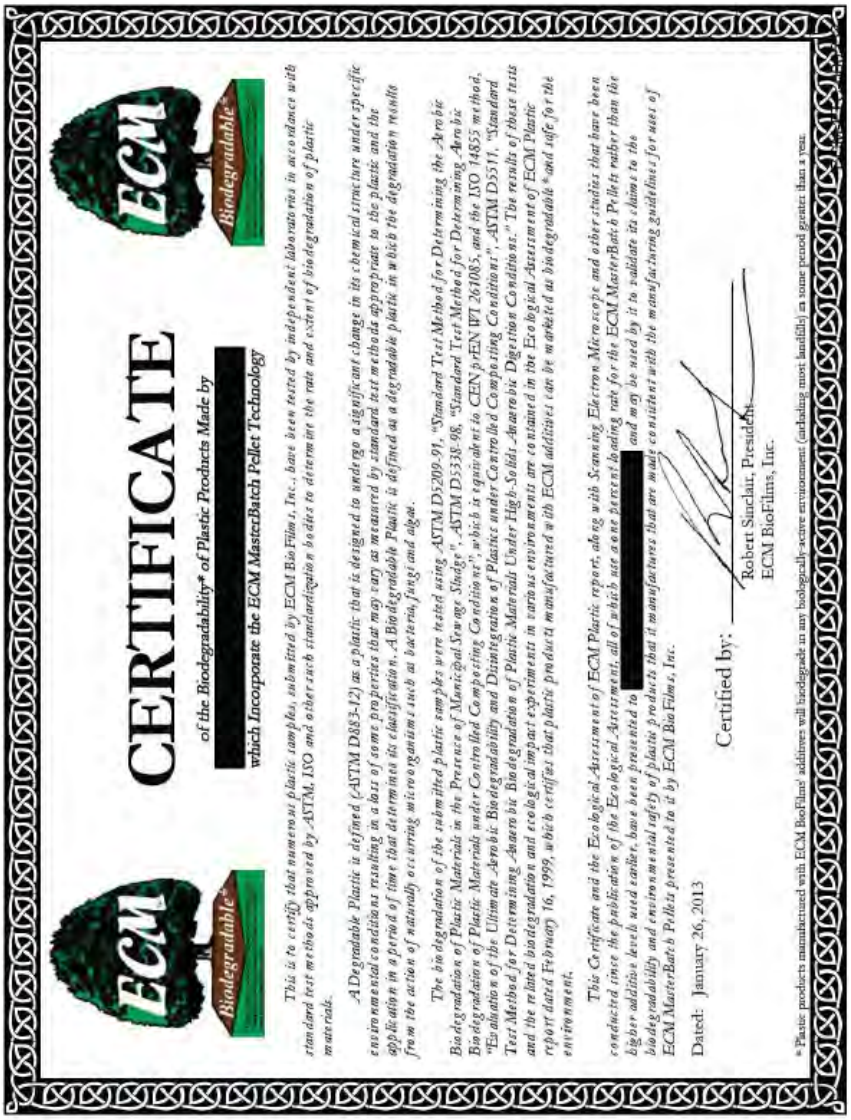
For Sales or Information, contact:

Phone: 440-350-1100
Fax: 440-350-1144
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.

ECM-FTC-000017
CCX - 3



CERTIFICATE

of the Biodegradability* of Plastic Products Made by

[redacted]

which 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 D883-12) 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 WI 261085, 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* 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 26, 2013

Certified by: _____

Robert Sinclair, President
ECM BioFilms, Inc.

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

CCX - 14

Opinion of the Commission

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.

Additives for Manufacturing Biodegradable* Plastic Packaging and Products

Plastic products made with ECM additives

- **Fully biodegrade over some number of 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).**

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 and in roughly the same time period.

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:

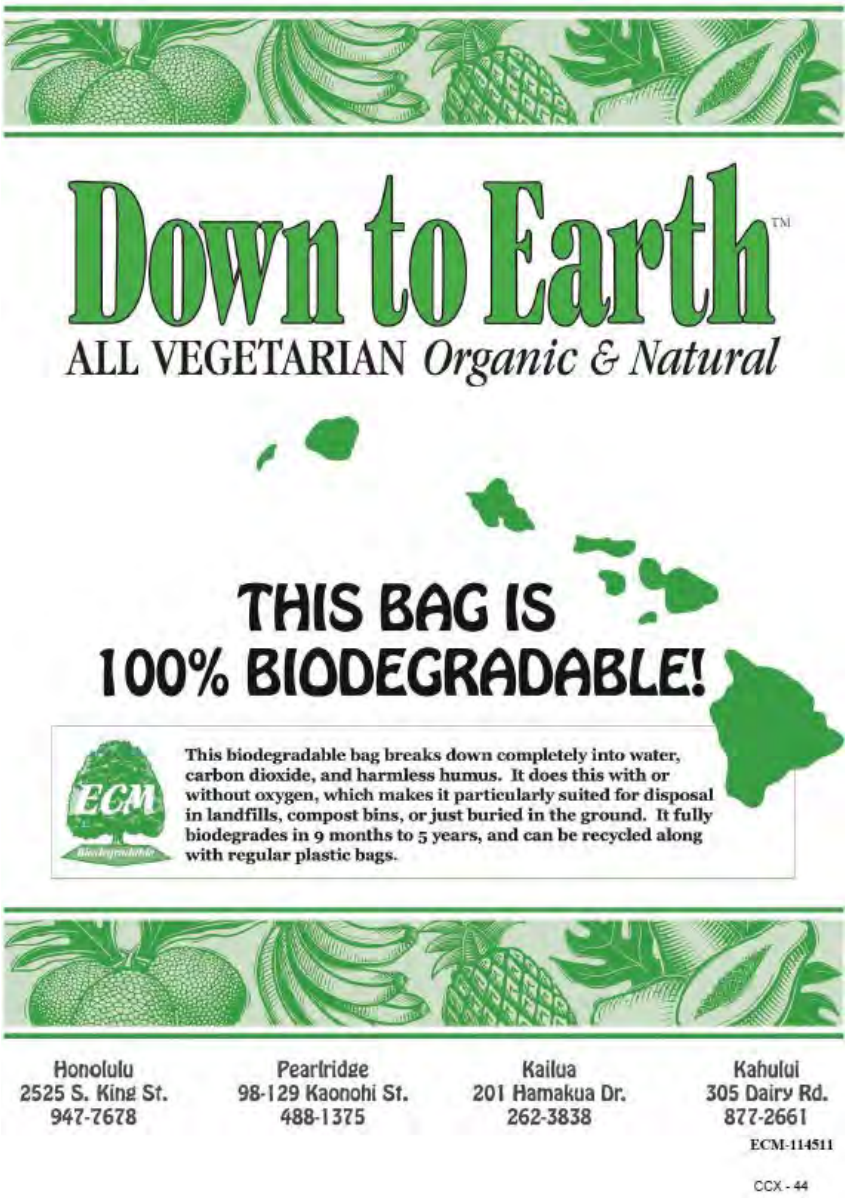
Phone: 440-350-1400
Fax: 440-350-1444
E-mail: sales@ecmbiofilms.com
U.S. Toll Free: 888-220-2792

ECM Biodegradable

* Plastic products manufactured with ECM BioFilms' additives will biodegrade in any biologically-active environment (including most landfills) in some period greater than a year.

ECM-001682

CCX - 15


Down to Earth™
ALL VEGETARIAN Organic & Natural
THIS BAG IS
100% BIODEGRADABLE!
ECM
This biodegradable bag breaks down completely into water, carbon dioxide, and harmless humus. It does this with or without oxygen, which makes it particularly suited for disposal in landfills, compost bins, or just buried in the ground. It fully biodegrades in 9 months to 5 years, and can be recycled along with regular plastic bags.
Honolulu
2525 S. King St.
947-7678
Pearlridge
98-129 Kaonohi St.
488-1375
Kailua
201 Hamakua Dr.
262-3838
Kahului
305 Dairy Rd.
877-2661
ECM-114511
CCX - 44

Opinion of the Commission

FINAL ORDER

DEFINITIONS

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

A. "Clearly and Prominently" shall mean as follows:

1. 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;

2. 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

3. 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.

B. "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.

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

D. "Competent and reliable scientific evidence" shall mean tests, analyses, research, 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:

1. For unqualified degradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition and simulate the physical conditions found in landfills, where most trash is disposed.

2. For qualified degradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:

   a. assure the entire product will (1) completely decompose into elements found in nature in any stated timeframe or; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and

b. 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.

E. "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.

F. "Degradable" includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.

G. "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.

H. "Means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, 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.

I. 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 plastic product or package is degradable, or that any product, package, or service affects a plastic product or package's degradability, 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; and

1. the entire item will completely decompose into elements found in nature within five (5) years 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.

B. That any 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, 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 misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, extrapolations, or interpretations of any test, study, or research, including making any representations that are prohibited, or otherwise contrary to limits set, by the promulgating organization for such test, study, or research.

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 Commission for inspection and copying:

A. All advertisements, labeling, packaging and promotional materials containing the representations specified in Parts I, II and III;

B. All materials that were relied upon in disseminating the representations specified in Parts I, II and III;

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 V.

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 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.

VI.

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."

VII.

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."

VIII.

This Order will terminate on October 11, 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 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.

PARTIAL DISSENT OF

COMMISSIONER MAUREEN K. OHLHAUSEN

By Commissioner Maureen K. Ohlhausen, for herself.

This matter presents challenging questions about consumer perceptions of the biodegradability of plastic, the appropriate standard for determining whether an unqualified biodegradable claim affected the perceptions of reasonable consumers, and the proper course forward when new information undermines the basis for previous Commission guidance on biodegradability.

Respondent ECM BioFilms, Inc. (ECM) made express claims that plastics treated with its "ECM Plastics" product would biodegrade within certain time periods. I support the majority's conclusion that those express claims were unsubstantiated.[1]

ECM also claimed that products using ECM Plastics were "biodegradable" without including a time period. Complaint Counsel alleged that this unqualified use of the word "biodegradable" conveyed an implied claim that such products would biodegrade in a year. The ALJ found that the evidence did not support this allegation. Relying on consumer survey evidence that the ALJ found insufficient, the majority now holds that ECM made an implied claim that the treated plastic products would biodegrade in a "reasonable" time period of between one and five years.[2]

The record in this case suggests that although consumers are interested in buying biodegradable products, many consumers do not understand certain aspects of biodegradability. The key question, however, is whether ECM's unqualified claim *caused* reasonable consumers to believe that plastics treated with the ECM Plastics product would biodegrade either in a year (the time period in the Green Guides and Complaint Counsel's original position) or between one and five years (the Commission majority's interpretation of a reasonably short period). To answer

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[1] I agree with the majority that ECM's express "9 months to 5 years" claim was material and unsubstantiated, that the related express establishment claim was also unsubstantiated, and that ECM's "some period greater than a year" express claim was also unsubstantiated. I also agree with the majority that the ALJ's pre-hearing discovery and evidentiary rulings below did not violate ECM's due process rights.

[2] The Opinion does not contradict the ALJ's finding that Complaint Counsel failed to prove that ECM had impliedly claimed that ECM Plastics completely biodegrade in a landfill *within a year*. Instead, the majority interprets the implied claim to convey complete degradation within five years. Opinion at 13. The majority finds this five-year interpretation consistent with the complaint's general allegation that ECM claimed degradation within "a reasonably short period of time" and supported by Complaint Counsel's occasional references to a one- to five-year range as the "reasonably short period of time" at issue. *Id.* But see *infra* note 53 (discussing Complaint Counsel's contrary statement during oral argument). Thus, the majority addresses a different question than did the ALJ.

this question, we must distinguish the effect of ECM's unqualified claim of biodegradability from pre-existing consumer misunderstanding about the biodegradability of plastic.[3] The majority and I agree that this task calls for extrinsic evidence in the form of experimental consumer surveys. We disagree, however, on the strength of the submitted survey evidence (particularly the surveys rejected by the ALJ as unreliable) and how to weigh weak evidence that a minority of consumers perceived a particular claim.

I dissent from finding liability on the unqualified biodegradable claim because Complaint Counsel lacks reliable extrinsic evidence sufficient to prove that ECM's unqualified claim caused reasonable consumers to believe that treated products would biodegrade in either a year or in a period between one and five years. Furthermore, in finding that the extrinsic evidence supports Complaint Counsel's claim interpretation, the majority misapplies the Deception Statement's "significant minority" exception.

I. The available extrinsic evidence is insufficient to determine how consumers interpreted ECM's claims.

The majority and I agree with the ALJ that ECM's unqualified "biodegradable" claim on its face does not convey an implied rate of degradation.[4] As such, ECM's alleged claims fall on the "barely discernible" end of the continuum of implied claims.[5] For such claims, the Commission "will not find the ad to have made the claim unless extrinsic evidence allows that such a reading of

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[3] For example, one of the consumer surveys in the record indicates that approximately 13% of consumers believe that an untreated plastic bag biodegrades fully within one year, and 25% believe such a bag biodegrades fully within five years. CCX-860, App. A at 34.

[4] *See* Opinion at 14; Initial Decision at 182.

[5] *See FTC v. QT*, 448 F. Supp.2d 908, 958 (N.D. Ill. 2006)(quoting *F.T.C. v. Febre*, 1996 WL 396117 at *4 (N.D. Ill., July 3, 1996), *aff'd,* 128 F.3d 530 (7th Cir. 1997)).

the ad is reasonable."[6] The extrinsic survey evidence offered in this case does not meet that standard.[7]

A. The consumer surveys all have significant methodological flaws.

In evaluating the evidence, we ought to weigh the results of each study based on its methodological soundness.[8] Four surveys are in the record. Complaint Counsel's expert, Dr. Frederick, based his results on a series of Google Consumer Surveys (GCS survey). ECM's expert, Dr. Stewart, offered the results of a telephone survey (Stewart survey). The record also includes discussion and analysis of two older surveys – the APCO and Synovate surveys – submitted to the FTC during the development of the Green Guides. All four surveys are either methodologically flawed, unsuited to discerning consumer beliefs about ECM's claims, or both.[9]

Moreover, I find it problematic that the majority shows no deference to the ALJ's findings about expert witness credibility.[10]

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[6] Initial Decision at 182 (citing *Stouffer*, 1994 FTC Lexis 196, at *10).

[7] Thus, I disagree with the ALJ to the extent he found that the extrinsic evidence shows that consumers interpreted ECM's unqualified biodegradable claim to mean a process without reference to any time period. *See* Initial Decision at 222. Instead, I believe the extrinsic evidence is insufficient to draw any conclusions about consumer interpretations of ECM's unqualified claims.

[8] *See* Dennis A. Yao and Christa Van Anh Vecchi, *Information and Decisionmaking at the Federal Trade Commission*, 11 J. PUB. POL'Y & MARKETING 1 (1992); *POM Wonderful*, 2013 FTC Lexis 6, at *49; *Stouffer*, 1994 FTC Lexis 196, at *29; Initial Decision at 190.

[9] I agree with the ALJ and the majority that the APCO and Synovate surveys are fatally flawed and offer no reliable evidence to support Complaint Counsel's allegation. Initial Decision at 67, ¶ 496 (citing FTC finding in Green Guides, describing their lack of controls and biased closed-ended questions, among other flaws); Opinion at 29-31. Given that the Green Guides relied on the APCO and Synovate surveys in defining "reasonably short period of time" as one year, 16 C.F.R. § 260.8, our unanimous conclusion that these two surveys are fatally flawed raises issues about the validity of this definition.

[10] *See e.g.*, Initial Decision at 46, ¶ 324 ("Having reviewed, evaluated, and weighed the opinions of both Dr. Stewart and Dr. Frederick, and the bases therefore, Dr. Stewart's opinions are well supported and are more well

Neither the majority nor I observed, as Judge Chappell did, the manner and tone in which the experts explained their theories and answered questions. That credibility assessment, which typically has a strong impact on a court's interpretation of expert testimony, lies solely with the ALJ. Yet the majority ignores or at least underplays the ALJ's finding that Dr. Stewart's opinions are more credible than are those of Dr. Frederick.

1. Dr. Frederick's GCS survey is flawed in methodology and application.

Dr. Frederick, Complaint Counsel's expert witness, used Google Consumer Surveys to perform his research. GCS is a novel online consumer survey technique that has no track record in litigation and very little history in academic research.[11]

The ALJ rejected the GCS survey, finding that it "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."[12] For example, Complaint Counsel failed to prove that the GCS methodology provides a representative sample of consumers.[13] Most problematically, the record shows that GCS

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reasoned, credible, and persuasive than the opposing opinions of Dr. Frederick."); *id.* at 188.

[11] *Id.* at 201 ("There is no legal precedent for relying on the 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 [*sic*] become generally accepted as a reliable research tool by market research professionals."); *Id*. at 50, ¶¶ 361-62 (citing Stewart, Tr. 2683).

[12] *Id.* at 201.

[13] *Id.* at 197-200. The majority asserts that the GCS enables the use of substantially larger sample sizes. Opinion at 18. Yet, despite the majority's repeated references to "29,000 responses," Dr. Frederick did not take advantage of this alleged strength. Because Dr. Frederick only asked a single question to each respondent, his "survey" is more accurately characterized as 60 separate, much smaller, single-question surveys. Indeed, that is how Dr. Frederick himself characterized his analysis. *See, e.g.,* CCX-860 at 12 ("Sample sizes of each survey ranged from 72 to 1704.") Each of the experimental questions on which the majority relies received only between 200 and 268 responses, before

infers, rather than gathers, demographic data from participants, and that GCS produces *no demographic data at all* for approximately 30% of participants.[14] Furthermore, the ALJ found that the GCS methodology likely suffers from disinterest bias because consumers are likely to give insincere or random responses to bypass the interruption of their web browsing.[15] For these and other reasons, the ALJ concluded that even if the GCS survey were admissible evidence, it was so flawed that it should receive little, if any, evidentiary weight. I agree.

Complaint Counsel cites two independent sources in defense of the GCS methodology, but neither shows that GCS is reliable for our purposes.[16] The first, a news article by a political pollster,

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coding. *See* CCX-860, App. 30-33 (questions 3C, 3D, 3E, 3J, 3K, 3M, and 3N). That is, the majority reaches its conclusions based on less than 6% of the approximately 29,000 responses Dr. Frederick collected and on questions with sample sizes approximately half the 400-person sample size of Dr. Stewart's telephone survey.

[14] GCS infers demographics and, for various reasons explained by the ALJ, does not report any demographic information for approximately 30-40% of those polled. CCX-874 at 3. Although Complaint Counsel's expert defended Google's inferred demographics, he failed to explain how the GCS survey methodology is provably representative when it lacks demographic information for up to 40% of participants.

[15] Initial Decision at 192-93. The majority asserts that the "obvious" protest answers are "1% of a 29,000 respondent sample," Opinion at 21, but as pointed out above, each of the questions on which the majority primarily relies had sample sizes of less than 1% of 29,000 respondents. *Infra* note 13. Furthermore, many protest answers might be less obvious. The majority also alleges: "[T]here is no reason to believe that 'disinterest bias' is of any greater concern in a Google survey" than in other survey methods. Opinion at 21. However, in a telephone survey or mall-intercept survey, disinterested persons can quickly end the interruption and return to their prior activity by hanging up or walking away, rather than answering. But in a GCS survey, "the user is blocked from access to the desired [website] content unless he or she answers the survey questions or pays for access to the desired content." Opinion at 16. Because the *easiest* way for a disinterested person to reach the content they desire is to answer the GCS survey, it is plausible that disinterested persons complete GCS surveys at a greater rate than other kinds of surveys.

[16] Complaint Counsel also cites Google's own white paper on the GCS methodology. Opinion at n.25 (citing CCX-248). This study lacked independence and only looked at the representativeness of the GCS sample as compared to other online survey methodologies.

briefly mentioned the relative accuracy of a specific GCS poll about the 2012 presidential election.[17] The accuracy of a single political poll asking a closed-ended question about a nationwide election says little about the accuracy of a survey asking an open-ended question about biodegradable products, or about the overall reliability of the survey methodology.[18] The second source, a study by the Pew Research Center, actually raised major concerns about flaws in the GCS survey sampling method that mirror the ALJ's concerns.[19] Academic researchers have also raised concerns about the GCS methodology.[20]

In addition to the general problems of the GCS methodology, Dr. Frederick's execution of his particular GCS survey also suffers from serious flaws. First, as the ALJ found, Dr. Frederick improperly coded answers to open-ended questions, throwing out 28% of all responses.[21] This skews the results in Complaint Counsel's favor by over-representing responses that included a time element.

Second, although an experimental survey is the best way to assess the effect on consumers of ECM's unqualified biodegradability claims, Dr. Frederick's survey was not a well-

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[17] CCX-872 at 2.

[18] Furthermore, a closed-ended nationwide presidential poll is unlikely to suffer from the same coding and sample problems as the survey used in this case.

[19] Specifically, (1) GCS does not use the general public as its sampling frame; (2) it is not clear whether the GCS samples are fully representative of all Internet users; (3) demographic information is unavailable for approximately 30-40% of those polled; and (4) there can be substantial errors in how GCS classifies people with its inferred demographics. CCX-874 at 2-5. (noting that using GCS "few measures of demographic characteristics are available for analysis"; "It is also difficult to ask complex questions using [GCS] platform" due to character limits). *Id*. at 4.

[20] *See e.g.*, Erin. R. Tanenbaum, Parvati Krisnamurty, and Michael Stern, *How Representative are Google Consumer Surveys?*, 2013 JSM 2481 (2013) (finding that GCS survey about household cell phone use produced anomalous data, lacked inferred demographic data, thus supporting prior work that inferred demographics may not be fully accurate).

[21] Initial Decision at 194-97. Discarded answers included accurate, if vague, answers such as "it depends."

designed experimental survey.[22] As noted above, to assess how ECM's unqualified biodegradable claim affected consumer beliefs, we must control for previously existing consumer beliefs about the rate at which plastic biodegrades. In this case, what evidence we have suggests that as many as 25% of consumers believe – without any exposure to ECM's claims – that untreated plastic bags biodegrade within five years.[23] In such an environment, only a well-designed experimental survey can offer persuasive evidence about the effect of ECM's claims on consumer beliefs.

Dr. Frederick's survey, however, was not well designed to test the effect of ECM's unqualified claim. Although a few pairs of questions can be repurposed as an experimental test, none is well suited for this purpose. For example, two pairs of questions—3O and 3H[24] and 3P and 3I[25]—compare pictures of plastic products with or without ECM "biodegradable" logos. These pairs would appear best suited to reveal how consumers' beliefs change when exposed to the ECM biodegradable claim.[26] But Dr. Frederick criticizes these questions *which he created* because they used "not legible" logos.[27] In retrofitting his own analysis to answer experimental questions, he instead relies on questions that place extra emphasis on the term biodegradable in the question and thus muddies what stimulus affects consumer behavior – the ECM

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[22] In fact, Complaint Counsel never used Dr. Frederick's evidence as an experimental survey until we sought supplemental briefing.

[23] CCX-860 App. A at 34.

[24] Each asks, "What is your best estimate of the amount of time it would take for this container below to biodegrade?" over an identical picture of plastic containers except that the container in question 3H has ECM's biodegradable logo placed on it. CCX-860 at 31, 34.

[25] Each asks, "What is your best estimate of the amount of time it would take for this plastic bag to biodegrade?" over an identical picture of a plastic bag except that the bag in question 3I has ECM's biodegradable logo placed on it. CCX-860 at 32, 34.

[26] As discussed below, the responses to those pairs of questions suggest that the unqualified biodegradability claim had a negligible effect on consumer beliefs. *See infra* Section A2.

[27] CCSuppB, Frederick Dec. at 7 n.5.

logo or the text of the question.[28] Thus, these question pairs also are not well designed for an experimental test of the effect of ECM's claim on consumer beliefs.

2. The Stewart survey fails to control for consumers' prior beliefs.

Because it lacks an experimental control, the Stewart survey cannot explain how ECM's claim affected consumer beliefs. The survey allegedly has some methodological weaknesses,[29] although Dr. Stewart used a more traditional and well-established methodology than did Dr. Frederick.[30] However, even if the Stewart survey were a perfectly executed descriptive survey, it would still lack an experimental control group and thus could not control for consumers' prior beliefs. An experimental control is particularly important in this case to distinguish preexisting consumer misunderstanding about all plastics' biodegradability from any misunderstanding potentially caused by ECM's unqualified biodegradable claim.[31] Lacking such a control, the

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[28] Dr. Frederick, when asked to analyze his survey as an experimental survey, compared control questions 3O and 3P to questions 3J and 3K. *Id.* at 8. 3J and 3K show the same pictures as their counterparts 3H and 3I, but the question is different: "What is your best estimate of the amount of time it would take for this [container or plastic bag] (which bears the symbol 'ECM biodegradable') to biodegrade?" CCX-860 at 30-34.

[29] For example, Complaint Counsel argues that the Stewart survey lacks a representative sample of consumers because such landline phone surveys skew older. CCAppB at 17.

[30] Initial Decision at 216 (finding that the Stewart survey was designed and conducted in accordance with generally acceptable principles of survey research such as drawing a representative sample, use of open-ended questions, use of trained interviewers, and use of trained "blind" coders).

[31] The majority disputes that "we must separate ad meaning from preexisting beliefs as a general matter." Opinion at 31. The majority thus appears to believe that the Commission can deduce the existence and the effect on consumers of an *implied claim not facially apparent in an advertisement* without accounting for the level of knowledge of the audience. But the consumers' level of knowledge matters to a deception inquiry, as the Deception Statement itself acknowledges. Deception Statement, 103 F.T.C. at 178 (noting that "ignorance or incomprehension" may cause some consumers to be misled by "a scrupulously honest claim.") (quoting *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). Furthermore, a proper deception analysis evaluates

Stewart survey cannot support Complaint Counsel's theory that ECM's claims affected consumer beliefs.

B. Even ignoring the methodological flaws, the experimental survey data is inconclusive.

Leaving aside the serious flaws in methodology, neither Dr. Frederick's nor Dr. Stewart's surveys provide evidence sufficient to determine what consumers believe biodegradable means.

The massive amount of data collected by Dr. Frederick can be sliced and diced to support a wide range of results.[32] At one extreme (Outcome A), the results chosen for comparison indicate that a "biodegradable" label causes only 5% more consumers to believe the bag will biodegrade within a year, or 10% to believe it would biodegrade within five years.[33] At the other extreme (Outcome B) the results chosen for comparison indicate that a "biodegradable" label could cause 41% of consumers to believe a plastic bottle would biodegrade within one year, and 52% of

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representations "in light of the sophistication and understanding of the persons to whom they were directed." *Id.* at 180 (quoting *Horizon Corp.*, 97 F.T.C. 464, 810 n.13 (1981).). For example, "[A] practice or representation directed to a well-educated group… would be judged in light of the knowledge and sophistication of that group." *Id.* at 181. Logic and our precedent are clear: we cannot understand how the implied claim about the rate of biodegradation likely affects consumers' beliefs or knowledge unless we know enough about consumers' prior beliefs or knowledge to identify a likely change in belief or knowledge. Control questions are one of many tools that can help to identify and account for the prior beliefs of consumers.

[32] Dr. Frederick's methodology used Google Consumer Surveys to collect 29,000 responses in approximately 60 different one-question surveys. *See, e.g.*, CCX-860 at 12, App. A at 27-45.

[33] To calculate Outcome A: compare results from question 3I (estimated time for labeled plastic bag to biodegrade) to question 3P (estimated time for unlabeled plastic bag to biodegrade), but ignore Dr. Frederick's questionable coding and therefore include the full denominator. CCX-860 at App. A, 32, 34. The majority argues that question 3I underestimates the effect because Dr. Frederick designed the question poorly by using an illegible label, yet cursorily dismisses any criticism of bias in his design of question 3K, which produces results more favorable to the majority's case. Opinion at n.18.

consumers to believe the bottle would biodegrade within five years.[34]

Something is amiss when data in a single analysis supports two conclusions differing by a factor of eight. Assuming that the population answering each question was representative, the differences must be a result of the design of each scenario's questions. The questions in Outcome A better represent a consumer's actual exposure to ECM's claims and thus were better designed to measure how consumers react to these claims.[35] The Commission should be cautious in placing too much confidence in a methodology where the results appear to depend quite heavily on how questions are asked, rather than on consumer opinion. At the very least, the Commission must evaluate the evidence as whole rather than rely exclusively on analyses that show the highest impact on consumer beliefs.

Nor is the Stewart survey persuasive. The majority primarily relies on a single question in the Stewart survey that did not ask consumers about ECM's actual claim.[36] Furthermore, the majority's strongest conclusions ignore most of the gathered responses. For example, by discarding 217 of the 400 answers, the majority concludes that 64-65% of consumers believed that biodegradation would occur in five years or less.[37] Perhaps

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[34] Compare question 3N (asking how long would it take a plastic water bottle to biodegrade) with question 3D (asking how long would it take for a plastic water bottle with a generic "biodegradable" label to biodegrade). CCX-860 at 30, 33.

[35] Outcome A uses the actual "ECM Biodegradable" label and claim, instead of a fictional label. *Id.* at 32, 34. Its question-pair asks identical questions ("What is your best estimate of the amount of time it would take for this plastic bag to biodegrade?"), with the only difference in the pair being whether or not the pictured plastic bag has the ECM logo. *Id.* In contrast, the questions in Outcome B are different, and only one question has an image. *Id.* at 30, 33.

[36] Question 4 asked participants, "If something is biodegradable, how long do you think it would take for it to decompose or decay?" RX-856 at 24, 28 & App. B (RX-847 at 16).

[37] Opinion at 26. This approach by the majority excluded the most common answer, given by 39% of respondents: it depends on the type of product. RX-856 App. D at 19.

recognizing the weakness of relying on a survey but then throwing out half the answers, the majority falls back to including those 217 answers, which dilutes the result to either 23% or 30%.[38] As I explain below, even ignoring the methodological unsuitability of the Stewart survey for evaluating ECM's claim, our case law does not support finding that a claim interpretation is reasonable based solely on such low percentages.

II. The majority misapplies the Deception Statement.

The majority finds, quite appropriately, that the "unqualified 'biodegradable' claim… in ECM's marketing materials, including its tree logo, cannot reasonably be read to convey the alleged specific implied rate claim based on a facial analysis alone."[39] Nonetheless, the majority concludes that Complaint Counsel's alleged implied rate claim is a reasonable interpretation of ECM's marketing materials based solely on extrinsic survey evidence (and testimony about that evidence) that a significant minority of consumers hold that interpretation. This approach conflicts with the Commission's practice and precedent in applying the Deception Statement.[40] It also incentivizes cherry-picking data rather than considering results as a whole.

A. The Deception Statement's "substantial minority" exception does not replace the "average listener," the "typical buyer," and the "general populace" test for reasonableness.

To be deceptive, an alleged interpretation of an advertisement must be reasonable: "The test is whether the consumer's interpretation or reaction is reasonable."[41] The Deception Statement explains that an advertisement interpretation is

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[38] Opinion at 26, n.37. Less than 17% of respondents believed that biodegradation would occur in one year or less. *See* RX-856, App D at 19.

[39] Opinion at 14.

[40] *FTC Policy Statement on Deception*, 103 F.T.C. 174, 177 (1984) (*appended to In the Matter of Cliffdale Assocs*., *Inc.*, 103 F.T.C. 110 (1984)) [hereinafter Deception Statement].

[41] *Id.*

reasonable if it is held by the "average listener," or the "typical buyer," or the "general populace."[42] Unreasonable interpretations are not deceptive, as "[s]ome people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim."[43] Footnote twenty of the Deception Statement further explains that an interpretation *may* be reasonable even though fewer than 50% of reasonable consumers hold that interpretation.[44] This exception means that if the Commission has otherwise determined a particular ad interpretation is reasonable, a defendant cannot rebut that conclusion by merely showing that only a minority of consumers hold that interpretation.[45] However, the footnote does not mean that a claim interpretation is necessarily reasonable simply if held by a "significant minority" (as low as 10%) of consumers.[46] Otherwise, the significant

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[42] *Id.* at 179-80.

[43] *Id.* at 178 (quoting *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). Indeed, at least some consumers will misunderstand some aspect of any communication. *See* Jacob Jacoby, Wayne D. Hoyer and David A. Sheluga, *Viewer Miscomprehension of Televised Communication: a Brief Report of Findings* (1981); Jacob Jacoby & Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications* (1987). Limiting advertisers to communications that cannot be misunderstood may deprive the average consumer of useful information.

[44] Deception Statement at 177, n.20 ("An interpretation ***may*** be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).") (emphasis added). The majority asserts that we have often brought cases challenging far-fetched and facially implausible weight-loss claims. Opinion at n.22. But those cases generally involved express claims, not implied claims that the Commission has determined are not conveyed on the face of the ad.

[45] Indeed, this is precisely the fact pattern in *Telebrands*, 140 F.T.C. 278 (2005).

[46] The majority appears to interpret footnote twenty to mean "a significant minority of generally reasonable consumers," *See* Opinion at 18 (arguing that because the polled individuals are "average or ordinary members of the adult population" they are therefore "reasonable consumers"). But rather than examine "whether the consumer's *interpretation or reaction* is reasonable," Deception Statement at 177 (emphasis added), the majority would have us examine whether the consumer *herself* is reasonable. And when the majority applies this faulty alternative test, it appears to *presume* that the consumer is

minority exception in the footnote would swallow the "average listener," the "typical buyer," and the "general populace" rule in the body of the Deception Statement.[47]

B. The FTC has never used extrinsic evidence of a "significant minority" as a stand-alone basis to determine that a claim interpretation is reasonable.

The Commission has never relied solely on the significant minority exception to find an ad interpretation reasonable. In every case the majority cites to support its use of the significant minority exception, the Commission first established that the claim's facial meaning was clear (and therefore reasonable), and then relied on extrinsic evidence, if at all, to bolster the facial finding.[48] For example, in *Telebrands*, the Commission relied on its facial analysis of the advertisement at issue, not extrinsic evidence. The Commission specifically stated that "it is not necessary to look beyond the four corners of respondents' ads"

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reasonable: "[I]n the absence of any evidence to the contrary we conclude they are 'reasonable.'" Opinion at 26. The majority cannot presume things Complaint Counsel is required to prove.

The more appropriate reading of the second sentence in footnote 20 is as a restatement of the entire deception standard, with "reasonable consumers" meaning "consumers with a reasonable interpretation," as it does in the body of the Deception Statement. Understood in the context of the entire Deception Statement, the second sentence of footnote 20 is a clarifying restatement of the main text, not an alternate, conflicting test.

[47] The majority makes precisely this mistake, ignoring the larger context of the Deception Statement and reading footnote 20 alone as the rule. *See* Opinion at n.11.

[48] The majority cites *Thompson Medical*, 104 F.T.C. 648 (1984), where the Commission determined that for a narrow category of Aspercreme advertisements there was no clear facial interpretation, but then used consumer copy tests of the ads to derive a reasonable interpretation. Opinion at 32-33. However, the Commission in *Thompson* did not treat the reasonableness test as a simple matter of finding a large enough percentage of consumers to comprise a "significant minority." In fact, the Commission there concluded that the copy tests showed that the advertisement "cause[d] *average viewers* to believe" the alleged claim. *Thompson Medical*, 104 F.T.C. at 805. Not only did the Commission in *Thompson* not apply the "significant minority" exception, it never even mentioned the term.

and "extrinsic evidence was not required to find liability."[49] Instead, reliance on the survey data merely confirmed the facial analysis.[50] Furthermore, the FTC did not rely on the significant minority exception when it adopted the Green Guides. Indeed, the Commission established the one-year interpretation based on the APCO survey, which claimed to reveal an interpretation held by a significant *majority* – 60%.[51] And the Commission actually rejected the Synovate survey, which found the one-year interpretation to be held by 25% of consumers, because its results were biased toward shorter time frames.[52]

I am not criticizing or discouraging the use of extrinsic consumer survey evidence in advertising cases. Indeed, the Commission must – and should – thoughtfully examine and address all such evidence provided by the parties. And generally speaking, the Commission itself should use reliable and persuasive extrinsic survey evidence. Reliable extrinsic evidence is particularly critical in advertising cases where, as here, the alleged implied claims fall on the "barely discernible" end of the continuum.

C. The majority's "significant minority" standard for reasonableness facilitates cherry-picking data rather than considering results as a whole.

The Deception Statement and FTC precedent show that an interpretation is not reasonable simply because it is held by a small number of consumers. Yet, the majority's approach of finding reasonableness by assembling enough consumers to comprise a "significant minority" risks reducing the reasonableness test to a mere game of stacking percentages.

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[49] *Telebrands*, 140 F.T.C. at 293, 329.

[50] In *Firestone*, which preceded the Deception Statement, the Commission again relied on its facial analysis and rejected the reliability of the extrinsic survey evidence at issue. On appeal, the court referred to the survey findings as bolstering the significant deference owed the FTC's facial analysis. *FTC v. Firestone*, 481 F.2d 246, 249 (6th Cir. 1973).

[51] FTC, The Green Guides, Statement of Basis and Purpose at 121.

[52] *Id.*

Here, the majority achieves a significant minority by choosing the upper range of outcomes at nearly every turn and ignoring reasonable alternative analyses. First, the majority relies upon surveys with problematic or unproven methodological approaches – including a methodology that guesses at demographics, likely lacked demographic information for 30% of the participants, and discarded nearly one-third of the responses – even though biases of 10% or even 5% could materially affect the "substantial minority" calculation. Second, the majority interprets the complaint to focus on a five-year claim instead of a one-year claim, where the evidence supporting the one-year claim was too weak.[53] Third, the majority dismisses Dr. Frederick's coding issues, which again, adjust the percentages a small but relevant amount upward. Fourth, the majority relies on the most favorable questions / question pairs from the studies and dismisses the rest. The majority assembles this stack of percentages and concludes they have reached a "significant minority." But this fragile foundation cannot support the conclusion that the "average listener," "typical buyer," or "general populace" understood ECM's unqualified use of the word "biodegradable" to mean that ECM Plastic would biodegrade within five years.[54]

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[53] Despite protest to the contrary, Opinion at 13, the majority has indeed revised Complaint Counsel's original position, at Complaint Counsel's urging upon appeal. During the oral argument, Chairwoman Ramirez asked Complaint Counsel, "So just so that I'm clear about this one versus five years, because there was certainly confusion in the briefing on that issue and the position that complaint counsel is taking, you are asking that the Commission interpret, based on the evidence, the word 'biodegradable' to impose a one-year limitation, is that right, or is it five years… what is your position?" Complaint Counsel responded, "The position is one year." Tr. Oral Arg. 62-63. Complaint Counsel then argued that "even greater majorities – a majority of consumers would be deceived by even a five-year claim. Or five-year time frame." Tr. Oral Arg. 63. The majority ultimately embraces the so-called "fallback position," thus admitting that the record does not support Complaint Counsel's original position alleging an implied one-year claim. Opinion at 13.

[54] Furthermore, the record suggests that the majority's position could lead to absurd results. The GCS survey indicates that approximately 25% of consumers surveyed believed that a regular, untreated plastic bag breaks down fully within five years. CCX-860, App. A at 34. Under the majority's approach, where a claim is reasonable solely if believed by a "significant majority" of between 11% and 20%, is the unlabeled plastic bag manufacturer

III. Conclusion

There is much in this case that I support. But on the issue discussed above, the majority relies on flawed evidence regarding the unqualified biodegradable claim and inappropriately interprets the significant minority exception.

The majority's order establishes a standard that is unhelpful in clarifying the deep consumer confusion about biodegradability of plastic.[55] Moreover, our own Green Guides are based on anemic, flawed evidence about those underlying consumer beliefs. Truthful advertising could help consumers better understand the complexity of biodegradability. Rather than reinforce consumer ignorance by setting an arbitrary, unjustifiable five-year threshold that conflicts with our own previous guidance, we should start a proceeding to revise the Green Guides, seeking public comment and running our own well-designed consumer survey to inform the results.

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deceptively omitting information by failing to disclose that the bag is *not* biodegradable?

[55] I dissent from the order to the extent it conditions degradable claims about plastic products or products affecting the degradability of plastics on the complete decomposition of those products into elements found in nature within five years after customary disposal.

Complaint

IN THE MATTER OF

PFIZER INC.
AND
HOSPIRA, INC.

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

Docket C-4537; File No. 151 0074
Complaint, August 21, 2015 – Decision, October 15, 2015

This consent order addresses the $16 Billion acquisition by Pfizer of certain assets of Hospira. Pfizer and Hospira are major pharmaceutical companies that provide a number of drugs/medicines throughout the United States. One drug in particular is generic acetylcysteine inhalation solution, which is very important in treating respiratory disorders. The Proposed Acquisition would eliminate competition between two of only four current competitors. The complaint alleges that this merger would lessen current competition in the markets for generic acetylcysteine inhalation solution and clindamycin phosphate injection and future competition in the markets for voriconazole injection and melphalan hydrochloride injection in the United States. Resulting in the creation of a duopoly and likely price increases. The consent order requires Pfizer to divest all its rights to generic acetylcysteine inhalation solution and Hospira to divest all of its rights and assets related to clindamycin phosphate injection, voriconazole injection, and melphalan hydrochloride injection to Alvogen. If the Commission determines that Alvogen 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 Alvogen and then divest the products to a Commission-approved acquirer within six months of the date the Order becomes final.

Participants

For the *Commission: Nandu Machiraju, David von Nirschl* and *Kari A. Wallace.*

For the *Respondents: Jonathan Klarfeld* and *Mike McFalls, Ropes & Gray LLP; Cliff Aronson, Skadden, Arps, Slate, Meagher & Flom LLP; Michael Keely, Axinn Veltrop & Harkrider 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 Pfizer Inc. ("Pfizer"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Hospira, Inc. ("Hospira"), 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 Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 235 East 42nd Street, New York, New York 10017.

2. Respondent Hospira is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 275 North Field Drive, Lake Forest, Illinois 60045.

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

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger executed February 5, 2015, Pfizer proposes to acquire 100% of the

outstanding voting securities of Hospira in a transaction valued at approximately $16 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following pharmaceutical products:

a. generic acetylcysteine inhalation solution;

b. clindamycin phosphate injection;

c. voriconazole injection; and

d. melphalan hydrochloride injection.

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

IV. THE STRUCTURE OF THE MARKETS

7. Acetylcysteine inhalation solution is a mucolytic therapy used to treat certain respiratory disorders. In the United States, three companies supply generic acetylcysteine inhalation solution: Fresenius Kabi, which is partnered with Gland Pharma Ltd. and Pfizer; Hospira; and American Regent, Inc. Among the competitors, Fresenius/Gland/Pfizer is the market leader with an approximately 69% market share and Hospira has an approximately 22% share. The Acquisition would reduce the number of suppliers from three to two and increase the Herfindahl-Hirschman Index ("HHI") by 3,036 points, resulting in a post-acquisition HHI of 8,362 points.

8. Clindamycin phosphate injection is an antibiotic used to treat lung, skin, blood, bone, joint, and gynecological infections. Pfizer, Hospira, Sagent Pharmaceuticals, and Fresenius Kabi currently supply clindamycin phosphate injection in the United States. Pfizer has an approximately 45% market share, while

Hospira has a 39% share. The Acquisition would reduce the number of suppliers from four to three and increase the HHI by 3,562 points, resulting in a post-acquisition HHI of 7,276 points.

9. Voriconazole injection is an antifungal medication used to treat significant fungal infections. Pfizer and Sandoz currently sell voriconazole injection in the United States. Hospira is one of a limited number of suppliers capable of entering the voriconazole injection market in the near future.

10. Melphalan hydrochloride injection is a chemotherapy agent used to treat multiple myeloma and ovarian cancer. Mylan N.V. and ApoPharma USA currently sell melphalan hydrochloride injection in the United States. Pfizer and Hospira are developing melphalan hydrochloride injection products. They are two of a limited number of suppliers capable of entering the market in the near future.

V. ENTRY CONDITIONS

11. Entry into the relevant markets 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 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

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, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Pfizer and Hospira and reducing the number of independent significant competitors in the markets for generic acetylcysteine inhalation

solution and clindamycin phosphate injection, thereby increasing the likelihood that: (1) Pfizer would be able to unilaterally exercise market power in these markets; (2) the remaining competitors would engage in coordinated interaction between or among each other; and (3) customers would be forced to pay higher prices; and

b. by eliminating future competition between Pfizer and Hospira in the markets for voriconazole injection and melphalan hydrochloride injection, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Hospira's voriconazole injection product or either Pfizer or Hospira's melphalan hydrochloride injection 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 an additional supplier of these products.

VII. VIOLATIONS CHARGED

13. The Acquisition 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 twenty-first day of August, 2015, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Pfizer Inc. ("Pfizer") of the voting securities of Respondent Hospira, Inc. ("Hospira"), 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 Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 235 East 42nd Street, New York, New York 10017.

2. Respondent Hospira is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Delaware with its executive offices and principal place of business located at 275 North Field Drive, Lake Forest, Illinois 60045.

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 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. "Pfizer" means: Pfizer Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pfizer Inc. (including, without limitation, Perkins Holding Company and Innopharma, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Pfizer shall include Hospira.

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

C. "Respondents" means Pfizer and Hospira, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Decision and Order" means the:

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

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

F. "Divestiture Product Business(es)" means the Business of Respondents within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondents and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondents.

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. "Transition Period" means, for each Clindamycin Product, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the Acquirer directs the Respondents to cease the marketing, distribution, and sale of the Clindamycin Product(s); (ii) the date on which the Acquirer commences the marketing, distribution, and sale of the Clindamycin Product(s); or (iii) the date four (4) months from the Closing Date for the Clindamycin Products.

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

II.

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

A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product 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 each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the 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. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to February 5, 2015, at the related High Volume Accounts;

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

6. 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. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondents shall:

1. for a period of twelve (12) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with 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 Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture 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 Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's

employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law); and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require Respondents

to terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

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.

E. With respect to the Clindamycin Products, during the Transition Period, Respondents, in consultation with the Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of the Clindamycin Products by the Acquirer is not delayed or impaired by the Respondents;

2. designate employees of Respondents knowledgeable about the marketing, distribution and sale related to each of the Clindamycin Products 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 the Business related to the Clindamycin Products to the Acquirer;

3. maintain and manage inventory levels of the Clindamycin Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to market, distribute and sell the Clindamycin Products;

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

6. provide the Acquirer with a listing of inventory levels (week of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) on a regular basis and in a timely manner;

7. provide the Acquirer with anticipated reorder dates for each customer on a regular basis and in a timely manner; and

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

F. Pending divestiture of the Divestiture Product Assets, Respondents shall:

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

   a. the requirements of this Order;

   b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

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

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

4. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products 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.

H. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' registered 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 relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

I. 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.

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

III.

IT IS FURTHER ORDERED that:

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 that is either a Clindamycin Product, Melphalan Product, or a Voricanazole Product, until the earliest of: (i) date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such 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 relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date *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 each Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; *provided,*

however, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer or the Acquirer's Manufacturing Designee 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, (ii) transitional services being provided by the Respondents to the relevant 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 Divestiture Product Assets, as required by and described in the Decision and Order, has been completed;

C. the day after the Product Manufacturing Technology related to each Divestiture Product that is either a Clindamycin Product, Melphalan Product or a Voricanazole Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to the provision of the Product Manufacturing Technology are complete; or

D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Pfizer Inc. ("Pfizer") of the voting securities of Respondent Hospira, Inc. ("Hospira"), 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 Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 235 East 42nd Street, New York, New York 10017.

2. Respondent Hospira is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 275 North Field Drive, Lake Forest, Illinois 60045.

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. "Pfizer" means: Pfizer Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pfizer Inc. (including, without limitation, Perkins Holding Company, and Innopharma, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Pfizer shall include Hospira.

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

C. "Respondents" means Pfizer and Hospira, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "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.

F. "Acquisition" means Respondent Pfizer's acquisition of fifty percent (50%) or more of the voting securities of Hospira. Respondents entered an Agreement and Plan of Merger on February 5, 2015, to effect the Acquisition, among Pfizer Inc., Perkins Holding Company, and Hospira Inc., that was submitted to the Commission.

G. "Acquisition Date" means the date on which the Acquisition is consummated.

H. "Acetylcysteine Products" means the following: the Products manufactured, marketed, sold, in Development, owned or controlled by Respondent Pfizer pursuant to the following Applications:

1. ANDA Number 203-853;

2. ANDA Number 204-674; and,

3. any supplements, amendments, or revisions to these Applications.

I. "Acetylcysteine Product Divestiture Assets" means the following assets and rights of Pfizer, as such assets and rights are in existence as of the date Pfizer signs the Agreement Containing Consent Orders in this matter and as are maintained by Pfizer in accordance with the Order to Maintain Assets until the Closing Date:

1. all rights to all of the Applications related to the Acetylcysteine Products; and,

2. all rights to any profits, royalties or other financial interests related to the Acetylcysteine Products.

J. "ADD-V Technology" means any and all intellectual property controlled by Hospira that is specifically directed to the manufacture or use of the ADD-Vantage® Vial.

K. "ADD-Vantage® Vial(s)" means the drug vial(s), in the form existing as of the Closing Date, that has been used for the Clindamycin Products, designed and promoted by Hospira under Hospira trademarks (including the ADD-Vantage® trademark) for the aseptic transfer of a drug from a vial into a compatible partial-fill, intravenous fluid container, as more fully described in Hospira's published specifications.

L. "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").

M. "Alvogen" means Alvogen Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 10 Bloomfield Avenue, Building B, Pine Brook, NJ 07058, or any of its wholly-owned subsidiaries.

N. "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 a Respondent and the FDA related thereto.

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

P. "Categorized Assets" means the following assets and rights of Hospira, as such assets and rights are in existence as of the date Hospira signs the Agreement Containing Consent Orders in this matter and as are maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the specified Divestiture Product;

4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the specified Divestiture Product;

6. all Product Scientific and Regulatory Material related to the specified Divestiture Product;

7. all Website(s) related exclusively to the specified Divestiture Product;

8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;

9. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date, a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:

    a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product except for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and except as may be required by applicable Law 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 the Respondents of any such cross-referencing that is discovered by a Respondent);

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

e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product except for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and except as may be required by applicable Law 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 specified Divestiture Product;

11. at the option of the Acquirer of the specified Divestiture Product, all Product Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);

12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date, a list of all customers and targeted customers for the specified Divestiture Product and a listing of the net sales (in either units or dollars)

of the specified Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

14. for each specified Divestiture Product, a list of all active pharmaceutical ingredient suppliers listed on any Application of a Retained Product that is the therapeutic equivalent (as that term is defined by the FDA) of that Divestiture Product;

15. for each specified Divestiture Product that is a Contract Manufacture Product:

    a. a list of the inventory levels (weeks of supply) for each customer (i.e., retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and

    b. anticipated reorder dates for each customer as of the Closing Date;

16. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the specified Divestiture Product;

17. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the

specified Divestiture Product not later than five (5) days after the Closing Date;

18. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and

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

provided, however, that "Categorized Assets" shall not include: (i) documents relating to 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 specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of any Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, the specified Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the specified Respondent shall provide that Acquirer access to original documents under circumstances where copies

of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the specified Respondent provides the Acquirer with the above-described information without requiring the Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

Q. "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.

R. "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.

S. "Clindamycin Product(s)" means the following: the Products manufactured, marketed, sold, in Development, owned or controlled by Respondent Hospira pursuant to the following Applications:

1. ANDA Number 62-801;

2. ANDA Number 62-800;

3. ANDA Number 62-943; and,

4. any supplements, amendments, or revisions to these Applications.

T. "Clindamycin Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Hospira related to each of the Clindamycin Products, to the extent legally transferable, including, without limitation, the following:

1. at the Acquirer's option, any equipment that is specialized for use in the manufacture or fill of the ADD-Vantage® Vial(s); and

2. the Categorized Assets related to the Clindamycin Products.

U. "Closing Date" means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.

V. "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 Divestiture Product(s). The term "Confidential Business Information" excludes the following:

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

2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);

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

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

W. "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.

X. "Contract Manufacture Product(s)" means:

1. the Clindamycin Products; and

2. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient, excipients or packaging materials (including, without limitation, drug vials);

provided however, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of that Respondent's agreement to Contract Manufacture.

Y. "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.

Z. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

AA. "Divestiture Agreements" means the following:

1. *Asset Purchase Agreement* by and between Pfizer Inc., Hospira, Inc., and Alvogen Group, Inc., dated as of July 28, 2015;

2. *Transitional Supply Agreement* by and between Hospira Worldwide, Inc. and Alvogen Group, Inc., attached to the *Asset Purchase Agreement* and to be executed on or before the Closing Date; and,

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Divestiture Product Assets that have been approved by the Commission to accomplish the requirements of this

Order. The Divestiture Agreements are contained in Non-Public Appendix I.

BB. "Divestiture Product(s)" means the following, individually and collectively:

1. the Acetylcysteine Products;

2. the Clindamycin Products;

3. the Melphalan Products; and

4. the Voriconazole Products.

CC. "Divestiture Product Assets" means the following, individually and collectively:

1. the Acetylcysteine Product Assets;

2. the Clindamycin Product Assets;

3. the Melphalan Product Assets; and,

4. the Voriconazole Product Assets.

DD. "Divestiture Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Contract Manufacture Product.

EE. "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:

1. all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by Respondents:

   a. to research and Develop the specified Divestiture Product(s) for marketing,

distribution or sale within the Geographic Territory;

b. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the Geographic Territory;

c. to import or export the specified Divestiture Product(s) to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Products in the Geographic Territory; and

d. to have the specified Divestiture Product(s) made anywhere in the World for distribution or sale within, or import into the Geographic Territory; and,

2. to use the ADD-V Technology, the ADD-Vantage® Vial, and ADD-Vantage® Trademark solely for the purposes of use in the Business specifically related to the Clindamycin Products;

provided however, that for any Product Licensed Intellectual Property or Product Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

FF. "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.

GG. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

HH. "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.

II. "Drug Master File(s)" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

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

KK. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

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

that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) the end of the last quarter following the Acquisition or the Closing Date.

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

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

OO. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

PP. "Melphalan Product(s)" means the following: the Products manufactured, in Development, owned or controlled by Respondent Hospira pursuant to ANDA No. 204-817, and any supplements, amendments, or revisions thereto.

QQ. "Melphalan Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Hospira related to each of the Melphalan Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Melphalan Products.

RR. "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.

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

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

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

VV. "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.

WW. "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.

XX. "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.

YY. "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.

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

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent 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 the specified Divestiture Product;

3. relating to any Clinical Trials involving the specified Divestiture Product;

4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;

5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);

6. pursuant to which a Third Party manufactures or plans to manufacture the specified Divestiture Product as a finished Product on behalf of the Respondent;

7. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the specified Divestiture Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

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

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), the Respondent shall, 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 specified Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

AAA. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in

adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

BBB. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Divestiture Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product;

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

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

6. FDA approved Product labeling related to the specified Divestiture Product;

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

8. FDA approved patient circulars and information related to the specified Divestiture Product;

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

10. summary of Product complaints from physicians related to the specified Divestiture Product;

11. summary of Product complaints from customers related to the specified Divestiture Product;

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

13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;

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

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

16. analytical methods development records related to the specified Divestiture Product;

17. manufacturing batch records related to the specified Divestiture Product;

18. stability testing records related to the specified Divestiture Product;

19. change in control history related to the specified Divestiture Product; and

20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

CCC. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the specified Respondent within ninety (90) days of the execution date of any Remedial Agreement);

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

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; provided, however, in lieu of this description, the specified Respondent may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

   e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

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

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

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

DDD. "Product Intellectual Property" means all of the following intellectual property related to a Divestiture Product (other than Product Licensed Intellectual Property) that is owned, licensed or controlled by Hospira as of the Closing Date:

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, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Pfizer" or "Hospira" 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 Pfizer, or Hospira can be identified or defined;

provided further, however that "Product Intellectual Property" does not include the ADD-V Technology or the ADD-Vantage® trademark.

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

1. all of the following intellectual property related to a Divestiture Product that is owned, licensed or controlled by Hospira as of the Closing Date, as follows:

   a. Patents that are related to a Divestiture Product that the Respondents 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;

   b. 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 Respondents 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,

2. in those instances in which any Respondent (i) owns, licenses or controls the rights to the Drug Master File of a Product that is the subject of an NDA ("NDA Product") that is the therapeutic equivalent (as that term is defined by the FDA) of any Divestiture Product that is the subject of an ANDA and (ii) such NDA Product is a Retained Product, a full, complete and unlimited Right of Reference or Use to such Drug Master File to

reference or use in any Application related to that Divestiture Product.

FFF. "Product Manufacturing Employees" means all salaried employees of a Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Divestiture Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

GGG. "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, at the Acquirer's option, all such equipment used to manufacture that Product.

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

III. "Product Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or clinical studies of the specified Divestiture Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

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

KKK. "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.

LLL. "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.

MMM. "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.

NNN. "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 Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order,

including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

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

OOO. "Retained Product" means any Product(s) other than a Divestiture Product.

PPP. "Right of Reference or Use" means the authority to rely upon, and otherwise use, (i) an investigation of the quality, safety or efficacy of a Product (including any or all such investigations conducted in vitro, in vivo, or in silico and any and all Clinical Trials), (ii) Product Development Reports, or (iii) Product Scientific and Regulatory Material 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, Product Development Reports, or Product Scientific and Regulatory Material for FDA audit, if necessary.

QQQ. "Supply Cost" means a cost not to exceed the Respondent's (as that Respondent is identified in the definition of the respective Divestiture Product) average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; provided, however, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product.

RRR. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, inter alia,

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified

Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, inter alia, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

   a. manufacture the specified Divestiture Product in the quality and quantities achieved by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), or the manufacturer and/or developer of such Divestiture Product;

   b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and

   c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

SSS. "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.

TTT. "Voriconazole Product(s)" means the following: the Products manufactured, in Development, owned or

controlled by Respondent Hospira pursuant to ANDA No. 206-398, and any supplements, amendments, or revisions thereto.

UUU. "Voriconazole Product Assets" means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of Hospira related to each of the Voriconazole Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Voriconazole Products.

VVV. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *provided, however,* "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than 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 Alvogen pursuant to, and in accordance with, the Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Alvogen or to reduce any obligations of Respondents under such agreements), and each 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 Alvogen 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 Alvogen is not an acceptable purchaser of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Alvogen, 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 Alvogen 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 Alvogen (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts for the purposes of 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 assets required to be divested pursuant to this Order to an Acquirer, and to permit the relevant Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;

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

D. Respondents shall:

1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;

2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products 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 related to the Business of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

   c. applicable Law;

5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the 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.

E. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondents shall provide, or cause to be provided to that Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the

Divestiture Product(s) being acquired by that Acquirer; and

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to any Respondent related to the Divestiture Products being acquired by that Acquirer.

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 Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

F. 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 Respondents, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) from Persons other than Respondents;

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 Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the relevant Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;

4. make representations and warranties to each Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

provided, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer 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 that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products acquired by that Acquirer in the same quality achieved by, or on behalf of, the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) 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 the 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 the Manufacturing Designee(s) of that Acquirer) 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 the relevant 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 the relevant Contract Manufacture Product, or (iv) the date five (5) 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 Divestiture Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the

Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of 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 related to the Divestiture Products 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 provide a copy of the notification to the relevant Acquirer. 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 relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

I. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondents shall:

1. for a period of twelve (12) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter

referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with 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 Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture 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 Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with that Acquirer or its

Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to

prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, *however*, that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

J. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the relevant Acquirer,

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;

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

c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

d. ensure the assets related to each Divestiture Product are provided to the relevant Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;

e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses associated with that Divestiture Product.

K. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer under the following:

1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter

of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. Each Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

L. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation

brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.

M. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Product(s), that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent

that Acquirer in any ongoing patent litigation related to that Divestiture Product; and

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.

N. The purpose of the divestiture of the Divestiture 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 associated with each Divestiture Product within the Geographic Territory; and

2. to create a viable and effective competitor, that is independent of Respondents in the Business of each Divestiture Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

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

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If 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 Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing

Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product that is either a Clindamycin Product, Melphalan Product, or a Voricanazole Product, until the earliest of: (i) the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer of that Divestiture Product 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 each Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer or the Acquirer's Manufacturing Designee toward obtaining

FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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

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

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

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

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

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*, 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*, 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 copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure such Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

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

provided further, *however,* that pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. For each Divestiture Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of the Respondents, all as soon as reasonably practicable.

E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any 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 every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A., II.B., II.C., II.D.1, II.D.2., 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 relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

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

C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at 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 October 15, 2025.

By the Commission.

NON-PUBLIC APPENDIX I

AGREEMENTS RELATED TO THE DIVESTITURES

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Pfizer Inc. ("Pfizer") and Hospira, Inc. ("Hospira") that is designed to remedy the anticompetitive effects resulting from Pfizer's acquisition of Hospira. Under the terms of the proposed Consent Agreement, the parties are required to divest all of Pfizer's rights and assets related to generic acetylcysteine inhalation solution and all Hospira's rights and assets related to clindamycin phosphate injection, voriconazole injection, and melphalan hydrochloride injection to Alvogen Group, Inc. ("Alvogen").

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 and Plan of Merger executed on February 5, 2015, Pfizer proposes to acquire Hospira for approximately $16 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 current competition in the markets for generic acetylcysteine inhalation solution and clindamycin phosphate injection and future competition in the markets for voriconazole injection and melphalan hydrochloride injection 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 current suppliers in the markets for generic acetylcysteine inhalation solution and clindamycin phosphate injection, and reduce the number of future suppliers in the markets for voriconazole injection and melphalan hydrochloride injection.

Generic acetylcysteine inhalation solution is a mucolytic therapy used to treat certain respiratory disorders. Acetylcysteine liquefies mucus in the lungs, which then can be coughed or suctioned out. Patients inhale the solution through a nebulizer mask, facemask, mouthpiece, tent, or intermittent positive pressure-breathing machine. Only three companies—Fresenius Kabi, partnered with Gland Pharma Ltd. and Pfizer; Hospira; and American Regent, Inc.—supply generic acetylcysteine inhalation solution in the United States. The branded version of this product, Mucomyst, is no longer available. Fresenius/Gland/Pfizer is the market leader with an approximately 69% share and Hospira has an approximately 22% share.

Clindamycin phosphate injection is an antibiotic used to treat lung, skin, blood, bone, joint, and gynecological infections in hospitals. Currently, only four companies supply the product in the United States: Pfizer, Hospira, Sagent Pharmaceuticals, and Fresenius Kabi. While Pfizer's clindamycin phosphate product is a branded version, the price of Pfizer's product is competitive with the generic products. Customers, therefore, play the branded and the generic products against each other to negotiate prices. Pfizer and Hospira have a combined approximate market share of more than 80%.

Voriconazole injection is an antifungal medication used to treat significant fungal infections in hospitals. Pfizer currently sells its Vfend brand voriconazole injection product priced competitively with the only generic version in the United States, which is offered by Sandoz. Hospira is one of a limited number of suppliers capable of entering the voriconazole injection market in the near future.

Melphalan hydrochloride injection is a chemotherapy agent used to treat multiple myeloma and ovarian cancer. There are currently two melphalan hydrochloride injection products available in the United States: the branded version, which was originally developed and marketed by Glaxo Smith Kline and is now supplied by ApoPharma USA, Inc. ("ApoPharma"), and the generic version, sold by Mylan N.V. ("Mylan"). ApoPharma prices its branded version of the product competitively with the generic version offered by Mylan. Pfizer and Hospira are developing melphalan hydrochloride injection products, and are two of a limited number of suppliers capable of entering the market in the near future.

II. Entry

Entry into the four markets described earlier 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 United States Food and Drug Administration ("FDA"), is costly and lengthy.

III. Effects

In markets for pharmaceutical products used primarily in hospitals, like the products here, branded drug manufacturers are typically unable to command a premium price for their products because of the reimbursement structure for drugs administered in hospitals. Hospitals typically would not be reimbursed for using a premium-priced branded injectable product, when lower-priced therapeutically equivalent products are available. As a result, brand manufacturers of sterile injectable or inhalation products may lower their prices and compete directly with generic manufacturers' products. Customers tend to gravitate to the lowest-priced product, regardless of whether the drug was approved by the FDA as a brand or a generic product.

Like true generic pharmaceutical markets, these multi-source pharmaceutical products generally are commodities, and prices often are inversely correlated with the number of competitors in each market. As the number of suppliers offering a therapeutically equivalent drug increases, the price for that drug decreases due to the direct competition between the existing suppliers and each additional supplier. The Proposed Acquisition would eliminate the current competition between two of the three competitors in the market for generic acetylcysteine inhalation solution, resulting in a duopoly and likely price increases. Similarly, in the market for clindamycin phosphate solution, the Proposed Acquisition would eliminate competition between two of only four current competitors, leading to higher prices.

In addition, the Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating future competition that would otherwise have occurred if Pfizer and Hospira remained independent. The evidence shows that anticompetitive effects are likely to result from the Proposed Acquisition due to the elimination of an additional independent entrant in the currently concentrated markets for voriconazole injection and melphalan hydrochloride injection, which would have enabled customers to negotiate lower prices. Customers and competitors have observed—and pricing data confirms—that the price of these pharmaceutical products decreases with new entry even after several other suppliers have entered the market. Thus, absent a remedy, the Proposed Acquisition will likely cause U.S.

consumers to pay significantly higher prices for voriconazole injection and melphalan hydrochloride injection.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the competitive concerns raised by the acquisition in all four markets at issue by requiring Pfizer to divest all its rights to generic acetylcysteine inhalation solution and Hospira to divest all of its rights and assets related to clindamycin phosphate injection, voriconazole injection, and melphalan hydrochloride injection to Alvogen. Alvogen is a private, global pharmaceutical corporation that develops, manufacturers, sells, and distributes generic pharmaceuticals in the United States and in 33 other countries around the world. 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 Alvogen 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 Alvogen 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. Alvogen will acquire Pfizer's acetylcysteine inhalation ANDA and stream of revenue associated with the product and will assume Pfizer's role in the contractual relationships with the third parties. Pfizer/Hospira will supply Alvogen with the clindamycin phosphate injection products for three years while the company transfers the manufacturing technology to Alvogen or its designee. Similarly, Pfizer/Hospira will transfer the third-party development and contract manufacturing agreements for voriconazole injection and melphalan hydrochloride injection to Alvogen. The proposed Order also requires Pfizer and Hospira to

provide transitional services to Alvogen to assist it in establishing its manufacturing capabilities and securing all of the necessary FDA approvals. These transitional services include technical assistance to manufacture clindamycin in substantially the same manner and quality employed or achieved by Hospira, and advice and training from knowledgeable employees of the parties.

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

CONCORDIA PHARMACEUTICALS INC., CONCORDIA HEALTHCARE CORP., PAR PHARMACEUTICAL, INC., AND PAR PHARMACEUTICAL HOLDINGS, INC.

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

Docket C-4553; File No. 151 0030
Complaint, October 20, 2015 – Decision, October 20, 2015

The complaint alleges that Par Pharmaceutical, Inc., Par Pharmaceutical Holdings, Inc., TPG Partners VI, L.P. (hereinafter "Par"), and Concordia Pharmaceuticals Inc., and Concordia Healthcare Corp. (hereinafter "Concordia") entered into an unlawful agreement not to compete relating to generic versions of Concordia's prescription drug known as Kapvay. Concordia owns and markets various brand-named drug products and Par markets and develops generic drugs. Concordia was awarded the rights to Kapvay in May 2013, while Par filed an application seeking FDA approval to sell a generic version of Kapvay in March 2011. The complaint further alleges that the defendants entered an unlawful agreement that Concordia would refrain from launching an "authorized generic" version of its brand-name drug Kapvay in exchange for a share of the supra-competitive profits Par would earn as the sole seller of generic Kapvay. Concordia's entry into the market would promote competition but would have a significant financial implication on the first generic entrant, Par. This unlawful agreement would allow Par's generic to be the sole seller which would allow their revenues to double in a six month span. The consent orders prohibit Par and Concordia from enforcing the relevant provisions of their 2013 License Agreement and entering into similar "no-authorized-generic" agreements in the future. The proposed orders each include a notice provision designed to assist in monitoring the respondents' future conduct with respect to an agreement to restrict the sale of an authorized generic product -- without regard to whether the agreement extends beyond expiration of any listed patent.

Participants

For the *Commission: Bradley Albert, Malcolm Catt, Alpa Davis, Elizabeth Hilder,* and *Susan Huber.*

For the *Respondents: Daniella Esses* and *Christine Varney, Cravath, Swaine & Moore, LLP; Michael Brockmeyer, Frommer Lawrence & Haug, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Concordia Pharmaceuticals Inc. ("Concordia"), Concordia Healthcare Corp. (collectively "Concordia Entities"), Par Pharmaceutical, Inc., and Par Pharmaceutical Holdings, Inc. (collectively "Par") have violated Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

Nature of the Case

1. This action challenges an agreement not to compete between Concordia and Par relating to generic equivalents of the prescription drug Kapvay. Until May 15, 2015, Concordia and Par were the only two firms permitted to market generic Kapvay. Rather than competing against one another, however, Concordia agreed not to sell an authorized generic version of Kapvay in exchange for a share of the revenues Par earns as the sole seller of generic Kapvay. This agreement not to compete likely resulted in higher prices for consumers.

The Respondents and Jurisdiction

2. Concordia Pharmaceuticals Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Country of Barbados, with its office and principal place of business located at Chancery Chambers, Chancery House, High Street Bridgetown, BB Barbados 11128. Concordia Pharmaceuticals Inc. is a subsidiary of Concordia Healthcare Corp.

3. Concordia Healthcare Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the Province of Ontario, Canada, with its office and principal place of business located at 277 Lakeshore Road East, Suite 302, Oakville, Ontario, L6J 1H9, Canada.

4. Par Pharmaceutical, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical, Inc. is a wholly-owned subsidiary of Par Pharmaceutical Companies, Inc. and a wholly-owned indirect subsidiary of Par Pharmaceutical Holdings, Inc.

5. Par Pharmaceutical Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical Holdings, Inc. is a parent of Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc.

6. At all times relevant hereto, each of the Concordia and Par entities has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

7. The acts and practices of Concordia and Par, 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 FTC Act, 15 U.S.C. § 44.

Background

Regulation of Prescription Pharmaceuticals in the United States

8. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act") and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2), 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs.

9. A company seeking to market a new pharmaceutical product must file a New Drug Application ("NDA") with the U.S. Food and Drug Administration ("FDA"), demonstrating the safety and efficacy of the new product. Newly developed drugs

are often protected by patents and marketed under proprietary brand names. These NDA-based products are referred to as "brand-name drugs" or "branded drugs."

10. The FDA requires brand-name drug manufacturers to identify the patents that cover their approved drugs. The FDA publishes a list of these drugs and their associated patents in its publically available database *Approved Drug Products with Therapeutic Equivalence Evaluations*, commonly known as the "Orange Book."

11. A competitor who wishes to market a generic version of a branded drug may seek FDA approval by filing an Abbreviated New Drug Application ("ANDA"). The generic applicant must demonstrate that its generic drug is therapeutically equivalent to the brand-name drug that it references and for which it seeks to be a generic substitute. The FDA assigns a generic drug an "AB" rating if it is therapeutically equivalent to a brand-name drug.

12. When a brand-name drug is covered by one or more patents listed in the Orange Book, a company that intends to market a generic version of that drug prior to expiration of the patents must make a "paragraph IV certification", certifying that the patents are invalid, unenforceable, or will not be infringed by the generic drug.

13. If a company makes a paragraph IV certification, it must notify the patent holder of the filing of its ANDA. If the patent holder initiates a patent infringement suit against the company within 45 days of receiving such notice, the FDA may not grant final approval of the ANDA until the earliest of (1) patent expiry, (2) district court resolution of the patent litigation in favor of the generic company, or (3) the expiration of an automatic 30-month waiting period.

14. The Hatch-Waxman Act gives the first generic company or companies filing an ANDA containing a paragraph IV certification ("first-filer") a period of protection from competition with other ANDA filers. This is referred to as the "180-day exclusivity" period.

15. The brand-name drug manufacturer, however, is permitted to market a generic version of its branded product during the first filer's exclusivity period. In that case, no ANDA is necessary, because the manufacturer already has approval to sell the drug under its NDA. The NDA holder may also permit another company to market a generic version under the NDA. Such generics, made available at the discretion of the NDA holder and sold under the authority of the NDA, are commonly known as "authorized generics."

16. In the absence of other actual or impending generic competition, an NDA holder typically will not undercut its profits on its branded drug by introducing a lower-priced, authorized generic version of that drug. Once an ANDA filer enters, however, an authorized generic may become attractive to the NDA holder as a means of maintaining some of the revenue it would otherwise lose to the ANDA-based generic competitor.

The Benefit to Consumers from Generic Drugs

17. Competition from generic drugs generates large savings for consumers. According to a 2010 Congressional Budget Office report, the retail price of a generic is 75 percent lower, on average, than the retail price of a brand-name drug. The Generic Pharmaceutical Association reported that use of generic versions of brand-name drugs saved the U.S. health care system $239 billion in 2013 alone.

18. AB-rated generic drugs are typically priced significantly lower than brand-name drugs. As more AB-rated generic drugs enter the market, generic prices generally fall even further.

19. Because of these price advantages, state laws facilitate substitution of AB-rated generic drugs for higher priced brand-name drugs. Many third-party payers of prescription drugs (e.g., health insurance plans, Medicaid programs) have adopted policies to encourage the substitution of AB-rated generic drugs for their brand-name counterparts. As a result of these policies and lower prices, many purchasers routinely switch from a brand-name drug to an AB- rated generic drug upon its introduction. Consequently, AB-rated generic drugs typically capture a significant share of

sales, causing a significant reduction of the branded drug's unit and dollar sales.

20. Consumers benefit from competition between an authorized generic drug and ANDA-based generic drug. Empirical evidence from the FTC's Authorized Generic Study shows that competition from an authorized generic drug during the first-filer's 180-day exclusivity period results, on average, in retail generic prices that are 4 to 8 percent lower and wholesale generic prices that are 7 to 14 percent lower than prices without authorized generic competition.

21. Competition from an authorized generic also typically has a significant financial impact on the first ANDA entrant. According to the FTC's Authorized Generic Study, an authorized generic typically takes a significant share of the first ANDA entrant's generic sales, thereby reducing revenues during its 180-day exclusivity period by 40 to 52 percent on average. This financial impact is well-known in the pharmaceutical industry.

Kapvay and its Generic Equivalents

22. The FDA approved Kapvay (clonidine hydrochloride tablets) for the treatment of Attention Deficit Hyperactivity Disorder ("ADHD") in September 2010. Kapvay tablets are available in .1 mg and .2 mg dosage strengths.

23. U.S. Patent No. 5,869,100 ("the '100 patent") is the only patent listed in the Orange Book for Kapvay. The '100 patent expired on October 13, 2013.

24. Par filed an ANDA seeking FDA approval to launch a generic version of Kapvay on March 4, 2011. As the first company to file a substantially complete ANDA with a paragraph IV certification under 21 U.S.C. §355(j), Par was eligible for 180 days of market exclusivity. Par was not sued for patent infringement.

25. Concordia acquired the rights to Kapvay in May, 2013. Prior to generic entry, annual U.S. sales of Kapvay were $72 million.

26. Par received final FDA approval to market generic Kapvay on September 30, 2013. Par was legally entitled to market its generic Kapvay product at that time. As the NDA holder, Concordia was also legally permitted to sell an authorized generic version of Kapvay.

27. No other firm received final FDA approval to market a generic version of Kapvay until May 15, 2015.

The Agreement Not to Compete between Concordia and Par

28. On September 6, 2013, Concordia and Par signed a "License Agreement" whereby Concordia granted Par rights to the '100 patent and any future intellectual property relating to Kapvay. Under the terms of the license, Par was permitted to market its generic Kapvay product on October 7, 2013, just one week prior to expiration of the '100 patent. Concordia agreed that for five years it would not market, or permit a third party to market an authorized generic version of Kapvay. This provision secured Par as the only generic Kapvay product on the market unless and until the FDA approves another ANDA for generic Kapvay. In exchange, Par agreed to share with Concordia a substantial portion of the profits Par would earn on sales of its generic Kapvay product, ranging from 35 to 50 percent.

29. Par launched its generic Kapvay product on October 7, 2013. Par has made payments to Concordia under the agreement.

30. Par's generic product was the only generic version of Kapvay available for fourteen months. In December of 2014, after learning of the FTC's investigation, Concordia launched an authorized generic version of Kapvay.

The Agreement Not to Compete between Concordia and Par Harms Consumers

31. An authorized generic version of Kapvay would have competed on the basis of price with Par's ANDA product, likely resulting in lower prices for consumers of generic Kapvay.

32. By agreeing not to compete, Concordia and Par, the only two firms permitted to market generic Kapvay at the time,

reduced the number of competing generic Kapvay products available to consumers. The agreement, therefore, deprived consumers of the lower prices that occur with generic competition.

33. This lack of competition likely permitted Par to charge supra-competitive prices for generic Kapvay.

The Agreement Not to Compete between Concordia and Par is Not Justified

34. The agreement not to compete between Concordia and Par is not reasonably necessary to achieve any efficiency-enhancing purpose.

35. Par's payments to Concordia on its sales of generic Kapvay cannot be justified as compensation for rights to intellectual property. Concordia's '100 patent expired only seven days into the license term. Under the agreement, however, Par's payments would continue for five years from the execution date. In substance, the payments, though purportedly for intellectual property, are the mechanism for Par to share with Concordia the supra-competitive profits preserved by their agreement not to compete.

Violation Charged: Restraint of Trade

36. As set forth above, Par agreed to pay Concordia to refrain from launching an authorized generic version of Kapvay. The acts, policies and practices of Concordia and Par, as alleged herein, unreasonably restrained trade and constitute an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, as amended. Such acts, practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of October 2015, issues its complaint against Respondents.

By the Commission.

DECISION AND ORDER
(Concordia)

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Concordia Pharmaceuticals Inc. and its parent Concordia Healthcare Corp. (collectively "Concordia Entities" or "Respondents") and Par Pharmaceutical, Inc. and Par Pharmaceutical Holdings, Inc. (collectively "Par") 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 violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by each 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 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 Act, 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 enters the following Decision and Order ("Order"):

1. Respondent Concordia Pharmaceuticals Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Country of

Barbados, with its office and principal place of business located at Chancery Chambers, Chancery House, High Street Bridgetown, BB Barbados 11128. Concordia Pharmaceuticals Inc. is a subsidiary of Concordia Healthcare Corp.

2. Respondent Concordia Healthcare Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the Province of Ontario, with its office and principal place of business located at 277 Lakeshore Road East, Suite 302, Oakville, Ontario, L6J 1H9.

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

ORDER

I.

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

A. "Respondents" or "Concordia Entities" means Concordia Pharmaceuticals Inc., Concordia Healthcare Corp., all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Concordia Pharmaceuticals Inc., or Concordia Healthcare Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Par" means Par Pharmaceutical Holdings, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977, and its subsidiaries Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc.

C. "505(b)(2) application" means an application filed with FDA pursuant to Section 505(b)(2) of the FFDC Act seeking to market and sell a drug product in the United States.

D. "ANDA" means an Abbreviated New Drug Application filed with the FDA pursuant to Section 505(j) of the FFDC Act, 21 U.S.C.§ 355(j).

E. "Authorized Generic" of a Brand-Name Drug means a drug product that: (a) is manufactured pursuant to (i) the NDA for the Brand-Name Drug, or (ii) an ANDA or a 505(b)(2) application for which the Brand-Name Drug is identified as the reference listed drug; and (b) is sold, offered for sale or distributed by—or on behalf of— the holder of the NDA, but not sold or distributed under the proprietary name of the Brand-Name Drug.

F. "Brand-Name Drug" means a drug product that is manufactured under an approved NDA and is marketed, sold and distributed in the United States under the proprietary name of the drug product. The proprietary name of the drug product is identified in the NDA of the drug product.

G. "Competing ANDA Filer" means a party who controls an ANDA or 505(b)(2) application or who has an exclusive right to sell, offer for sale, or distribute a drug product under such ANDA or 505(b)(2) application if a Respondent controls the NDA for, or has the exclusive right to distribute, the Brand-Name Drug identified as the reference listed drug in the ANDA or 505(b)(2) application.

H. "Concordia License Agreement" means the License Agreement effective September 6, 2013, by and between Concordia Pharmaceuticals, Inc. and Par Pharmaceutical, Inc., attached hereto as Confidential Appendix A.

I. "Entering Into or Attempting to Enter Into" means directly or indirectly entering into, adhering to,

participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

J. "FDA" means the United States Food and Drug Administration.

K. "FFDC Act" means the Federal Food Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.

L. "NDA" means a New Drug Application filed with FDA pursuant to Section 505(b)(1) of the FFDC Act, 21 U.S.C. § 355(b)(1), including all changes or supplements thereto which do not result in the submission of a new NDA.

M. "Orange Book" means the "Approved Drug Products with Therapeutic Equivalence Evaluations" published by the FDA under the FFDC Act, 21 U.S.C. § 301 et seq.

N. "Relevant Employee" means an employee whose responsibilities include, either directly or in a supervisory capacity, business development, pricing, marketing, and sales.

II.

IT IS FURTHER ORDERED that Concordia Pharmaceuticals Inc. shall relinquish all rights to receive, and Respondents shall not receive, the payment of any Additional Supply Price, as defined in Paragraph 3 of the Concordia License Agreement, or any other payment pursuant to the Concordia License Agreement. Not later than ten (10) days after this Order is issued, Respondents shall provide written notice to Par that Concordia Pharmaceuticals Inc. relinquishes all rights to receive any payment of any kind pursuant to the Concordia License Agreement. On the same day that Respondents provide the written notice required by this paragraph to Par, Respondents shall file a copy of such notice with the Secretary of the Commission and shall electronically send a copy of such notice to the Compliance Division of the Bureau of Competition of the Commission at bccompliance@ftc.gov.

III.

IT IS FURTHER ORDERED that in connection with any actions in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device, Entering Into or Attempting to Enter Into any combination, conspiracy, agreement, or understanding with a Competing ANDA Filer that (1) prohibits or delays in any manner the research, development, manufacture, regulatory approval, marketing or sale of an Authorized Generic and (2) the prohibition or delay in III(1) above is or will be in effect for any period following the expiration of all Patents listed in the patent and exclusivity information section of the Orange Book entry for the Brand-Name Drug.

IV.

IT IS FURTHER ORDERED that

A. For ten (10) years following issuance of this Order, Respondents shall provide a written notice of any agreement with a Competing ANDA Filer that (i) prohibits or delays in any manner the research, development, manufacture, regulatory approval, marketing or sale of an Authorized Generic of a Brand-Name Drug, and (ii) is in effect prior to the expiration of all Patents listed in the patent and exclusivity information section of the Orange Book entry for the Brand-Name Drug (the "Agreement"). Such notice shall:

1. Be provided thirty (30) days prior to the effective date of the Agreement;

2. Be filed in writing with the Secretary of the Commission;

3. Identify all persons and businesses subject to the Agreement;

4. State when the Agreement will go into effect; and

5. To the extent known by Respondents, identify all persons and businesses who have filed an ANDA or 505(b)(2) Application for which the relevant Brand-Name Drug is identified as the reference listed drug.

V.

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

A. Respondents shall establish and maintain a compliance program in the United States for the purpose of ensuring compliance with the requirements of this Order.

B. As part of establishing and maintaining a compliance program under this Paragraph, for five years after the date this Order is issued, Respondents shall

1. provide training regarding Respondents' obligations under this Order to its Relevant Employees at least annually, and within thirty (30) days after an individual first becomes a Relevant Employee through hiring or promotion;

2. provide a procedure that enables Relevant Employees to ask questions about, and report violations of, this Order confidentially and without fear of retaliation of any kind;

3. discipline Relevant Employees for failure to comply with this Order; and

4. maintain records showing that Respondents have complied with and are complying with the provisions of this compliance program, including but not limited to, records showing that all Relevant Employees have received all trainings

required under this Order during the preceding two (2) years.

VI.

IT IS FURTHER ORDERED that

A. Respondents shall submit to the Commission verified written reports:

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 reports shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order.

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 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 that Respondent; and

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

VII.

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

A. any proposed dissolution of a Respondent; or

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on October 20, 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 Orders with Par Pharmaceutical, Inc., Par Pharmaceutical Holdings, Inc., TPG Partners VI, L.P. (hereinafter "Par"), and with Concordia Pharmaceuticals Inc., and Concordia Healthcare Corp. (hereinafter "Concordia"). The proposed orders are designed to settle allegations that Par and Concordia violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,

by entering into an unlawful agreement not to compete relating to generic versions of Concordia's prescription drug known as Kapvay.

The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make the proposed orders final.

The purpose of this analysis is to facilitate public comment on the proposed orders. This Analysis to Aid Public Comment is not intended to constitute an official interpretation of the agreement, the complaint, or the proposed consent orders, or to modify their terms in any way. The proposed consent orders have been entered into for settlement purposes only and do not constitute admissions by Par or Concordia that either violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

Background and The Challenged Conduct

The complaint charges that Par and Concordia entered an unlawful agreement that Concordia would refrain from launching an "authorized generic" version of its brand-name drug Kapvay in exchange for a share of the supra-competitive profits Par would earn as the sole seller of generic Kapvay.

An authorized generic is a prescription drug that has been approved by the FDA as a brand-name drug product, but is marketed by the brand company (or its representative) as a generic drug product, without the trademark of the brand-name drug. An authorized generic can be sold under the approval the FDA granted under a new drug application (NDA) at any time.[1] Brand-name drug companies frequently introduce authorized generics upon entry of the first generic to stem large losses resulting from the rapid shift of sales from brand-name drugs to

[1] *See Teva Pharm. Indus. v. Crawford*, 410 F.3d 51 (D.C. Cir. 2005).

lower-priced generic products. Empirical evidence from the Federal Trade Commission's Authorized Generic Study shows that competition between the first generic entrant and an authorized generic typically drives down both retail and wholesale generic drug prices.[2]

Competition from an authorized generic has significant financial implications for the first generic entrant, for two reasons: (1) the authorized generic typically takes substantial sales from the first entrant; and (2) the competition from an authorized generic means that, on average, sales are made at lower prices. When the first generic entrant is the sole seller of the generic drug product, it enjoys approximately double the revenues that it would otherwise make in the first six months on the market if it faced competition from an authorized generic.[3]

As alleged in the complaint:

Concordia owns and markets various brand-name drug products. It acquired the rights to Kapvay in May 2013. Kapvay is a non-stimulant medication for the treatment of attention deficit hyperactivity disorder, approved for sale in the United States in September 2010.

Par develops and markets generic drugs. Par filed an application seeking FDA approval to sell a generic version of Kapvay in March 2011.

The timing of FDA approval for an independent generic drug is subject to certain patent and regulatory exclusivity protections. The federal law commonly known as the Hatch-Waxman Act requires a brand-name drug manufacturer to notify the FDA of patents that could reasonably be asserted against a party making or selling its drug. The FDA publishes patent information in a document known as the "Orange Book." If a generic drug

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[2] Fed. Trade Comm'n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* (2011) (hereinafter "Authorized Generic Study") at 41-48, *available at* https://www ftc.gov/reports/authorized-generic-drugs-short-term-effects-long-term-impact-report-federal-trade-commission.

[3] Authorized Generic Study at iii.

manufacturer seeks FDA approval to market a generic product prior to the expiration of a listed patent or patents relating to the brand-name drug upon which the generic is based, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a "paragraph IV certification"); and (2) notify the patent holder of the filing of the certification. If the holder of patent rights files a patent infringement suit within 45 days of the notification, FDA approval to market the generic drug is automatically stayed for 30 months, unless before that time the patent expires or is judicially determined to be invalid or not infringed.

In the case of Kapvay, the single patent listed in the FDA's Orange Book expired on October 13, 2013 (U.S. Patent No. 5,869,100 ("the '100 patent")). When Par filed its application for approval of its generic Kapvay product in 2011, it submitted a paragraph IV certification concerning this patent. The company that held the rights to Kapvay at the time did not assert any claim for patent infringement.

Approximately five weeks before the '100 patent was due to expire, however, Par and Concordia entered into a "License Agreement" relating to Kapvay. The agreement granted Par a license effective one week before expiration of the '100 patent. Under this agreement, Concordia agreed not to market an authorized generic version of Kapvay for five years. Par in turn agreed to pay Concordia at least 35 percent (and as much as 50 percent) of the net profits from the sale of Par's generic Kapvay product.

Although the License Agreement purports to grant Par rights under the '100 patent and other unspecified current or future intellectual property (and a waiver of unspecified regulatory exclusivities), the parties provided no evidence that Concordia held any rights that might have prevented Par from selling generic Kapvay after expiration of the '100 patent. Aside from the '100 patent, which expired a week after the effective date of the license, no patent claiming Kapvay has ever been listed in the FDA Orange Book.

Par received final FDA approval for its generic Kapvay ANDA on September 30, 2013. It began selling generic Kapvay

on October 7, 2013. Until May 15, 2015, Par was the only generic drug manufacturer to receive FDA approval for a generic Kapvay product.

Concordia launched an authorized generic Kapvay product in December 2014, after learning that the FTC was investigating its agreement with Par concerning Kapvay.

Competitive Analysis

The complaint charges that the challenged agreement between Par and Concordia constituted an unreasonable restraint of trade that was likely to harm competition and consumers by enabling Par to price its generic Kapvay product without facing competition from an authorized generic version of the drug. By agreeing to share a portion of its likely supra-competitive profits with Concordia, Par protected itself from competition from an authorized generic for five years. The agreement was not plausibly related to any efficiency-enhancing joint undertaking. It is therefore appropriate to analyze the challenged conduct here as a straightforward agreement not to compete.

The evidence in this case indicated that, without a competing generic Kapvay product, consumers and other private and public purchasers were likely forced to pay higher prices for generic Kapvay. In addition, as noted above, empirical evidence from the FTC's Authorized Generic Study confirms what economic theory predicts: when the brand company cedes all generic sales to the first generic entrant by agreeing not to introduce an authorized generic, the generic drug company on average captures substantially more sales and sells at significantly higher prices. Consumers, meanwhile, are forced to pay supra-competitive prices for the generic product.[4]

[4] *See* Authorized Generic Report at vi, 41-48, 57-59.

The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged in the complaint and to prevent recurrence of similar conduct. The orders prohibit Par and Concordia from (1) enforcing the relevant provisions of their 2013 License Agreement and (2) entering into similar "no-authorized-generic" agreements in the future.

In the Par order, Paragraph II.A prohibits Par from seeking to enforce any provision in its 2013 License Agreement with Concordia that restricts Concordia's ability to market an authorized generic Kapvay product. Paragraph II.B provides that Par may not enter into any agreement that (1) limits a brand-name drug manufacturer's ability to market an authorized generic version of a drug product for which Par is seeking FDA approval to sell a generic counterpart; and (2) the limitation extends beyond the expiration of any Orange-Book listed patents for the drug in question.[5]

In the Concordia order, Paragraph II requires Concordia to relinquish any and all rights to payment under the License Agreement and to provide written notice to Par and the FTC of that relinquishment. Paragraph III bars Concordia from entering any agreement with a generic applicant for a reference-listed drug for which Concordia holds the NDA, if the agreement (1) limits marketing of an authorized generic version of that drug and (2) the limitation extends beyond the expiration of any Orange-Book listed patents for the drug in question.

The proposed orders' prohibitions on future agreements limiting an authorized generic cover only agreements in which the restraint extends beyond patent expiration. Agreements to restrict the sale of an authorized generic sometimes appear in patent litigation settlements and can serve as a means of compensating the generic patent challenger for agreeing to stay off the market

[5] This provision applies to actions taken on behalf of Par Pharmaceutical, Inc., and Par Pharmaceutical Holdings, Inc., but would not apply to conduct by Respondent TPG Partners VI, L.P. that is not taken on behalf of the Par entities.

for a period of time.[6] These arrangements can raise the same antitrust concerns that the Supreme Court addressed in *FTC v. Actavis*, 133 S. Ct. 2223 (2013).[7] That is not this case, however, and the proposed orders are not designed to address that type of conduct. As discussed above, the challenged agreement here did not arise out of pending or threatened patent litigation and nearly the entire five-year term of the agreement covered the period after expiration of the Kapvay patent.

For purposes of these proposed orders, "authorized generic" means a drug product distributed by or on behalf of an NDA holder, but marketed as a generic, regardless of whether it is manufactured pursuant to an NDA, an ANDA, or a 505(b)(2) application.[8]

The proposed orders each include a notice provision designed to assist in monitoring the respondents' future conduct with respect to an agreement to restrict the sale of an authorized generic product -- without regard to whether the agreement extends beyond expiration of any listed patent. Par is required to notify the Commission and provide certain specified information if it enters certain agreements with a party that markets a brand-name drug for which Par has filed an application to sell a generic equivalent. Covered agreements are those that (1) limit the sale of an authorized generic and (2) take effect before the expiration of all Orange-Book listed patents for the relevant brand-name drug. A comparable provision in the Concordia order requires Concordia to provide such notice for agreements with a party

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[6] *See, e.g.*, Authorized Generic Study at 139-53.

[7] *See King Drug Co. of Florence Inc.v. Smithkline Beecham Corp.*, No. 14-1243 (3rd Cir. June 26, 2015). *See also* Brief of Federal Trade Commission as Amicus Curiae, *American Sales Co.v. Warner-Chilcott Co., LLC,* Nos. 14-2071 and 15-1250 (1st Cir. June 16, 2015).

[8] A company seeking to market a generic product typically files an abbreviated new drug application (ANDA). In that case, instead of providing independent evidence of safety and effectiveness, the applicant must demonstrate that its drug is bioequivalent to its branded counterpart. In some circumstances, a generic drug manufacturer may need to submit reports of investigations of the safety and effectiveness of its product in addition to relying on existing data, under what is known as a "505(b)(2)" application.

seeking FDA approval to market a generic version of a brand-name drug for which Concordia holds the NDA. Both notice provisions terminate ten years after issuance of the orders.

These notice provisions differ from the filing requirements contained in Section 1112 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). The notice required by the orders must be filed at least 30 days prior to the effective date of the agreement; MMA filings must be made within ten days after execution of the agreement.

The proposed orders also require that for five years Par and Concordia maintain compliance programs with certain prescribed features. Finally, the proposed orders contain certain reporting and other provisions that are designed to assist the Commission in monitoring compliance and are standard provisions in Commission orders. The proposed orders will expire in 20 years.

Complaint

IN THE MATTER OF

CONCORDIA PHARMACEUTICALS INC., CONCORDIA HEALTHCARE CORP., PAR PHARMACEUTICAL, INC., AND PAR PHARMACEUTICAL HOLDINGS, INC.

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

Docket C-4554; File No. 151 0030
Complaint, October 20, 2015 – Decision, October 20, 2015

The complaint alleges that Par Pharmaceutical, Inc., Par Pharmaceutical Holdings, Inc., TPG Partners VI, L.P. (hereinafter "Par"), and Concordia Pharmaceuticals Inc., and Concordia Healthcare Corp. (hereinafter "Concordia") entered into an unlawful agreement not to compete relating to generic versions of Concordia's prescription drug known as Kapvay. Concordia owns and markets various brand-named drug products and Par markets and develops generic drugs. Concordia was awarded the rights to Kapvay in May 2013, while Par filed an application seeking FDA approval to sell a generic version of Kapvay in March 2011. The complaint further alleges that the defendants entered an unlawful agreement that Concordia would refrain from launching an "authorized generic" version of its brand-name drug Kapvay in exchange for a share of the supra-competitive profits Par would earn as the sole seller of generic Kapvay. Concordia's entry into the market would promote competition but would have a significant financial implication on the first generic entrant, Par. This unlawful agreement would allow Par's generic to be the sole seller which would allow their revenues to double in a six month span. The consent orders prohibit Par and Concordia from enforcing the relevant provisions of their 2013 License Agreement and entering into similar "no-authorized-generic" agreements in the future. The proposed orders each include a notice provision designed to assist in monitoring the respondents' future conduct with respect to an agreement to restrict the sale of an authorized generic product -- without regard to whether the agreement extends beyond expiration of any listed patent.

Participants

For the *Commission: Bradley Albert, Malcolm Catt, Alpa Davis, Elizabeth Hilder,* and *Susan Huber.*

For the *Respondents: Daniella Esses* and *Christine Varney, Cravath, Swaine & Moore, LLP; Michael Brockmeyer, Frommer Lawrence & Haug, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Concordia Pharmaceuticals Inc. ("Concordia"), Concordia Healthcare Corp. (collectively "Concordia Entities"), Par Pharmaceutical, Inc., and Par Pharmaceutical Holdings, Inc. (collectively "Par") have violated Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

Nature of the Case

1. This action challenges an agreement not to compete between Concordia and Par relating to generic equivalents of the prescription drug Kapvay. Until May 15, 2015, Concordia and Par were the only two firms permitted to market generic Kapvay. Rather than competing against one another, however, Concordia agreed not to sell an authorized generic version of Kapvay in exchange for a share of the revenues Par earns as the sole seller of generic Kapvay. This agreement not to compete likely resulted in higher prices for consumers.

The Respondents and Jurisdiction

2. Concordia Pharmaceuticals Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Country of Barbados, with its office and principal place of business located at Chancery Chambers, Chancery House, High Street Bridgetown, BB Barbados 11128. Concordia Pharmaceuticals Inc. is a subsidiary of Concordia Healthcare Corp.

3. Concordia Healthcare Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the Province of Ontario, Canada, with its office and principal place of business located at 277 Lakeshore Road East, Suite 302, Oakville, Ontario, L6J 1H9, Canada.

4. Par Pharmaceutical, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical, Inc. is a wholly-owned subsidiary of Par Pharmaceutical Companies, Inc. and a wholly-owned indirect subsidiary of Par Pharmaceutical Holdings, Inc.

5. Par Pharmaceutical Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical Holdings, Inc. is a parent of Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc.

6. At all times relevant hereto, each of the Concordia and Par entities has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

7. The acts and practices of Concordia and Par, 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 FTC Act, 15 U.S.C. § 44.

Background

Regulation of Prescription Pharmaceuticals in the United States

8. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act") and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 21 U.S.C. §§ 355(b)(2), 355(j) and 35 U.S.C. § 271(e), establishes procedures designed to facilitate competition from lower priced generic drugs, while maintaining incentives for pharmaceutical companies to invest in developing new drugs.

9. A company seeking to market a new pharmaceutical product must file a New Drug Application ("NDA") with the U.S. Food and Drug Administration ("FDA"), demonstrating the safety and efficacy of the new product. Newly developed drugs

are often protected by patents and marketed under proprietary brand names. These NDA-based products are referred to as "brand-name drugs" or "branded drugs."

10. The FDA requires brand-name drug manufacturers to identify the patents that cover their approved drugs. The FDA publishes a list of these drugs and their associated patents in its publically available database *Approved Drug Products with Therapeutic Equivalence Evaluations*, commonly known as the "Orange Book."

11. A competitor who wishes to market a generic version of a branded drug may seek FDA approval by filing an Abbreviated New Drug Application ("ANDA"). The generic applicant must demonstrate that its generic drug is therapeutically equivalent to the brand-name drug that it references and for which it seeks to be a generic substitute. The FDA assigns a generic drug an "AB" rating if it is therapeutically equivalent to a brand-name drug.

12. When a brand-name drug is covered by one or more patents listed in the Orange Book, a company that intends to market a generic version of that drug prior to expiration of the patents must make a "paragraph IV certification", certifying that the patents are invalid, unenforceable, or will not be infringed by the generic drug.

13. If a company makes a paragraph IV certification, it must notify the patent holder of the filing of its ANDA. If the patent holder initiates a patent infringement suit against the company within 45 days of receiving such notice, the FDA may not grant final approval of the ANDA until the earliest of (1) patent expiry, (2) district court resolution of the patent litigation in favor of the generic company, or (3) the expiration of an automatic 30-month waiting period.

14. The Hatch-Waxman Act gives the first generic company or companies filing an ANDA containing a paragraph IV certification ("first-filer") a period of protection from competition with other ANDA filers. This is referred to as the "180-day exclusivity" period.

15. The brand-name drug manufacturer, however, is permitted to market a generic version of its branded product during the first filer's exclusivity period. In that case, no ANDA is necessary, because the manufacturer already has approval to sell the drug under its NDA. The NDA holder may also permit another company to market a generic version under the NDA. Such generics, made available at the discretion of the NDA holder and sold under the authority of the NDA, are commonly known as "authorized generics."

16. In the absence of other actual or impending generic competition, an NDA holder typically will not undercut its profits on its branded drug by introducing a lower-priced, authorized generic version of that drug. Once an ANDA filer enters, however, an authorized generic may become attractive to the NDA holder as a means of maintaining some of the revenue it would otherwise lose to the ANDA-based generic competitor.

The Benefit to Consumers from Generic Drugs

17. Competition from generic drugs generates large savings for consumers. According to a 2010 Congressional Budget Office report, the retail price of a generic is 75 percent lower, on average, than the retail price of a brand-name drug. The Generic Pharmaceutical Association reported that use of generic versions of brand-name drugs saved the U.S. health care system $239 billion in 2013 alone.

18. AB-rated generic drugs are typically priced significantly lower than brand-name drugs. As more AB-rated generic drugs enter the market, generic prices generally fall even further.

19. Because of these price advantages, state laws facilitate substitution of AB-rated generic drugs for higher priced brand-name drugs. Many third-party payers of prescription drugs (e.g., health insurance plans, Medicaid programs) have adopted policies to encourage the substitution of AB-rated generic drugs for their brand-name counterparts. As a result of these policies and lower prices, many purchasers routinely switch from a brand-name drug to an AB- rated generic drug upon its introduction. Consequently, AB-rated generic drugs typically capture a significant share of

sales, causing a significant reduction of the branded drug's unit and dollar sales.

20. Consumers benefit from competition between an authorized generic drug and ANDA-based generic drug. Empirical evidence from the FTC's Authorized Generic Study shows that competition from an authorized generic drug during the first-filer's 180-day exclusivity period results, on average, in retail generic prices that are 4 to 8 percent lower and wholesale generic prices that are 7 to 14 percent lower than prices without authorized generic competition.

21. Competition from an authorized generic also typically has a significant financial impact on the first ANDA entrant. According to the FTC's Authorized Generic Study, an authorized generic typically takes a significant share of the first ANDA entrant's generic sales, thereby reducing revenues during its 180-day exclusivity period by 40 to 52 percent on average. This financial impact is well-known in the pharmaceutical industry.

Kapvay and its Generic Equivalents

22. The FDA approved Kapvay (clonidine hydrochloride tablets) for the treatment of Attention Deficit Hyperactivity Disorder ("ADHD") in September 2010. Kapvay tablets are available in .1 mg and .2 mg dosage strengths.

23. U.S. Patent No. 5,869,100 ("the '100 patent") is the only patent listed in the Orange Book for Kapvay. The '100 patent expired on October 13, 2013.

24. Par filed an ANDA seeking FDA approval to launch a generic version of Kapvay on March 4, 2011. As the first company to file a substantially complete ANDA with a paragraph IV certification under 21 U.S.C. §355(j), Par was eligible for 180 days of market exclusivity. Par was not sued for patent infringement.

25. Concordia acquired the rights to Kapvay in May, 2013. Prior to generic entry, annual U.S. sales of Kapvay were $72 million.

26. Par received final FDA approval to market generic Kapvay on September 30, 2013. Par was legally entitled to market its generic Kapvay product at that time. As the NDA holder, Concordia was also legally permitted to sell an authorized generic version of Kapvay.

27. No other firm received final FDA approval to market a generic version of Kapvay until May 15, 2015.

The Agreement Not to Compete between Concordia and Par

28. On September 6, 2013, Concordia and Par signed a "License Agreement" whereby Concordia granted Par rights to the '100 patent and any future intellectual property relating to Kapvay. Under the terms of the license, Par was permitted to market its generic Kapvay product on October 7, 2013, just one week prior to expiration of the '100 patent. Concordia agreed that for five years it would not market, or permit a third party to market an authorized generic version of Kapvay. This provision secured Par as the only generic Kapvay product on the market unless and until the FDA approves another ANDA for generic Kapvay. In exchange, Par agreed to share with Concordia a substantial portion of the profits Par would earn on sales of its generic Kapvay product, ranging from 35 to 50 percent.

29. Par launched its generic Kapvay product on October 7, 2013. Par has made payments to Concordia under the agreement.

30. Par's generic product was the only generic version of Kapvay available for fourteen months. In December of 2014, after learning of the FTC's investigation, Concordia launched an authorized generic version of Kapvay.

The Agreement Not to Compete between Concordia and Par Harms Consumers

31. An authorized generic version of Kapvay would have competed on the basis of price with Par's ANDA product, likely resulting in lower prices for consumers of generic Kapvay.

32. By agreeing not to compete, Concordia and Par, the only two firms permitted to market generic Kapvay at the time,

reduced the number of competing generic Kapvay products available to consumers. The agreement, therefore, deprived consumers of the lower prices that occur with generic competition.

33. This lack of competition likely permitted Par to charge supra-competitive prices for generic Kapvay.

The Agreement Not to Compete between Concordia and Par is Not Justified

34. The agreement not to compete between Concordia and Par is not reasonably necessary to achieve any efficiency-enhancing purpose.

35. Par's payments to Concordia on its sales of generic Kapvay cannot be justified as compensation for rights to intellectual property. Concordia's '100 patent expired only seven days into the license term. Under the agreement, however, Par's payments would continue for five years from the execution date. In substance, the payments, though purportedly for intellectual property, are the mechanism for Par to share with Concordia the supra-competitive profits preserved by their agreement not to compete.

Violation Charged: Restraint of Trade

36. As set forth above, Par agreed to pay Concordia to refrain from launching an authorized generic version of Kapvay. The acts, policies and practices of Concordia and Par, as alleged herein, unreasonably restrained trade and constitute an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, as amended. Such acts, practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of October 2015, issues its complaint against Respondents.

By the Commission.

DECISION AND ORDER
(Par)

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Par Pharmaceutical, Inc. and Par Pharmaceutical Holdings, Inc. (collectively "Respondents") and Concordia Pharmaceuticals Inc. and its parent Concordia Healthcare Corp. (collectively "Concordia") 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 violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by each 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 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 Act, 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 enters the following Decision and Order ("Order"):

1. Respondent Par Pharmaceutical, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One

Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical, Inc. is a wholly-owned subsidiary of Par Pharmaceutical Companies, Inc. and a wholly-owned indirect subsidiary of Par Pharmaceutical Holdings, Inc.

2. Respondent Par Pharmaceutical Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at One Ram Ridge Road, Chestnut Ridge, NY 10977. Par Pharmaceutical Holdings, Inc. is a parent of Par Pharmaceutical Companies, Inc. and Par Pharmaceutical, Inc.

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

ORDER

I.

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

A. **"**Respondents" means Par Pharmaceutical Inc., Par Pharmaceutical Companies, Inc., Par Pharmaceutical Holdings, Inc., all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Par Pharmaceutical Inc., Par Pharmaceutical Companies, Inc. or Par Pharmaceutical Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each, including, but not limited to, successors to Par Pharmaceutical Inc., Par Pharmaceutical Companies, Inc., and Par Pharmaceutical Holdings, Inc.

B. "Concordia" means Concordia Healthcare Corp., a corporation organized, existing and doing business under and by virtue of the laws of the Province of

Ontario, with its office and principal place of business located at 277 Lakeshore Road East, Suite 302, Oakville, Ontario, L6J 1H9; and its subsidiary Concordia Pharmaceutical Inc. a corporation organized, existing and doing business under and by virtue of the laws of the Country of Barbados, with its office and principal place of business located at Chancery Chambers, Chancery House, High Street Bridgetown, BB Barbados 11128.

C. "505(b)(2) application" means an application filed with FDA pursuant to Section 505(b)(2) of the FFDC Act seeking to market and sell a drug product in the United States.

D. "The FFDC Act" means the Federal Food Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.

E. "ANDA" means an Abbreviated New Drug Application filed with the FDA pursuant to Section 505(j) of the FFDC Act, 21 U.S.C.§ 355(j).

F. "Authorized Generic" of a Brand-Name Drug means a drug product that: (a) is manufactured pursuant to (i) the NDA for the Brand-Name Drug, or (ii) an ANDA or a 505(b)(2) application for which the Brand-Name Drug is identified as the reference listed drug; and (b) is sold, offered for sale or distributed by—or on behalf of— the holder of the NDA, but not sold or distributed under the proprietary name of the Brand-Name Drug.

G. "Brand-Name Drug" means a drug product that is manufactured under an approved NDA and is marketed, sold and distributed in the United States under the proprietary name of the drug product. The proprietary name of the drug product is identified in the NDA of the drug product.

H. "Brand-Name Competitor" means any person or business other than Respondents that sells or markets a Brand-Name Drug that the FDA has identified as the

reference listed drug for an ANDA or a 505(b)(2) application held by Par.

I. "Concordia License Agreement" means the License Agreement effective September 6, 2013 by and between Concordia Pharmaceuticals Inc. and Par Pharmaceutical, Inc., attached hereto as Confidential Appendix A.

J. "Entering Into or Attempting to Enter Into" means directly or indirectly entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

K. "FDA" means the United States Food and Drug Administration.

L. "NDA" means a New Drug Application filed with FDA pursuant to Section 505(b)(1) of the FFDC Act, 21 U.S.C. § 355(b)(1), including all changes or supplements thereto which do not result in the submission of a new NDA.

M. "Orange Book" means the "Approved Drug Products with Therapeutic Equivalence Evaluations" published by the FDA under the FFDC Act, 21 U.S.C. § 301 et seq.

N. "Relevant Employee" means an employee whose responsibilities include, either directly or in a supervisory capacity, business development, pricing, marketing, and sales.

II.

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

A. Enforcing or attempting to enforce Paragraph 2(e) of the Concordia License Agreement or any other provision of the Concordia License Agreement that impairs in any way Concordia's ability to market an Authorized Generic of the Brand-Name Drug Kapvay.

B. Entering Into or Attempting to Enter Into any combination, conspiracy, agreement, or understanding with a Brand-Name Competitor that (1) prohibits or delays in any manner the research, development, manufacture, regulatory approval, marketing or sale of the Authorized Generic of a Brand-Name Drug and (2) the prohibition or delay in II(B)(1) above is or will be in effect for any period following the expiration of all Patents listed in the patent and exclusivity information section of the Orange Book entry for the Brand-Name Drug.

III.

IT IS FURTHER ORDERED that

A. For ten (10) years following issuance of this Order, Respondents shall provide a written notice of any agreement between or among Respondents and a Brand-Name Competitor if such agreement (i) prohibits or delays in any manner the research, development, manufacture, regulatory approval, marketing or sale of an Authorized Generic of a Brand-Name Drug, and (ii) is in effect prior to the expiration of all Patents listed in the patent and exclusivity information section of the Orange Book entry for the Brand-Name Drug (the "Agreement"). Such notice shall:

1. Be provided thirty (30) days prior to the effective date of the Agreement;

2. Be filed in writing with the Secretary of the Commission;

3. Identify all persons and businesses subject to the Agreement;

4. State when the Agreement will go into effect; and

5. To the extent known by Respondents, identify all persons and businesses who have filed an ANDA or 505(b)(2) Application for which the Relevant Brand-Name Drug is identified as the reference listed drug.

IV.

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

A. Respondents shall establish and maintain a compliance program in the United States for the purpose of ensuring compliance with the requirements of this Order.

B. As part of establishing and maintaining a compliance program under this Paragraph, for five years after the date this Order is issued, Respondents shall

1. provide training regarding Respondents obligations under this Order to its Relevant Employees at least annually, and within thirty (30) days after an individual first becomes a Relevant Employee through hiring or promotion;

2. provide a procedure that enables Relevant Employees to ask questions about, and report violations of, this Order confidentially and without fear of retaliation of any kind;

3. discipline Relevant Employees for failure to comply with this Order; and

4. maintain records showing that Respondents have complied with and are complying with the provisions of this compliance program, including but not limited to, records showing that all

Relevant Employees have received all trainings required under this Order during the preceding two (2) years.

V.

IT IS FURTHER ORDERED that

A. 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 Respondents intend to comply, are complying, and have complied with this Order.

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 Respondents made to its 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:

1. access, during business office hours 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 Respondents; and

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

VI.

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

A. any proposed dissolution of a Respondent; or

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

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on October 20, 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 Orders with Par Pharmaceutical, Inc., Par Pharmaceutical Holdings, Inc., TPG Partners VI, L.P. (hereinafter "Par"), and with Concordia Pharmaceuticals Inc., and Concordia Healthcare Corp. (hereinafter "Concordia"). The proposed orders are designed to settle allegations that Par and Concordia violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,

by entering into an unlawful agreement not to compete relating to generic versions of Concordia's prescription drug known as Kapvay.

The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreement or make the proposed orders final.

The purpose of this analysis is to facilitate public comment on the proposed orders. This Analysis to Aid Public Comment is not intended to constitute an official interpretation of the agreement, the complaint, or the proposed consent orders, or to modify their terms in any way. The proposed consent orders have been entered into for settlement purposes only and do not constitute admissions by Par or Concordia that either violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

Background and The Challenged Conduct

The complaint charges that Par and Concordia entered an unlawful agreement that Concordia would refrain from launching an "authorized generic" version of its brand-name drug Kapvay in exchange for a share of the supra-competitive profits Par would earn as the sole seller of generic Kapvay.

An authorized generic is a prescription drug that has been approved by the FDA as a brand-name drug product, but is marketed by the brand company (or its representative) as a generic drug product, without the trademark of the brand-name drug. An authorized generic can be sold under the approval the FDA granted under a new drug application (NDA) at any time.[1] Brand-name drug companies frequently introduce authorized generics upon entry of the first generic to stem large losses resulting from the rapid shift of sales from brand-name drugs to

[1] *See Teva Pharm. Indus. v. Crawford*, 410 F.3d 51 (D.C. Cir. 2005).

lower-priced generic products. Empirical evidence from the Federal Trade Commission's Authorized Generic Study shows that competition between the first generic entrant and an authorized generic typically drives down both retail and wholesale generic drug prices.[2]

Competition from an authorized generic has significant financial implications for the first generic entrant, for two reasons: (1) the authorized generic typically takes substantial sales from the first entrant; and (2) the competition from an authorized generic means that, on average, sales are made at lower prices. When the first generic entrant is the sole seller of the generic drug product, it enjoys approximately double the revenues that it would otherwise make in the first six months on the market if it faced competition from an authorized generic.[3]

As alleged in the complaint:

Concordia owns and markets various brand-name drug products. It acquired the rights to Kapvay in May 2013. Kapvay is a non-stimulant medication for the treatment of attention deficit hyperactivity disorder, approved for sale in the United States in September 2010.

Par develops and markets generic drugs. Par filed an application seeking FDA approval to sell a generic version of Kapvay in March 2011.

The timing of FDA approval for an independent generic drug is subject to certain patent and regulatory exclusivity protections. The federal law commonly known as the Hatch-Waxman Act requires a brand-name drug manufacturer to notify the FDA of patents that could reasonably be asserted against a party making or selling its drug. The FDA publishes patent information in a document known as the "Orange Book." If a generic drug

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[2] Fed. Trade Comm'n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* (2011) (hereinafter "Authorized Generic Study") at 41-48, *available at* https://www ftc.gov/reports/authorized-generic-drugs-short-term-effects-long-term-impact-report-federal-trade-commission.

[3] Authorized Generic Study at iii.

manufacturer seeks FDA approval to market a generic product prior to the expiration of a listed patent or patents relating to the brand-name drug upon which the generic is based, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a "paragraph IV certification"); and (2) notify the patent holder of the filing of the certification. If the holder of patent rights files a patent infringement suit within 45 days of the notification, FDA approval to market the generic drug is automatically stayed for 30 months, unless before that time the patent expires or is judicially determined to be invalid or not infringed.

In the case of Kapvay, the single patent listed in the FDA's Orange Book expired on October 13, 2013 (U.S. Patent No. 5,869,100 ("the '100 patent")). When Par filed its application for approval of its generic Kapvay product in 2011, it submitted a paragraph IV certification concerning this patent. The company that held the rights to Kapvay at the time did not assert any claim for patent infringement.

Approximately five weeks before the '100 patent was due to expire, however, Par and Concordia entered into a "License Agreement" relating to Kapvay. The agreement granted Par a license effective one week before expiration of the '100 patent. Under this agreement, Concordia agreed not to market an authorized generic version of Kapvay for five years. Par in turn agreed to pay Concordia at least 35 percent (and as much as 50 percent) of the net profits from the sale of Par's generic Kapvay product.

Although the License Agreement purports to grant Par rights under the '100 patent and other unspecified current or future intellectual property (and a waiver of unspecified regulatory exclusivities), the parties provided no evidence that Concordia held any rights that might have prevented Par from selling generic Kapvay after expiration of the '100 patent. Aside from the '100 patent, which expired a week after the effective date of the license, no patent claiming Kapvay has ever been listed in the FDA Orange Book.

Par received final FDA approval for its generic Kapvay ANDA on September 30, 2013. It began selling generic Kapvay

on October 7, 2013. Until May 15, 2015, Par was the only generic drug manufacturer to receive FDA approval for a generic Kapvay product.

Concordia launched an authorized generic Kapvay product in December 2014, after learning that the FTC was investigating its agreement with Par concerning Kapvay.

Competitive Analysis

The complaint charges that the challenged agreement between Par and Concordia constituted an unreasonable restraint of trade that was likely to harm competition and consumers by enabling Par to price its generic Kapvay product without facing competition from an authorized generic version of the drug. By agreeing to share a portion of its likely supra-competitive profits with Concordia, Par protected itself from competition from an authorized generic for five years. The agreement was not plausibly related to any efficiency-enhancing joint undertaking. It is therefore appropriate to analyze the challenged conduct here as a straightforward agreement not to compete.

The evidence in this case indicated that, without a competing generic Kapvay product, consumers and other private and public purchasers were likely forced to pay higher prices for generic Kapvay. In addition, as noted above, empirical evidence from the FTC's Authorized Generic Study confirms what economic theory predicts: when the brand company cedes all generic sales to the first generic entrant by agreeing not to introduce an authorized generic, the generic drug company on average captures substantially more sales and sells at significantly higher prices. Consumers, meanwhile, are forced to pay supra-competitive prices for the generic product.[4]

[4] *See* Authorized Generic Report at vi, 41-48, 57-59.

The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged in the complaint and to prevent recurrence of similar conduct. The orders prohibit Par and Concordia from (1) enforcing the relevant provisions of their 2013 License Agreement and (2) entering into similar "no-authorized-generic" agreements in the future.

In the Par order, Paragraph II.A prohibits Par from seeking to enforce any provision in its 2013 License Agreement with Concordia that restricts Concordia's ability to market an authorized generic Kapvay product. Paragraph II.B provides that Par may not enter into any agreement that (1) limits a brand-name drug manufacturer's ability to market an authorized generic version of a drug product for which Par is seeking FDA approval to sell a generic counterpart; and (2) the limitation extends beyond the expiration of any Orange-Book listed patents for the drug in question.[5]

In the Concordia order, Paragraph II requires Concordia to relinquish any and all rights to payment under the License Agreement and to provide written notice to Par and the FTC of that relinquishment. Paragraph III bars Concordia from entering any agreement with a generic applicant for a reference-listed drug for which Concordia holds the NDA, if the agreement (1) limits marketing of an authorized generic version of that drug and (2) the limitation extends beyond the expiration of any Orange-Book listed patents for the drug in question.

The proposed orders' prohibitions on future agreements limiting an authorized generic cover only agreements in which the restraint extends beyond patent expiration. Agreements to restrict the sale of an authorized generic sometimes appear in patent litigation settlements and can serve as a means of compensating the generic patent challenger for agreeing to stay off the market

[5] This provision applies to actions taken on behalf of Par Pharmaceutical, Inc., and Par Pharmaceutical Holdings, Inc., but would not apply to conduct by Respondent TPG Partners VI, L.P. that is not taken on behalf of the Par entities.

for a period of time.[6] These arrangements can raise the same antitrust concerns that the Supreme Court addressed in *FTC v. Actavis*, 133 S. Ct. 2223 (2013).[7] That is not this case, however, and the proposed orders are not designed to address that type of conduct. As discussed above, the challenged agreement here did not arise out of pending or threatened patent litigation and nearly the entire five-year term of the agreement covered the period after expiration of the Kapvay patent.

For purposes of these proposed orders, "authorized generic" means a drug product distributed by or on behalf of an NDA holder, but marketed as a generic, regardless of whether it is manufactured pursuant to an NDA, an ANDA, or a 505(b)(2) application.[8]

The proposed orders each include a notice provision designed to assist in monitoring the respondents' future conduct with respect to an agreement to restrict the sale of an authorized generic product -- without regard to whether the agreement extends beyond expiration of any listed patent. Par is required to notify the Commission and provide certain specified information if it enters certain agreements with a party that markets a brand-name drug for which Par has filed an application to sell a generic equivalent. Covered agreements are those that (1) limit the sale of an authorized generic and (2) take effect before the expiration of all Orange-Book listed patents for the relevant brand-name drug. A comparable provision in the Concordia order requires Concordia to provide such notice for agreements with a party

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[6] *See, e.g.*, Authorized Generic Study at 139-53.

[7] *See King Drug Co. of Florence Inc.v. Smithkline Beecham Corp.*, No. 14-1243 (3rd Cir. June 26, 2015). *See also* Brief of Federal Trade Commission as Amicus Curiae, *American Sales Co.v. Warner-Chilcott Co., LLC,* Nos. 14-2071 and 15-1250 (1st Cir. June 16, 2015).

[8] A company seeking to market a generic product typically files an abbreviated new drug application (ANDA). In that case, instead of providing independent evidence of safety and effectiveness, the applicant must demonstrate that its drug is bioequivalent to its branded counterpart. In some circumstances, a generic drug manufacturer may need to submit reports of investigations of the safety and effectiveness of its product in addition to relying on existing data, under what is known as a "505(b)(2)" application.

seeking FDA approval to market a generic version of a brand-name drug for which Concordia holds the NDA. Both notice provisions terminate ten years after issuance of the orders.

These notice provisions differ from the filing requirements contained in Section 1112 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). The notice required by the orders must be filed at least 30 days prior to the effective date of the agreement; MMA filings must be made within ten days after execution of the agreement.

The proposed orders also require that for five years Par and Concordia maintain compliance programs with certain prescribed features. Finally, the proposed orders contain certain reporting and other provisions that are designed to assist the Commission in monitoring compliance and are standard provisions in Commission orders. The proposed orders will expire in 20 years.

Complaint

IN THE MATTER OF

BMW OF NORTH AMERICA, LLC

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

Docket C-4555; File No. 132 3150
Complaint, October 20, 2015 – Decision, October 20, 2015

The complaint alleges that BMW of North America, LLC required owners to have routine maintenance, such as oil changes, performed by MINI dealers and to use genuine MINI parts or else their warranty would be voided, which is in violation of the Warranty Act. The FTC enforces the Warranty Act, which regulates consumer warranties and the procedures used to resolve warranty disputes. the Warranty Act prohibits a warrantor from conditioning a consumer product's warranty on the consumer's use of an article or a service which is identified by brand, trade, or corporate name. The complaint further alleges that this requirement appears in two places in the Warranty Statement. BMW of North America, LLC was established in 1975 as the United States importer of BMW luxury/performance vehicles. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent, in connection with the sale of any MINI Division good or service, from violating any provision of the Warranty Act, including, but not limited to, the anti-tying provision. It also prohibits respondent, in connection with the sale of any MINI good or service, from misrepresenting that vehicles, in order to operate safely or maintain value, must have maintenance work performed by a MINI dealer.

Participants

For the *Commission: Svetlana Gans,* and *Kelly Horne*

For the *Respondent: Daniel Savrin, Morgan Lewis.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that BMW of North America, LLC, a limited liability company, ("Respondent") 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 BMW of North America, LLC ("BMW"), is a Delaware limited liability company with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake, New

Jersey 07677. Respondent uses, among others, the trade names MINI USA and the MINI Division of BMW NA.

2. Respondent has advertised, marketed, offered for sale, sold, and distributed products through authorized dealers to consumers, including MINI passenger cars and MINI parts.

3. The FTC enforces the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, ("Warranty Act"), which regulates consumer warranties and the procedures used to resolve warranty disputes. The broad purposes of the Warranty Act are: (1) to improve the adequacy of warranty information available to consumers, and thereby facilitate consumer choice; (2) to prevent deception; and (3) to improve competition in the marketing of consumer products. Among other things, the Warranty Act prohibits a warrantor from conditioning a consumer product's warranty on the consumer's use of an article or a service (other than an article or a service provided without charge) which is identified by brand, trade, or corporate name. 15 U.S.C. § 2302(c). Pursuant to Section 2310(b) of the Warranty Act, 15 U.S.C. § 2310(b), a violation of the Warranty Act constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("FTC Act").

4. Respondent is a "warrantor" as defined by the Warranty Act because it is a supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty. 15 U.S.C. § 2301(5).

5. 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 FTC Act.

RESPONDENT'S BUSINESS ACTIVITIES

Overview

6. Respondent's MINI Division distributes new MINI passenger cars throughout the United States to authorized MINI dealers, who then sell or lease MINI passenger cars to consumers.

7. Respondent's MINI Division, through MINI dealers, provides purchasers of new MINI passenger cars a "written warranty" as defined by the Warranty Act, 15 U.S.C. § 2301(6), in the form of a Service and Warranty Information Statement ("Warranty Statement").

8. The length of the MINI New Passenger Car Limited Warranty offered by Respondent's MINI Division is four years or 50,000 miles, whichever comes first.

9. Since at least 2002, Respondent's MINI Division has offered purchasers of its new MINI passenger cars the "MINI Maintenance Program" ("Maintenance Program"), included automatically in the purchase of a MINI passenger car from a MINI dealer.

10. For MINI passenger cars sold with the Maintenance Program, the Maintenance Program's benefits cease after three years whereas the warranty lasts four years.

Respondent's MINI Division Conditions Warranty Coverage on the Use of MINI Dealers and MINI Parts

11. In numerous instances, Respondent's MINI Division, through its Warranty Statements for MINI passenger cars, conditions warranty coverage on the consumer's use of genuine MINI parts and on the usage of MINI dealers to perform maintenance and repair work.

12. For instance, in the Warranty Statements for numerous models, including but not necessarily limited to the one attached as Exhibit A, Respondent's MINI Division directs consumers to "[h]ave maintenance and repair work performed by your MINI dealer" and to "[m]ake sure that the maintenance work is stamped in [the] Service and Warranty Information Statement" because "[t]hese entries are the evidence of regular maintenance of your vehicle and are a requirement for warranty claims." (Exhibit A at 2).

13. In addition, Respondent's MINI Division includes in Warranty Statements a disclaimer that, "while [the owner] may elect to use non-genuine MINI parts for maintenance or repair

services, MINI USA is not obligated to pay for repairs that include non-genuine MINI parts . . . " (Exhibit A at 19). Thus, Respondent's MINI Division expressly states to consumers that its warranty will not cover repairs for parts that merely *include* "non-genuine" MINI parts.

14. By conditioning its warranty on the use of MINI dealers and genuine MINI parts without providing such parts and services without charge during the fourth year of its warranty, Respondent has violated the tying prohibition in the Warranty Act, which prohibits companies from conditioning their warranties on the consumer's use of any article or service (other than an article or service provided without charge under the terms of the warranty) identified by brand, trade, or corporate name.

15. Moreover, the Commission has not waived this prohibition as to Respondent, and Respondent has never sought such a waiver under the procedure identified in the Warranty Act, 15 U.S.C. § 2302(c).

THE WARRANTY ACT

16. The Warranty Act, 15 U.S.C. §§ 2301-2312, is the federal law that regulates consumer warranties and the procedures used to resolve warranty disputes. It also directs the FTC to prescribe rules enforcing certain requirements pertaining to the use and content of consumer warranties.

17. Section 2302(c) of the Warranty Act, 15 U.S.C. § 2302(c), prohibits any warrantor from conditioning a warranty on the consumer's using, in connection with the warranted product, any article or service (other than an article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.

Count I

Violating the Tying Prohibition of the Warranty Act

18. In numerous instances, Respondent has conditioned a warranty on the consumer's using, in connection with the warranted product, an article or a service (other than an article or

a service provided without charge under the terms of the warranty) identified by brand, trade, or corporate name.

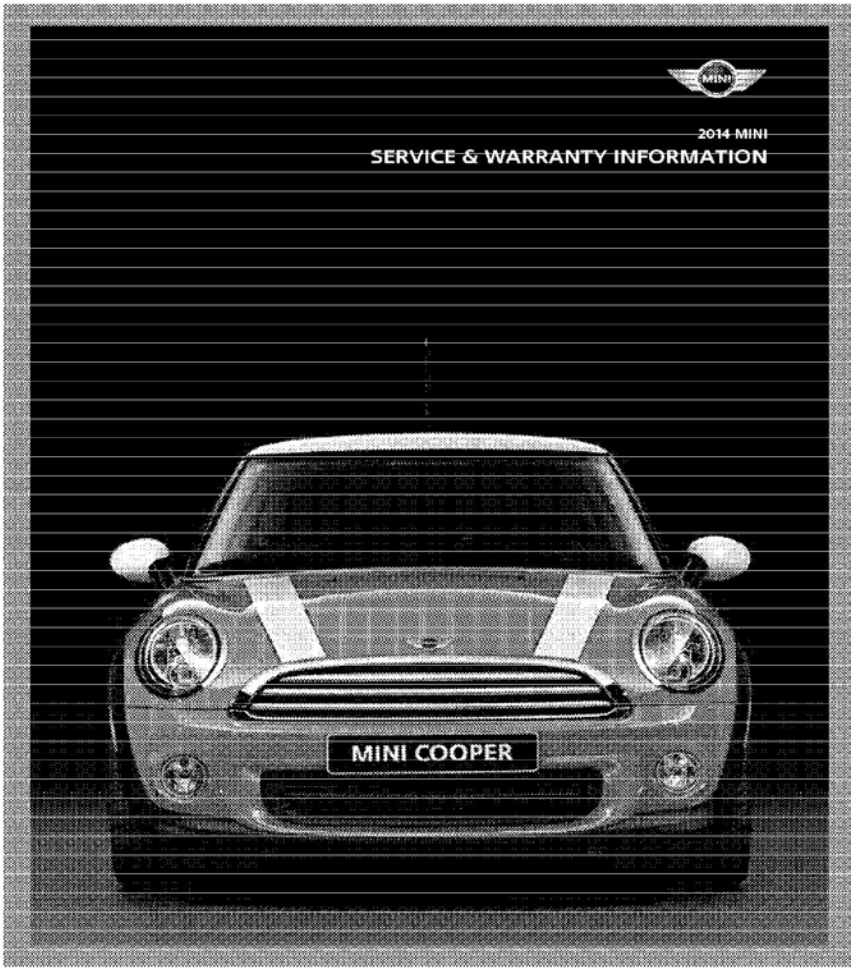
19. The acts or practices of Respondent, as described in Paragraph 18 above, violate the Warranty Act, 15 U.S.C. § 2302(c), and Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

THEREFORE, the Federal Trade Commission this twenty-first day of October 2015, has issued this Complaint against Respondent.

By the Commission.

Complaint

Attachment A



Complaint

Owner/Driver Information:

Name _____

Address _____

_____

_____

_____

Owner/Driver Telephones:

Business _____

Home _____

Model MINI Year 2014

VIN

Retail/In-Service Date _____

Trim Code _____ Color Code _____

Production Date _____

License Plate Number _____

MINI Dealer Telephone Numbers:

Offices _____

Services _____

Complaint

Table of Contents

2014 MINI Models covered in this Booklet

MINI Cooper Convertible, Clubman, Clubvan, Countryman, Paceman, Coupe and Roadster
MINI Cooper S Convertible, Clubman, Countryman, Paceman, Coupe and Roadster
MINI Cooper S Countryman ALL4 and Paceman ALL4
MINI John Cooper Works Convertible, Clubman, Countryman, Paceman, Coupe and Roadster

The MINI Maintenance Program

The MINI Maintenance Program is a benefit designed to help reduce the cost of scheduled and unscheduled maintenance. The program has been devised with the following objectives: to maximize vehicle safety, reliability, and resale value by minimizing breakdowns resulting from wear, and minimizing cost and inconvenience by computing maintenance intervals based upon the specific manner in which each individual vehicle is driven.

MINI Cooper, MINI Cooper S and MINI John Cooper Works passenger cars purchased from any authorized MINI dealer in the United States are covered by the MINI Maintenance Program for 36 months or 36,000 miles, whichever occurs first. Coverage begins on the date of first retail sale or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier.

Any authorized MINI dealer in the United States will perform the scheduled or additional maintenance services on your vehicle at no expense to you.

Coverage

The MINI Maintenance Program covers all factory recommended maintenance, as determined by the Condition Based Service (CBS) system. Additional specific items that need replacement due to normal wear and tear, and that are not covered by the original MINI New Passenger Car Limited Warranty - such as brake pads, brake rotors, and wiper blades - are included, provided wear and tear exceeds MINI specifications. Any applicable adjustments required due to normal operating conditions are also included. See pages 6 - 8 of this Booklet for additional information.

Exclusions from coverage include the following:

- Items reimbursable under your MINI New Passenger Car Limited Warranty
- Gasoline and gasoline additive
- Windshield washer additive (except when in conjunction with scheduled maintenance)
- Tires, wheel alignment, tire balance and rotation
- Reset Run Flat Indicator
- Wear and tear of soft trim items, such as: seats, carpets, moldings, headliner, door panels and all chrome trim
- Damage, including consequential, which results from negligence, improper operation of the vehicle, wear and tear or deterioration due to driving habits or conditions, improper repair, environmental influences, flood, accident or fire damage, road salt corrosion, alteration, installation of non-genuine MINI accessories, or use of improper, poor quality or contaminated fuel
- Altered or unreadable Vehicle Identification Number (VIN) or odometer irregularities or vehicles where the true mileage cannot be determined
- Maintenance or repair after the vehicle is deemed a total loss
- Maintenance or repairs performed by other than an authorized MINI dealer within the United States
- "Topping off" low fluids (e.g., engine oil, antifreeze, washer fluid, etc.) except when done in conjunction with a scheduled maintenance or other required maintenance work (as outlined in the customized maintenance checklist printout) that is performed during an applicable Maintenance Program period
- Vehicles used in competitive events
- Oil changes performed outside the recommended maintenance intervals as indicated by the CBS

Maintenance Upgrade Option

Please contact your authorized MINI dealer for information and availability on the optional Maintenance Program Upgrade for coverage up to 6 years or 100,000 miles, whichever occurs first.

Intervals

Time intervals should be followed using the maintenance interval as indicated by the Condition Based Service data.

Maintenance intervals on motor vehicles have conventionally been specified based upon accumulated mileage. However, driving conditions have a major influence on routine maintenance requirements; distance traveled is only one of the significant factors. A vehicle driven for 50,000 miles of short trips in the city with numerous cold starts, prolonged periods of idling, stop-and-go driving, and high engine speeds during acceleration requires more frequent maintenance intervals than a vehicle driven for 50,000 miles for long distances at low engine speeds primarily at operating temperature.

The advanced technologies at MINI have led to the development of the Condition Based Service (CBS) system which computes the actual optimum maintenance requirements based not only upon the accumulated mileage, but taking into account important factors such as high or low engine speeds, short or long trip driving.

Condition Based Service (CBS)

CBS is a further development of the Service Interval Indicator System.

The remaining times for selected maintenance tasks as well as any legally prescribed dates are displayed to you individually:

- Engine oil
- Brakes - front and rear separately
- Brake fluid
- Vehicle check
- Required State inspection(s)

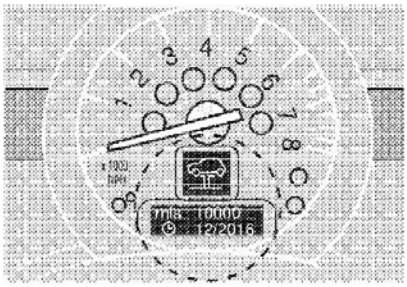
CBS thus determines the current and future maintenance requirements.

The vehicle's current service status is automatically saved in the remote control key. The MINI Service Advisor at your MINI dealer has a device called a key reader. When your MINI Service Advisor inserts your key into the key reader, all pertinent vehicle and servicing data will be available, and a customized maintenance checklist is printed out based on the specific operations called for by the Condition Based Service.

Have maintenance and repair work performed by your MINI dealer. Make sure that the maintenance work is stamped in this Service and Warranty Information Statement. These entries are the evidence of regular maintenance of your vehicle and are a requirement for warranty claims.

Disconnecting the battery during periods of long-term storage will interrupt the calculation of time-based services. Have all items requiring time-based maintenance, such as brake fluid, and possibly also the engine oil and microfilter, brought up to date by your MINI dealer. Also see the section on battery care on page 8 of this Booklet.

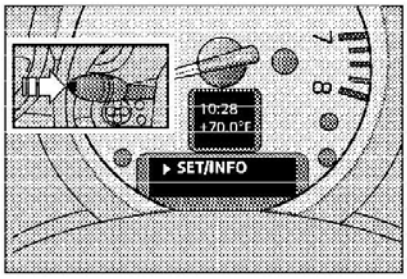
Service Required Display



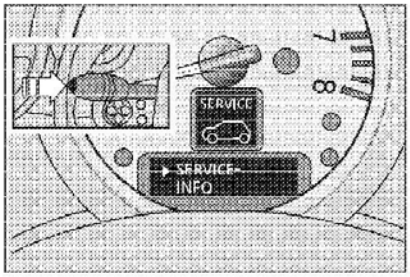
The remaining driving distance and the date of the next scheduled service are displayed briefly immediately after you start the engine or switch on the ignition.

For specific maintenance operations, you can view the respective distance remaining or due date individually in the tachometer.

1. With the driver's door closed, the ignition on; or the engine running, press the button in the turn indicator lever repeatedly until "SET/ INFO" appears.

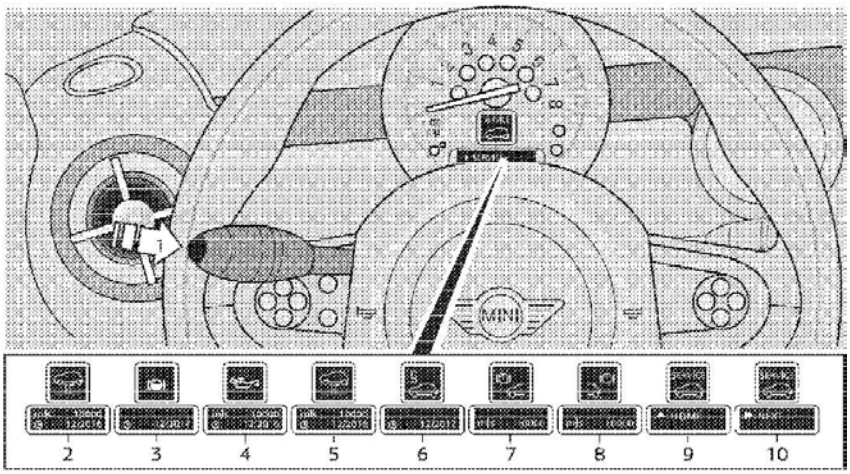


2. Keep the button pressed until the display changes.
3. Briefly press the button until the corresponding symbol and "SERVICE-INFO" appear.



4. Keep the button pressed until the display changes.
5. Briefly press the button to display the individual service requirements.

Possible service displays



1. Button for selecting information
2. Any service due/overdue
3. Brake fluid
4. Engine oil
5. Vehicle check
6. State required safety inspection*
7. Front brakes
8. Rear brakes
9. Exit display
10. Next setting/information

***Note:** The display icons for the state required safety and emissions inspections may be deactivated by your MINI dealer, if the state in which your MINI is registered does not require them.

The sequence of displayed service items may vary. The data for the next service appointment is shown first.

Special Note – Maintenance Intervals

The maintenance requirements for your vehicle are determined dynamically by the Condition Based Service (CBS) system. The maintenance items stated herein reflect the latest information available at the time of the printing of this Booklet, and are subject to change.

The completion of certain subsequent maintenance items or services, as required by the MINI New Passenger Car Limited Warranty, will be specified at intervals computed by the MINI Condition Based Service system as follows:

▷ Oil Service: Engine oil should be changed with the engine at operating temperature.

Your MINI is factory-filled with MINI High Performance Synthetic oils. We recommend MINI High Performance 5W-30 Synthetic Oil (MINI part number 07 51 0 143 829) for regular scheduled engine oil changes.

MINI recommends that you check your engine oil level whenever you add fuel to your vehicle.

If you need to add oil between oil changes and MINI High Performance Synthetic Oil is unavailable, for the purpose of topping up the engine oil level only, use one of the following approved synthetic oils. For information on checking your engine oil level, refer to your vehicle's Owner's Manual.

The synthetic oils listed below meet MINI USA, a Division of BMW of North America, LLC's Long-life rating LL-01:

▷ Castrol Syntec European Formula SAE 0W-30

▷ Mobil 1 SAE 0W-40

▷ Pennzoil Platinum European Formula Ultra SAE 5W-30

▷ Valvoline SynPower SAE 5W-30

The choice of the right SAE grade is based on the climatic conditions in the region in which you normally drive your MINI. To best determine which SAE grade is best suited for your vehicle, contact an authorized MINI dealer.

If you are unable to obtain MINI High Performance Synthetic Oil or an approved synthetic oil from the list above, for the purpose of topping up the engine oil level only, use only a synthetic oil with an API rating of SM or higher.

The following maintenance services:

– Brake Fluid Service;
– Intake Air Cleaner Service;
– Oxygen Sensor Service;
– Spark Plug Service;
– Ventilation Microfilter Service,

must be performed when required as indicated by the following as applicable:

▷ The specified CBS engine oil service counter interval

▷ The time interval (the first occurrence based on the vehicle's production date)

▷ The stated mileage for a "non-connected" maintenance service

Refer to pages 6 - 8 for additional information.

Additionally,

– The engine coolant has a long-term rating and does not need to be changed except for system repairs.

For your convenience, you may also wish to have your MINI dealer perform any necessary operations to fulfill any state inspection requirements in your area concurrent with the maintenance services specified above during other repairs. **Should you request more frequent maintenance service, the cost of these services will not be covered by the MINI Maintenance Program.**

MINI has applied the most modern technological advances not only to the design and production of your vehicle, but also to computing of the optimum maintenance interval for your type of operations and driving style. Your MINI dealer has made a substantial investment in unique MINI special service tools to enable its MINI factory trained service technicians to perform quality repairs on your MINI in minimal time to help maximize your satisfaction with your MINI, its longevity, and resale value.

Quality Certification I

For a detailed list of items inspected, refer to the Quality Certification I form provided to the Owner at time of delivery. A copy of the form is on file at the selling MINI dealer.

Fuel Quality – Gasoline

Only use fuels advertised to have adequate detergency and low alcohol (such as ethanol) content. Please refer to your Owner's Manual for important information on the fuel recommended for use in your vehicle. Use of fuels with insufficient detergent and/or excess alcohol can cause driveability problems that necessitate cleaning intake valves and fuel injection valves, and, when applicable, adjusting the engine idle. We suggest having this work performed by your authorized MINI dealer, perhaps while regular maintenance is performed. Your MINI dealer can also recommend a gasoline additive that will provide sufficient detergency. While this recommended unscheduled maintenance is not required in order to maintain the emission warranty, cleaning of intake valves or, when applicable, fuel injection valves, or adjustment of engine idle, necessitated by use of inappropriate fuel, it is not covered by warranty because no defect in material or workmanship or component failure is involved.

Maintenance Service Summary

The Condition Based Service (CBS) system will determine the requirement for performing the maintenance services described in this section, ending on page 8. These services may be required either individually or in conjunction with other maintenance services.

Maintenance services are performed as outlined in this section, based on intervals of either time, mileage or after performing a specified number of previous services. These intervals correspond to the latest information available when this Booklet was printed. Maintenance intervals are subject to change with newer vehicles or may also apply retroactively. Your MINI dealer will advise and perform maintenance services as required by the most recent information that applies to your vehicle.

Unscheduled maintenance

Only use fuels advertised to have adequate detergency and low alcohol content. Use of fuels with insufficient detergent and/or excess alcohol can cause driveability problems that necessitate cleaning intake valves and fuel injection valves, and, when applicable, adjusting the engine idle. We suggest having this work performed by your authorized MINI dealer, perhaps while regular maintenance is performed. Your MINI dealer can also recommend a gasoline additive that will provide sufficient detergency. While this recommended unscheduled maintenance is not required in order to maintain the emission warranty, cleaning of intake valves or, when applicable, fuel injection valves, or adjustment of engine idle, necessitated by use of inappropriate fuel, is not covered by warranty because no defect in material or workmanship or component failure is involved.

Standard operations

Maintenance work:

- ▷ Verify Check Control messages.
- ▷ Check indicator and warning lights.
- ▷ Reset CBS display.
- ▷ Lubricate tailgate hinges.
- ▷ Inspect tires, adjust tire pressures and reset Tire Pressure Monitor.
- ▷ Check parking brake functionality while the vehicle is being driven into the workshop.

Engine oil

Maintenance work:

▷ Change the engine oil and oil filter (as shown in CBS). We recommend MINI High Performance 5W-30 Synthetic Oil P/N 07 51 0 143 829.

Maintenance services connected to a specific engine oil service*

Maintenance work:

▷ At every 2nd Engine Oil Service: Ventilation microfilter: replace ventilation microfilter.

▷ At every 5th Engine Oil Service: Intake air cleaner: replace air filter element (reduce replacement interval in dusty operating conditions).

*These additional connected services will not be shown in the vehicle's CBS display.

Maintenance services that display in CBS

Front brake

Maintenance work:

▷ Replace brake pads, clean brake pad contact points in calipers.

▷ Brake discs: Check surface and thickness; replace as necessary.

Rear brake

Maintenance work:

▷ Replace brake pads, clean brake pad contact points in calipers.

▷ Brake discs: Check surface and thickness; replace as necessary.

▷ Parking brake: Check function. Repair or replace parking brake shoes/linings only if a reduction in the brake's effectiveness is noted.

Vehicle check

Maintenance work:

▷ Check operation of horn, headlight flasher and hazard warning flashers.

▷ Check instrument and control lighting, and heater/air-conditioning blower.

▷ Check lighting system: turn signals, back-up, license plate, interior (incl. map, reading lights), glovebox, luggage area lights.

▷ Safety belts: check condition and function.

▷ Check windshield wiper and washer jet positions.

▷ Tires: check tread depth, wear pattern, outer condition, inflation pressure. If necessary, correct pressure.

▷ Battery: check state of charge (magic eye) and charge if required.

▷ Visually inspect all SRS airbag units for torn covers, obvious damage or attachment of stickers.

▷ Convertible: Open the convertible top. Activate automatic rollover protection system via OBD diagnostic link.

▷ Rear-view mirrors.

▷ Coolant: check fluid level and concentration.

▷ Windshield washer and intensive cleaning systems: check protection level, fluid level; top if necessary.

▷ Brake system connections and lines: check for leaks, damage and correct positioning.

▷ Underbody, incl. all visible parts (i.e., transmission, rear axle, fuel lines, exhaust system): check for damage, leaks and corrosion.

▷ Steering components: check for clearance, damage and wear.

▷ MINI Mobility System: check expiration date on sealant bottle. Change sealant bottle if necessary.

▷ Final Inspection: Road test with check of:

- Brakes
- Steering
- Shock absorbers (visual)
- Transmission

Brake fluid

Maintenance work:

▷ Replace brake fluid (as shown in CBS).

Spark plugs (connected to specific Engine Oil Service)

Maintenance work:

▷ Replace at every 6th Engine Oil Service (approximately 60,000 miles)

Emission Control Maintenance Schedule

The maintenance schedule as shown is required for the proper functioning of the emission control systems for optimum vehicle performance and fuel economy.

Basic Engine	
Engine oil	As specified by CBS
Engine oil filter	As specified by CBS
Fuel System	
Air filter	As determined by CBS
Ignition System	
Spark plugs (all models)	At every 6th Engine Oil Service (approximately 60,000 miles)
Emission Control Components	
Oxygen sensor	120,000 miles
Oxygen sensor	150,000 miles (if eligible for the California Emissions Warranty)

Oxygen Sensor Service: The oxygen sensor deteriorates strictly on a mileage basis and must therefore be replaced to maximize vehicle fuel economy and minimize exhaust pollution.

Battery Care

If your car is driven only for short distances of less than 10 miles over a prolonged period of time, without an occasional drive at highway speeds, the engine's charging system will not maintain the battery. Insufficient use of the vehicle could result in short-term starting problems and in the long term could damage the battery.

In case the car is not operated for more than four weeks, it is advisable to:

▷ consider using a proper trickle charger, following the charger manufacturer's instructions, to maintain the battery's state of charge; or

▷ consult your MINI dealer regarding battery removal. Once removed, the battery must be charged and stored in a cool, dry place where it can be protected from freezing. If the battery will be stored for over 3 months, it must be recharged every 3 months, or else it will become damaged and useless.

Please consult with your MINI dealer for further guidance and information.

Corrosion Protection

Extensive corrosion protection measures now make it possible to offer a 12-year unlimited mileage anti-corrosion warranty against rust perforation on your vehicle provided that the vehicle is maintained in accordance with the provisions of the MINI New Passenger Car Limited Warranty as outlined in the Warranty Section of this Booklet (page 18).

The major degree of corrosion protection is due to the electrophoretic dip painting process which cathodically deposits paint particles on all body parts, attracting paint particles into the minutest cavities or seams. Body parts are designed to provide optimum corrosion protection.

During manufacture, exterior body parts receive an additional corrosion protection coat. Hood, trunk, doors and other body parts with metal folds are coated with PVC and sealed from the outside.

All floor panels receive a resilient coating of PVC for maximum protection against damage due to stones, etc.

Corrosion protection materials tested over many years are applied to the surfaces of cavities and to the entire underside of the vehicle during and after assembly.

For additional information on the 12-year unlimited mileage anti-corrosion warranty, see the Warranty Section of this Booklet (page 19).

Restoring Corrosion Protection

Please take care that anti-corrosion material is replaced when your car is repaired after body or chassis damage.

MINI will not accept any liability for any parts and accessories not approved by the MINI USA, a Division of BMW North America, LLC.

Underbody Maintenance

The underbody has to be cleaned at least once a year, in Spring, with plain water in order to remove mud, chemical sediments and other deposits. If those materials are not removed, corrosion (rust) will occur.

Your MINI dealer will do this anti-corrosion service for you.

⚠ Do not apply additional undercoating or rust-proofing on or near the exhaust manifold, exhaust pipes, catalytic converter or heat shields. During driving, the substance used for undercoating could overheat and cause a fire.◀

MINI Roadside Assistance

The MINI Roadside Assistance Program reflects MINI USA, a Division of BMW North America, LLC's commitment to your complete satisfaction with the MINI ownership experience.

It's available for U.S. version MINIs in all 50 states, Canada, and Puerto Rico 24 hours a day, 365 days a year.

It's a valuable benefit provided to you at no additional cost. (Subject to certain limitations and exclusions noted on pages 11).

Telephone: 1 866 646-4772 (MINIRSA).

The MINI Roadside Assistance Program is not a warranty and does not affect your rights under the MINI New Passenger Car Limited Warranty.

Services provided by a third-party business partner.

MINI Roadside Assistance Smartphone Application

The free MINI Roadside Assistance Smartphone App dispatches fast, reliable service to your MINI. For more details and to download the App for your iPhone®, BlackBerry®, Android™ or Windows Mobile® Smartphone, visit http://roadsidemobile.com/mini

Owner's Eligibility

You are covered if your vehicle is:

- ▷ A new MINI passenger car, distributed by MINI USA, a Division of BMW North America, LLC, and purchased at an authorized MINI dealer, OR;
- ▷ A new, U.S. version, MINI passenger car purchased under the Diplomatic or Military Sales programs, operated in any of the 50 states, Canada and Puerto Rico.

The vehicle itself is covered when driven by any authorized driver. Protection is concurrent with the MINI New Passenger Car Limited Warranty.

Protection:
New MINI — Protection is provided for 4 years/ unlimited miles. NOTE: This does not affect warranty coverage which remains at 4 years/50,000 miles.

Getting Started

For your convenience, a decal showing Roadside Assistance information has been affixed on the driver's side of the windshield and in the rear compartment area.

Calling For Assistance

The toll-free MINI Roadside Assistance number is answered by a MINI Roadside Assistance service representative. In order for you to receive quick and reliable services, it is essential that you provide detailed and accurate information to the service representative.

Be prepared to give:

- Your name
- Your complete Vehicle Identification Number (found on your vehicle registration, or on the bottom driver's side of your windshield)
- Model description of your vehicle
- License plate number of your vehicle
- Vehicle location (including nearby crossroads/ intersections, highway mile markers, street numbers, landmarks, etc.)
- Location you are calling from (including a telephone number where you can be reached). If you are calling from a public phone, wait there for the return call. Do not leave this location without informing the Roadside Assistance service representative.
- A description of your vehicle's problem. Specific and accurate information will enable the Roadside Assistance service representative to provide the proper help.

Note: If you are using the free MINI Roadside Assistance Smartphone App, the information above is not required.

Services

From the information you provide, the MINI Roadside Assistance service representative will determine the type of help required.

Dispatch Service

A service provider will be dispatched to the site of your disabled vehicle.

On-Site Assistance

On-site service for vehicle disablements such as flat tires, dead batteries, and out of fuel conditions is provided by MINI Roadside Assistance.

The cost for parts and fuel, when used on-site, are the responsibility of the owner/driver. The MINI New Passenger Car Limited Warranty does not cover any of the above on-site services.

Lock-Out

Please contact MINI Roadside Assistance for lockout situations. MINI Roadside Assistance will attempt to reunite the owner with a spare key by calling someone at the customer's residence or by sending a taxicab to pick you up. (Cost of the taxi is not reimbursable.) Be sure the vehicle is in a safe location in the above situations. As a last resort, we will have your MINI towed to a dealership. The MINI dealership can assist with key replacement. Towing services will be provided up to a maximum of $100.00 per incident. The cost for replacement keys is the responsibility of the owner/driver.

Towing Service

In the event of a mechanical breakdown normally covered under the MINI New Passenger Car Limited Warranty, your vehicle will be transported (at no cost) to the nearest authorized MINI dealer, or to the MINI dealer of your choice, provided that the dealer is within a 50 mile radius of the closest dealer. Your vehicle is also covered in the event of an accident or collision.

If a breakdown occurs after normal business hours, your vehicle will be transported to a secure location and transported to the nearest authorized MINI dealer on the next business day.

If you request that the vehicle be taken to a location other than the nearest authorized MINI dealer, any additional expense will be your responsibility.

Towing requests for vehicles disabled because of casualty, fire, act of God, acts of war (declared or undeclared), or violation of law (federal, state or local) are accepted at the expense of the owner/driver.

If it is necessary for you to have your vehicle towed through your own arrangements, **you must contact MINI Roadside Assistance for prior authorization and instructions on claim procedures.** All claims must be submitted within sixty (60) days of the disablement or occurrence, accompanied by the original receipts. Claims received after that time period may not be honored and are subject to the full discretion of MINI Roadside Assistance. If MINI Roadside

Assistance is not contacted for "prior" authorization, the maximum coverage for towing situations is $50.00.

Sign-and-Drive

In most instances, services provided under the MINI Roadside Assistance Program do not require immediate payment.

Usually, you will be able to sign a receipt, so the provider of the service can be reimbursed directly by MINI Roadside Assistance.

Parts, materials, and fuel should be paid for by you directly to the provider of the services.

Trip Interruption Benefits

Trip interruption benefits are provided for mechanical breakdowns as follows:

- Breakdowns that are warranty related, and;
- Must occur in excess of 100 miles from the driver's primary residence, and;
- Repairs cannot be completed during normal business hours on the same day of breakdown.

Reimbursements will be made for meals, lodging, car rentals, and alternate transportation to bring the driver and the MINI passenger car together after the vehicle has been repaired by an authorized MINI dealer. Original receipts and a copy of the vehicle repair order must accompany all reimbursement requests.

Trip interruption coverage is limited to $1,000.00 per incident, for a maximum of five days per incident.

Always contact MINI Roadside Assistance for trip interruption benefits. They will assist in making all the necessary arrangements.

Exclusions

Specifically excluded from coverage are:

- Fines, taxes, or impound towing fees caused by a violation of local or state law.
- Expenses related to extreme adverse weather conditions, including, but not limited to, floods, hurricanes and tornadoes (removal from water, snow, ice, etc.).
- Expenses for the removal of snow tires, and mounting or removal of snow chains.

Customer Assistance Information

Your satisfaction with our product and the services provided by authorized MINI dealers is of great importance to us. We take pride in our product, as does the MINI dealer who services it. If you should ever have a question regarding your MINI dealer's service or your MINI's performance, we recommend that you contact your authorized MINI dealer.

When contacting an authorized MINI dealer, we suggest that depending upon the nature of your contact, you discuss it with either the Sales, Service, or Parts Manager.

As all matters are resolved at the MINI dealer level, it is important that they be given the opportunity to provide a solution. Should you feel that you were not provided with the proper response, we urge you to contact the General Manager or MINI Dealer Operator.

Despite the best intentions of all parties, a misunderstanding may occur between you and your MINI dealer. Should this occur and you require further assistance, you may wish to contact the MINI USA's Customer Relations and Services Department at:
Telephone: 1 866 ASK-MINI (275-6464)
Email: MINI.assistance@askMINIUSA.com

When contacting us, we ask that you provide the following information:

- Your name, address and telephone number
- Vehicle Identification Number (last seven digits)
- Vehicle's delivery date
- Vehicle mileage
- Selling MINI dealer's name
- Servicing MINI dealer's name
- Description of the problem

A MINI USA Customer Relations and Services Representative will carefully review all the facts involved and let you know what further action will be taken in conjunction with your MINI dealer.

Please remember: the first step in resolving a complaint is to contact the authorized MINI dealer that performed the work on your vehicle. They have the necessary equipment and the personnel to achieve this goal.

We are confident that every effort will be made to ensure your satisfaction.

Customer Assistance - Notification

During a specific period (for example, the earlier of 12 months or 12,000 miles, though this period varies by state), some states require us or our authorized MINI dealer to repair in a reasonable number of attempts, any defect or condition which substantially impairs the use, value, or safety of a new vehicle sold, leased or registered in that state.

A "reasonable number of attempts" is generally defined as: (i) four or more attempts to repair the same defect (the number of attempts vary by state) or (ii) the vehicle is out of service by reason of one or more repair(s) for more than a cumulative total of 30 days (this period varies by state), except for delays created by conditions beyond our control.

If we are unable to correct a defect or condition covered by these statutes in a reasonable number of attempts, we may be obligated either to replace the vehicle or reimburse the owner/lessee in an amount equal to the purchase price or lease payments paid by the owner/lessee, less the amount directly attributable to use of the vehicle by the owner/lessee.

You should send written notification directly to MINI USA, a Division of BMW North America, LLC of the existence of an alleged defect. Send written communication to the Customer Relations and Services Department address listed below.

MINI USA, a Division of BMW of North America, LLC
Customer Relations and Services Department
P.O. Box 1227
Westwood, NJ 07675-1227

Telephone: 1 866 ASK-MINI (275-6464)
Email: MINIassistance@askMINIUSA.com

IMPORTANT: IF THIS VEHICLE HAS A DEFECT THAT SUBSTANTIALLY AFFECTS ITS USE, VALUE OR SECURITY, OR THAT MAY CAUSE DEATH OR SERIOUS BODILY INJURY IF DRIVEN, AND WAS PURCHASED, LEASED OR REGISTERED IN NEW JERSEY, YOU MAY HAVE THE RIGHT UNDER THE LEMON LAW IN THE STATE OF NEW JERSEY TO A REFUND OF THE PRICE OF PURCHASE OR TO YOUR LEASE PAYMENTS.

Here is a summary of your rights:

1. To qualify for compensation under the New Jersey lemon law, you must give the manufacturer or your dealer opportunity to repair or correct the defect of the vehicle within the terms of protection under the lemon law, which are the first 24,000 miles of operation or two years after the date of original date of delivery or whichever comes first.

2. If the manufacturer or your dealer cannot fix or correct the defect within a reasonable amount of time, you may have the right to return the vehicle and receive a full refund, less a discount for the use of the vehicle.

3. If it is assumed that the manufacturer or your dealer cannot repair or correct the defect and if the same defect continues to substantially exist after that the manufacturer has received a notice of the defect, sent by certified mail with return receipt, and has had a final chance to correct the defect or condition within 10 days of receiving the notice. This notice must be received by the manufacturer within the terms of protection and can only be given after (i) the manufacturer or your dealer has attempted two or more times to correct the defect; (ii) the manufacturer or your dealer has attempted, at least once, to correct the defect if the defect is one which can cause death or serious bodily injury if the vehicle is operated; or (iii) the vehicle has been out of service for repairs by a total of 20 calendar days accumulation or more, or in the case of a rolling motorized house (motorhome) 45 days or more.

4. If the same defect substantially continues to exist after the manufacturer has had the last opportunity to repair or correct the defect, you may file a claim for compensation under the New Jersey lemon law.

FOR COMPLETE INFORMATION ABOUT YOUR RIGHTS AND RESOURCES UNDER THIS LAW, INCLUDING THE MANUFACTURER'S ADDRESS FOR NOTIFICATION OF THE DEFECT, PLEASE CONTACT: NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CONSUMER AFFAIRS, LEMON LAW UNIT, POST OFFICE BOX 45026, NEWARK, NEW JERSEY 07101, PHONE NUMBER: 1 973 504-6226

IMPORTANTE: SI EL VEHÍCULO TIENE UN DEFECTO QUE AFECTE DE MANERA SUSTANCIAL SU USO, VALOR O SEGURIDAD, O QUE PUEDA CAUSAR LA MUERTE O LESIONES CORPORALES GRAVES SI SE MANEJA, Y SE COMPRÓ, ARRENDÓ O REGISTRÓ EN NUEVA JERSEY, PUEDE TENER DERECHO EN LOS TÉRMINOS DE LA LEY SOBRE DEFECTOS CONOCIDA COMO "LEMON LAW" DEL ESTADO DE NUEVA JERSEY A UN REEMBOLSO DEL PRECIO DE COMPRA O DEL PAGO DEL ARRENDAMIENTO.

Aquí le damos un sumario de sus derechos:

1. Para tener derecho a una indemnización en los términos de la "Lemon Law" de Nueva Jersey, debe dar el fabricante o a su concesionaria la oportunidad de reparar o corregir el defecto del vehículo dentro de los plazos de protección que establece esta ley, que son las primeras 24,000 millas de operación o dos años a partir de la fecha de entrega original, lo que ocurra primero.
2. Si el fabricante o su concesionaria no pueden arreglar o corregir el defecto en un plazo razonable, puede tener derecho a devolver el vehículo y recibir un reembolso íntegro, menos un descuento por el uso del vehículo.
3. Se da por sentado que el fabricante o su concesionaria no pueden reparar o corregir el defecto si el mismo defecto continúa existiendo de manera sustancial después de que el fabricante ha recibido una notificación del defecto enviada por correo certificado con acuse de recibo, y ha tenido un última oportunidad de corregir el defecto o problema en los 10 días posteriores a la recepción de la notificación. Esta notificación debe ser recibida por el fabricante dentro de los plazos de protección y sólo se puede dar después de que (i) el fabricante o su concesionaria han intentado dos o más veces corregir el defecto, (ii) el fabricante o su concesionaria han intentado, al menos una vez, corregir el defecto si este puede causar la muerte o lesiones corporales graves si se maneja el vehículo, o (iii) el vehículo ha estado fuera de servicio por reparaciones un total de 20 días calendario o más, o en el caso de una casa rodante motorizada (casa rodante), 45 días o más.
4. Si el mismo defecto sigue existiendo de manera sustancial después de que el fabricante ha tenido la última oportunidad de reparar o corregir dicho defecto, puede presentar una reclamación de indemnización en los términos de la "Lemon Law" de Nueva Jersey.

SI DESEA MÁS INFORMACIÓN ACERCA DE SUS DERECHOS Y RECURSOS EN LOS TÉRMINOS DE ESTA LEY, INCLUIDA LA DIRECCIÓN DEL FABRICANTE PARA NOTIFICACIONES DE DEFECTOS, ESTOS SON LOS DATOS DE CONTACTO: NEW JERSEY DEPARTAMENT OF LAW AND PUBLIC SAFETY, DIVISION OF CONSUMER AFFAIRS, LEMON LAW UNIT, POST OFFICE BOX 45026, NEWARK, NEW JERSEY 07101, TELÉFONO: 1 973 504-6226

BBB Auto Line

If your concern is still not resolved to your satisfaction, MINI USA, a Division of BMW North America, LLC offers additional assistance through BBB AUTO LINE in ARKANSAS, CALIFORNIA, GEORGIA, IDAHO, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MINNESOTA, PENNSYLVANIA, and VIRGINIA. BBB AUTO LINE is a dispute resolution program

administered by the Council of Better Business Bureaus. BBB AUTO LINE resolves disputes through mediation or arbitration. Mediation is an informal proceeding whereby a neutral third party (mediator) helps the parties to find an acceptable resolution. Arbitration is also an informal proceeding in which an impartial third party renders a decision after a hearing at which both parties have an opportunity to be heard. You can select mediation or arbitration or both.

The program is free of charge to you, the consumer, but there are some minimum requirements for participation in the program. Please contact BBB AUTO LINE at the address or phone number listed below for more details:

BBB AUTO LINE
3033 Wilson Boulevard, Suite 600
Arlington, VA 22201
1 800 955-5100

If you wish to use the program and you qualify for participation, you will be required to provide the following information:

- Your name and address
- The Vehicle Identification Number (VIN)
- The make, model and year of your vehicle
- A description of the problem with your vehicle

BBB AUTO LINE will also ask you for other information that may help resolve your concerns, such as the purchase price of your vehicle, any mileage at the time of purchase, the current mileage, and copies of repair orders.

BBB AUTO LINE will notify you when your claim has been filed. If you decide to arbitrate, you may attend the hearing in person or by telephone. You may bring witnesses and give supporting evidence. You may also submit your claim in writing and ask for a decision on the documents you submit, without attending a hearing. BBB AUTO LINE will usually render a decision within 40 days from the time you file your complaint. The decision is binding on MINI if you decide to accept it. MINI must comply with the decision within the time frame specified by the arbitrator.

Important: You must use BBB AUTO LINE before asserting in court any rights or remedies created by the Magnuson Moss Warranty Act, ("The Act") 15 U.S.C. Sec. 2301, et seq. You may also be required to use BBB AUTO LINE before seeking remedies under your state's "Lemon Law". If you choose to seek redress by pursuing rights and remedies not created by Title 1 of the Magnuson Moss Warranty Act, prior resort to the BBB AUTO LINE is not required by any provision of the Act.

California Residents

1. MINI USA, a Division of BMW North America, LLC participates in **BBB** AUTO LINE, a mediation/arbitration program administered by the Council of Better Business Bureaus [3033 Wilson Boulevard, Arlington, Virginia 22201] through local Better Business Bureaus. The Arbitration Certification Program of the California Department of Consumer Affairs has certified **BBB** AUTO LINE and BMW.
2. If you have a problem arising under a MINI written warranty, we encourage you to bring it to our attention. If we are unable to resolve it, you may file a claim with **BBB** AUTO LINE. Claims must be filed with **BBB** AUTO LINE within six (6) months after the expiration of the warranty.
3. To file a claim with **BBB** AUTO LINE, call 1 800 955-5100. There is no charge for the call.
4. In order to file a claim with **BBB** AUTO LINE, you will have to provide your name and address, the brand name and Vehicle Identification Number (VIN) of your vehicle, and a statement of the nature of your problem or complaint. You will also be asked to provide: the approximate date of your acquisition of the vehicle, the vehicle's current mileage, the approximate date and mileage at the time any problem(s) were first brought to the attention of MINI or one of our dealers, and a statement of the relief you are seeking. There is no charge to the customer in bringing this claim.

5. **BBB** AUTO LINE staff may try to help resolve your dispute through mediation. If mediation is not successful, or if you do not wish to participate in mediation, claims within the program's jurisdiction may be presented to an arbitrator at an informal hearing. The arbitrator's decision should ordinarily be issued within 40 days from the time your complaint is filed; there may be a delay of 7 days if you did not first contact MINI about your problem, or a delay of up to 30 days if the arbitrator requests an inspection/report by an impartial technical expert or further investigation and report by **BBB** AUTO LINE.

6. You are required to use **BBB** AUTO LINE before asserting in court any rights or remedies conferred by California Civil Code Section 1793.22. You are not required to use **BBB** AUTO LINE before pursuing right and remedies under any other state or federal law. "You are also required to use **BBB** AUTO LINE before exercising rights or seeking remedies created by Title I of the Magnuson-Moss Warranty Act, 15 U.S.C. sec. 2301 et seq. If you choose to seek redress by pursuing rights and remedies not created by California Civil Code Section 1793.22 or Title I of the Magnuson-Moss Warranty Act, resort to **BBB** AUTO LINE is not required by those statutes."

7. California Civil Code Section 1793.3(d) requires that, if MINI or its representative is unable to repair a new motor vehicle to conform to the vehicle's applicable express warranty after a reasonable number of attempts, BMW NA may be required to replace or repurchase the vehicle. California Civil Code 1793.22(b) creates a presumption that MINI has had a reasonable number of attempts to conform the vehicle to its applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the vehicle's odometer, whichever occurs first, **one or more of the following occurs:**

   - The same nonconformity [a failure to conform to the written warranty that substantially impairs the use, value or safety of the vehicle] results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven AND the nonconformity has been subject to repair two or more times by MINI or its agents AND the buyer or lessee has directly notified MINI of the need for the repair of the nonconformity; OR
   - The same nonconformity has been subject to repair 4 or more times by MINI or its agents AND the buyer has notified MINI of the need for the repair of the nonconformity; OR
   - The vehicle is out of service by reason of repair of nonconformities by MINI or its agents for a cumulative total of more than 30 calendar days after delivery of the vehicle to the buyer.

NOTICE TO MINI AS REQUIRED ABOVE SHALL BE SENT TO THE FOLLOWING ADDRESS:

MINI USA, a Division of BMW of North America, LLC
Customer Relations and Services Department
P.O. Box 1227
Westwood, NJ 07675-1227
1 866 ASK-MINI (275-6464)
MINI.assistance@askMINIUSA.com

8. The following remedies may be sought in **BBB** AUTO LINE: repairs, reimbursement for money paid to repair vehicle or other expenses incurred as a result of a vehicle nonconformity, repurchase or replacement of your vehicle and compensation for damages and remedies available under MINI's written warranty or applicable law.

9. The following remedies may **not** be sought in **BBB** AUTO LINE: punitive or multiple damages, attorneys' fees, or consequential damages other than as provided in California Civil Code Section 1794(a) and (b).

10. You may reject the decision issued by a **BBB** AUTO LINE arbitrator. If you reject the decision, you will be free to pursue further legal action. The arbitrator's decision and any findings will be admissible in a court action.

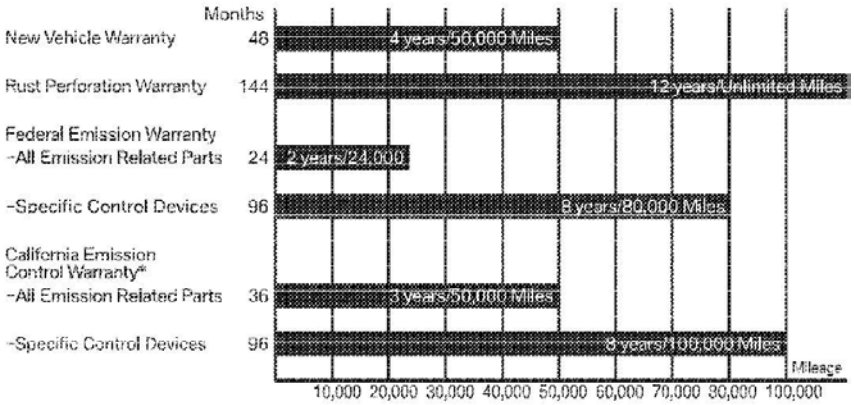
11. If you accept the arbitrator's decision, MINI will be bound by the decision, and will comply with the decision within a reasonable time not to exceed 30 days after we receive notice of your acceptance of the decision.

12. Please call **BBB** AUTO LINE at 1 800 955-5100 for further details about the program. IDAHO Residents IMPORTANT: IF THIS VEHICLE IS DEFECTIVE, YOU MAY BE ENTITLED UNDER THE STATE'S LEMON LAW TO REPLACEMENT OF IT OR A REFUND OF ITS PURCHASE PRICE OR YOUR LEASE PAYMENTS. HOWEVER, TO BE ENTITLED TO REFUND OR REPLACEMENT, YOU MUST FIRST NOTIFY THE MANUFACTURER, ITS AGENT, OR ITS AUTHORIZED DEALER OF THE PROBLEM IN WRITING AND GIVE THEM AN OPPORTUNITY TO REPAIR THE VEHICLE. YOU ALSO HAVE A RIGHT TO SUBMIT YOUR CASE TO THE CONSUMER ARBITRATION PROGRAM WHICH THE MANUFACTURER MUST OFFER IN THIS STATE.

Special Programs

SOMETIMES THE MINI USA, A DIVISION OF BMW NORTH AMERICA, LLC OFFERS A SPECIAL ADJUSTMENT PROGRAM TO PAY ALL OR PART OF THE COST OF CERTAIN REPAIRS BEYOND THE TERMS OF THE WARRANTY. CHECK WITH YOUR MINI DEALER TO DETERMINE WHETHER ANY ADJUSTMENT PROGRAM IS APPLICABLE TO YOUR MOTOR VEHICLE.

Overview of the MINI New Passenger Car Limited Warranties



* The California Emissions Control System Limited Warranty applies to all 2014 U.S.-specification MINI vehicles registered in California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont or Washington.

Your vehicle has been specifically adapted and designed to meet the particular operating conditions and homologation requirements in your country and continental region in order to deliver the full MINI Motoring experience driving pleasure while the vehicle is operated under those conditions.

If you wish to operate your vehicle in another country or region, you may be required to adapt your vehicle to meet different prevailing operating conditions and homologation requirements. You should also be aware of any applicable warranty limitations or exclusions for such country or region. In such case, please contact the Customer Relations and Services Department for further information.

The MINI limited warranties apply only to U.S.-specification MINI vehicles and is valid only when repairs are performed at an authorized U.S. MINI center, subject to all applicable exclusions or limitations. All other U.S.-specification programs such as Roadside Assistance and the Maintenance Programs are also valid only in the U.S.

MINI New Passenger Car Limited Warranty — 2014 Models (Valid Only in the U.S.A. including Puerto Rico)

Warrantor

MINI USA, a division of BMW North America, LLC ("MINI USA") warrants 2014 U.S.-specification vehicles distributed by MINI USA against defects in materials or workmanship to the first retail purchaser, and each subsequent purchaser.

Warranty Period

The warranty period is 48 months or 50,000 miles, whichever occurs first.

Warranty Begins

Coverage begins on the date of first retail sale, or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier.

Warranty Coverage

To obtain warranty service coverage, the vehicle must be brought, upon discovery of a defect in material or workmanship, to the workshop of any authorized MINI dealer in the United States or Puerto Rico, during normal business hours. The MINI dealer will, without charge for parts or labor, either repair or replace the defective part(s) using new or authorized remanufactured parts. The decision to repair or replace said part(s) is solely the prerogative of MINI USA. Parts for which replacements are made become the property of MINI USA.

In all cases, a reasonable time must be allowed for warranty repairs to be completed after the vehicle is received by the authorized MINI dealer.

Safety Belt Warranty - Kansas

Safety belts are covered under the MINI New Passenger Car Limited Warranty for defects in material or workmanship for a period of 10 years, unlimited mileage from the date of purchase. In order to be eligible for this coverage, the vehicle must be a new vehicle retailed in the State of Kansas and the repair must be performed by an authorized MINI dealer in Kansas.

Other Items

Wheel alignment, balancing and wiper blade inserts are covered up to the first 2,000 miles on the vehicle.

Items which are subject to wear and tear or deterioration due to driving habits or conditions, such as brake pads/linings, brake discs, clutch disc, pressure plate, filters, upholstery, trim and chrome items, paint finish, drive belts, glass, and similar items, are specifically limited to defects in material or workmanship.

What is not covered:

Remote control transmitter battery replacement.

Damage, including consequential, which results from negligence, improper operation of the vehicle, improper repair, lack of or improper maintenance, environmental influences, flood, accident or fire damage, road salt corrosion, or use of improper or contaminated fuel.

Damage to the engine, transmission or any related component caused by improper shifting of the transmission.

Maintenance services and parts when replaced during maintenance such as spark plugs, lubricants, fluids, engine tune-up parts, replacement of filters, coolant, and refrigerant.

Failure to maintain the vehicle properly in accordance with the instructions in the Owner's Manual or the Service section of this Statement, that results in the failure of any part of the vehicle.

Modification of the vehicle or installation of any performance accessories or components attached to the vehicle which alters the original engineering and/or operating specifications or which result in damage to the other original components, electrical interference, electrical short, radio static, water leaks, or wind noise.

Tires are warranted by their respective manufacturer. See the Tire Warranty Statement on page 29.

Driving over rough or damaged road surfaces, as well as debris, curbs and other obstacles can cause serious damage to wheels, tires and suspension parts. This is more likely to occur with low-profile tires that provide less cushioning between the wheel and the road. Be careful to avoid road hazards and reduce your speed, especially if your vehicle is equipped with low-profile tires.

Non-genuine MINI Parts - While you may elect to use non-genuine MINI parts for maintenance or repair services, MINI USA is not obligated to pay for repairs that include non-genuine MINI parts or for any damage resulting from the use of non-genuine parts.

MINI will not accept any liability for any parts and accessories not approved by MINI USA, a Division of BMW North America, LLC.

This warranty shall be null and void if the Vehicle Identification Number (VIN) has been altered or cannot be read, if the odometer has been replaced or altered and the true mileage cannot be determined, if the vehicle has been declared a total loss or sold for salvage purposes, or if the vehicle has been used in any competitive event.

General

These warranties give you specific legal rights, and you may also have other rights which vary from state to state.

THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTIES HEREIN.

THE MINI USA, A DIVISION OF BMW NORTH AMERICA, LLC HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations and exclusions may not apply to you.

Limited Warranty - Rust Perforation 2014 Models

MINI USA, a Division of BMW North America, LLC warrants this original vehicle against defects in materials or workmanship which will result in rust perforation of the vehicle body for a period of 12-years unlimited mileage. Coverage begins on the date of first retail sale or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier

To obtain warranty service coverage, the vehicle must be brought, upon discovery of any rust perforation, to the workshop of any authorized MINI dealer. This MINI dealer will, without charge for parts or labor, either repair or replace the defective part(s). The decision to repair or replace said part(s) is solely the prerogative of MINI USA, a Division of BMW North America, LLC. Parts for which replacements are made become the property of the MINI USA.

MINI USA, a Division of BMW North America, LLC makes no other express warranty on this product except the new vehicle warranty or the warranty as to the emission control system.

THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTIES HEREIN.

MINI USA, A DIVISION OF BMW NORTH AMERICA LLC HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY,

INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations and exclusions may not apply to you.

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. Any legal claim or action arising from any express or implied warranty contained herein must be brought within 12 months of the date it arises.

This warranty does not apply to damage caused by negligence, improper accident damage repairs, or improper use.

MINI will not accept any liability for any parts and accessories not approved by MINI USA, a Division of BMW North America, LLC.

This warranty shall be null and void if the Vehicle Identification Number (VIN) has been altered or cannot be read, if the odometer has been replaced or altered and the true mileage cannot be determined, if the vehicle has been declared a total loss or sold for salvage purposes, or if the vehicle has been used in any competitive event.

Federal Emissions System Defect Warranty (Valid Only in the U.S.A. including Puerto Rico)

This limited warranty applies only to U.S.-specification vehicles distributed by MINI USA, a Division of BMW North America, LLC.

In accordance with the defect warranty provisions of section 207(b) of the Clean Air Act, MINI warrants to the first retail purchaser, and each subsequent purchaser, that the passenger car: (a) was designed, built and equipped so as to conform, at the time of sale, with all regulations of the U.S. Environmental Protection Agency applicable at the time of manufacture; and (b) is free from defects in materials and workmanship which would cause it to fail to conform with applicable regulations for a period of 2 years or 24,000 miles, whichever occurs first, except for specific emission control components (as listed on page 23), for which the warranty period is 8 years or 80,000 miles, whichever occurs first.

Coverage begins on the date of first retail sale or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier.

Warranty claims must be made as soon as reasonably possible after a defect is discovered. To make a claim, the car must be brought to any authorized MINI dealer during normal business hours.

The MINI dealer will, without charge for parts or labor (including diagnosis), either repair or replace the defective part, if any. The decision whether to repair or replace said parts is solely the prerogative of MINI USA, a Division of BMW North America, LLC and must be expected to correct the failure of the warranted part. Parts for which replacements are made become the property of the MINI USA. In all cases, a reasonable time must be allowed for warranty repairs to be completed after the car is received by the MINI dealer.

For assistance in determining which specific parts or components of your vehicle are covered under this warranty, please contact your MINI dealer.

It is the owner's responsibility to have all scheduled inspection and maintenance services performed (at the owner's expense), as prescribed in the maintenance schedule for the MINI Emission Control System. Service intervals are computed by the onboard MINI Condition Based Service system and displayed on the instrument panel. The instructions for proper maintenance and use can be found in the Owner's Manual. It is strongly recommended that any replacement parts used for maintenance, repair or replacement of emission control systems be certified MINI Service Parts or MINI Authorized Remanufactured Parts. Without invalidating this warranty, the owner may elect to have maintenance, repair or replacement of the emission control systems performed by any automotive repair establishment, or elect to use parts other than certified MINI Service Parts. However, the cost of such service or parts will not be covered under this warranty, except in emergency situations. In an emergency situation,

where an authorized MINI dealer or a warranty replacement part is not reasonably available (within 30 days), repairs may be performed at any available service establishment using any equivalent part. MINI USA, a Division of BMW North America, LLC will reimburse the owner for such emergency repairs (including labor, parts and diagnosis not to exceed the MINI USA's rates for labor, parts, and diagnosis in said area) that are covered under this warranty. Replaced parts and paid invoices must be presented at an authorized MINI dealer as a condition of reimbursement for emergency repairs not performed by an authorized MINI dealer.

The use of replacement parts, which are not of equivalent quality, may impair the effectiveness of the emission control system. If other than certified MINI Service Parts or MINI Authorized Remanufactured Parts are used for maintenance, repair or replacement of components affecting emission control, the owner should obtain assurances that such parts are warranted by their manufacturer to be equivalent to genuine MINI parts in performance and durability. MINI USA, a Division of BMW North America, LLC assumes no liability under this warranty with respect to parts other than genuine MINI parts.

However, the use of non-genuine MINI replacement parts or non-EPA certified parts does not invalidate the warranty on other components, unless non-genuine MINI parts or non-EPA certified parts cause damage to warranted parts.

What Is Not Covered

This warranty does not cover malfunctions caused by any of the following: accident, flood, misuse, improper adjustment, modification, alteration, tampering, disconnection, improper or inadequate maintenance, use of leaded fuel or fuels containing more than 10% ethanol, or other oxygenates with more than 2.8% oxygen by weight (i.e., more than 15% MTBE or more than 3% methanol plus an equivalent amount of co-solvent).

The replacement of maintenance parts, such as spark plugs, filters and similar items used in required maintenance services, the repair or replacement of maintenance parts beyond the first required inspection/maintenance, or if the part has been replaced earlier for reasons other than it being defective.

The car or any part of the car unless a failure causes the car to fail to conform to applicable emission regulations.

Any car on which the odometer has been replaced or altered and the true mileage cannot be determined.

The car, if the Vehicle Identification Number (VIN) is altered or cannot be read, or if the car has been declared a total loss or sold for salvage purposes.

General

These warranties give you specific legal rights, and you may also have other rights which vary from state to state.

THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTIES HEREIN.

MINI USA, A DIVISION OF BMW NORTH AMERICA, LLC HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations and exclusions may not apply to you. Additionally, if you are a California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont or Washington resident and your vehicle is registered in that state, your vehicle is eligible for California Emissions Warranty coverage.

These federal warranty provisions also apply to all vehicles sold in all U.S. states and territories regardless of whether a state has enacted state warranty provisions that differ from the federal provisions.

Federal Emission Performance Warranty (Valid only in the U.S.A. including Puerto Rico)

In those states and jurisdictions that have established periodic vehicle emissions tests to encourage proper vehicle maintenance and require the vehicle to pass an emissions test approved by the U.S. Environmental Protection Agency and:

1. The passenger car was distributed by MINI USA, a Division of BMW North America, LLC; and
2. The car has been maintained and operated in accordance with the instructions for proper maintenance and use set forth in the Owner's Manual supplied with the car; and
3. The car fails to conform to the applicable emissions standards of the EPA as judged by an EPA approved emissions test; and
4. The failure to conform results or will result in the owner of the car having to bear a penalty or other sanction (including the denial of the right to use the car) under local state or federal law if the non-conformity is not remedied within a specified period of time.

Then, in accordance with the provisions of section 207(b) of the Clean Air Act, MINI USA, a Division of BMW North America, LLC warrants that if the car is eligible for coverage under this warranty, any non-conformities in the car, which cause it to fail an EPA-approved emissions test will, without charge for parts or labor (including diagnosis), be adjusted, repaired, or replaced, at the option of MINI USA, a Division of BMW North America, LLC to proper specifications, in order to make the car comply with applicable emissions standards. The decision to adjust, repair or replace parts is solely the prerogative of MINI USA and must reasonably be expected to correct the failure of the warranted part.

Coverage begins on the date of first retail sale, or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier. This limited warranty continues for a period of 2 years or 24,000 miles, whichever occurs first, except for specific emissions control components (as listed on page 23), for which the warranty period is 8 years or 80,000 miles, whichever occurs first.

This limited warranty is made subject to the terms and conditions that apply to the Emission Control System Warranty and the MINI New Passenger Car Limited Warranty.

No claim under this warranty will be denied on the basis of use of a properly installed EPA certified emission part for maintenance and repair.

A vehicle manufacturer may deny an emission performance warranty claim on the basis of an uncertified replacement part used in the maintenance or repair of a vehicle only if the vehicle manufacturer presents evidence that the uncertified replacement part is either defective in materials or workmanship or not equivalent from an emission standpoint to the original equipment part.

Maintenance, replacement, or repair of emission control devices and systems may be performed by any automotive repair establishment or individual using any certified part.

Immediately after the car has failed an EPA approved emission short test, your claim can be made at any authorized MINI dealer. The MINI dealer will honor or deny your claim within the time period specified by local or state laws (not to exceed 30 days), to avoid further penalties or sanctions. If the claim is denied, the MINI dealer will notify you in writing of the reason(s). The authorized MINI dealer is required by law to honor the claim if notice of denial is not received by the owner within the specified time period.

You may obtain further information concerning the emission warranties, or report violations of warranty terms, by contacting the Director, Field Operations and Support Division (6406J), Environmental Protection Agency, 401 M Street, Washington, DC 20460 (Attn: Warranty Claim).

The following systems are covered by the Federal Emission Performance Warranty for a period of 2 years or 24,000 miles, whichever occurs first. The specific systems may vary according to model, therefore, all of the systems listed may not be used on your vehicle. For assistance in determining which systems and specific components within these systems apply to your vehicle, please contact your MINI dealer.

AIR INDUCTION SYSTEM

FUEL METERING SYSTEM

IGNITION SYSTEM

POSITIVE CRANKCASE VENTILATION SYSTEM (PCV)

FUEL EVAPORATIVE CONTROL SYSTEM

EXHAUST SYSTEM

ENGINE EMISSION CONTROL SYSTEM

SENSORS/DEVICES

ONBOARD DIAGNOSTIC SYSTEM (OBD)

RELATED PARTS ASSOCIATED WITH THE ABOVE SYSTEMS

The following components and/or systems are/is covered under the Federal Emission Performance Warranty for a period of 8 years or 80,000 miles, whichever occurs first.

CATALYTIC CONVERTER

ENGINE CONTROL MODULE (INCLUDING ONBOARD DIAGNOSTIC SYSTEM)

For assistance in determining coverage of the specific components of the Onboard diagnostic system, please contact your MINI dealer.

California Emission Control Warranty Statement* Your Warranty Rights and Obligations

The California Air Resources Board and MINI USA, a Division of BMW North America, LLC are pleased to explain the emission control system warranty on your 2014 vehicle. In California, new motor vehicles must be designed, built, and equipped to meet the State's stringent anti-smog standards. MINI USA, a Division of BMW North America, LLC must warrant the emission control system on your vehicle for the periods of time listed below provided there has been no abuse, neglect, or improper maintenance to your vehicle.

Your emission control system may include parts such as the fuel injection system, the ignition system, catalytic converter, and engine computer. Also included may be hoses, belts, connectors, and other emission-related assemblies.

Where a warrantable condition exists, MINI USA will repair your vehicle at no cost to you including diagnosis, parts and labor.

Manufacturer's Warranty Coverage:

– For 3 years or 50,000 miles, whichever occurs first:

1. If your vehicle fails a Smog Check inspection, all necessary repairs and adjustments will be made by MINI USA to ensure that your vehicle passes the inspection. This is your emission control system PERFORMANCE WARRANTY.
2. If any emission-related part on your vehicle is defective, the part will be repaired or replaced by MINI USA. This is your short-term emission control system DEFECTS WARRANTY.

– For 8 years or 100,000 miles, whichever occurs first:

If an emission-related part, specially noted on page 28 as having coverage for 8 years or 100,000 miles is defective, the part will be repaired or replaced by MINI USA. This is your long-term emission control system DEFECTS WARRANTY.

Owner's Warranty Responsibilities:

– As the vehicle owner, you are responsible for the performance of the required maintenance listed in your Owner's Manual. MINI USA recommends that you retain all receipts covering maintenance on your vehicle, but MINI USA cannot deny warranty solely for the lack of receipts or for your failure to ensure the performance of all scheduled maintenance.

– You are responsible for presenting your vehicle to an authorized MINI dealer as soon as a problem exists. The warranty repairs should be completed in a reasonable amount of time, not to exceed 30 days.

– As the vehicle owner, you should also be aware that MINI USA may deny your warranty coverage if your vehicle or part has failed due to abuse, neglect, improper maintenance, or unapproved modifications.

If you have any questions regarding your warranty rights and responsibilities, you should contact:

MINI USA, a Division of BMW of North America, LLC
Customer Relations and Services Department
P.O. Box 1227
Westwood, NJ 07675-1227

Telephone: 1 866 ASK-MINI (275-6464)

Email: MINI.assistance@askMINIUSA.com

Website: www.miniusa.com

or the

California Air Resources Board
9528 Telstar Avenue
El Monte, CA 91731

*The California Emissions Control System Limited Warranty applies to all 2014 U.S.-specification MINI vehicles registered in California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont or Washington.

California Emission Control System Limited Warranty*

This limited warranty applies to California certified vehicles distributed by MINI USA, a Division of BMW North America, LLC registered and operated primarily in California.

MINI USA, a Division of BMW North America, LLC warrants to the original purchaser and each subsequent owner that the vehicle is:

a. designed, built and equipped so as to conform with the applicable California Air Resources Board emission standards.

b. free from defects in materials and workmanship which cause any part that can affect emissions to fail to conform with applicable requirements or to fail a California Smog Check test or EPA approved short test for a period of 3 years or 50,000 miles, whichever occurs first.

c. free from defects in materials and workmanship in emission related parts, which are contained in the California Emission Control System Limited Warranty Parts List on page 28, for a period of 8 years or 100,000 miles, whichever occurs first.

Coverage begins on the date of first retail sale or the date the vehicle is first placed into service as a sales demonstrator, Aftersales Mobility Program (AMP) Vehicle or company vehicle, whichever is earlier.

To obtain service under this warranty, the vehicle must be brought, upon failure of a Smog Check test or upon discovery of the defect, to the workshop of any authorized MINI dealer, during normal business hours. The MINI dealer will honor or deny your claim within 30 days. If the claim is denied, the MINI dealer will notify you in writing of the reason(s). The MINI dealer is required by law to honor the claim if notice is not given to the owner within 30 days.

The MINI dealer will, without charge for parts or labor (including diagnosis), either adjust, repair or replace the defective part and other parts affected by the failure of the warranted part, if any. If your vehicle failed the California Smog Check test or an EPA approved short test, then MINI USA will repair your vehicle so that it will pass this test. Items that require scheduled replacement are warranted up to the replacement interval specified in the Service section of this Statement. MINI USA may repair a part in lieu of replacing it when performing warranty repairs. Parts for which replacements are made become the property of MINI USA. After 3 years or 50,000 miles, and in accordance with paragraph (c) above, such repairs are limited to the repair or replacement of those parts identified in the California Emission Control System Limited Warranty List.

If your California registered vehicle is between 7 and 8 years old and has been driven less than 80,000 miles, then your vehicle is eligible for additional warranty coverage under the Federal Emissions Warranty.

A repair performed as the result of a Smog Check test failure due to a defect in a part, which is warranted for 8 years or 100,000 miles, is covered.

In all cases, a reasonable time, not to exceed 30 days, must be allowed for a warranty repair to be completed, after the car is received by the MINI dealer.

It is the owner's responsibility to have all required maintenance services performed (at the owner's expense), as prescribed in the maintenance schedule for the MINI Emission Control System. Service intervals are computed by the Condition Based Service system and displayed on the instrument panel.

*The California Emissions Control System Limited Warranty applies to all 2014 U.S.-specification MINI vehicles registered in California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont or Washington.

However, MINI USA will not deny your warranty repair claims solely because you do not have maintenance records or you did not perform the required maintenance unless MINI USA demonstrates that such lack of required maintenance is a direct cause of the emission control system failure. The instructions for required maintenance and use can be found in the Owner's Manual and in the Service section of this Statement.

It is strongly recommended that any replacement parts used for maintenance, repair or replacement of emission control systems be genuine MINI Service Parts or MINI Authorized Remanufactured Parts. Without invalidating this warranty, the owner may elect to have maintenance, repair or replacement of the emission control systems performed by any automotive repair establishment, or elect to use parts other than MINI Authorized Remanufactured or genuine MINI Service Parts. However, the cost of such service or parts will not be covered under this warranty, except in emergency situations. In an emergency situation, where an authorized MINI dealer is not reasonably available or a warranty replacement part is not available within 30 days, repairs may be performed at any available service establishment or by any individual using any replacement part.

A repair not completed within 30 days constitutes an emergency. MINI USA, a Division of BMW North America, LLC will reimburse the owner for such emergency repairs (including labor, parts and diagnosis not to exceed MINI suggested retail price for all warranted parts replaced and labor charges based on the manufacturer's recommended time allowance for the warranty repair and the geographically appropriate hourly labor rate) that are covered under this warranty. Replaced parts and paid invoices must be presented to an authorized MINI dealer as a condition of reimbursement for emergency repairs not performed by an authorized MINI dealer.

The use of replacement parts, which are not of equivalent quality, may impair the effectiveness of emission control systems. If other than genuine MINI Service Parts or Authorized Remanufactured Parts are used for maintenance, repair or replacement of components affecting emission control, the owner should obtain assurances that such parts are warranted by their manufacturer to be equivalent to genuine MINI parts in performance and durability. MINI USA, a Division of BMW North America, LLC assumes no liability under this warranty with respect to parts other than genuine MINI parts.

However, the use of non-genuine MINI replacement parts does not invalidate the warranty on other components, unless non-genuine MINI parts cause damage to warranted parts.

What is not covered

This limited warranty does not cover malfunctions caused by any of the following: accident, flood, misuse, modification, alteration, tampering, disconnection, improper or inadequate maintenance, except if performed by an authorized MINI dealer doing warranty repair work, use of leaded fuel or fuel other than as specified in the Owner's Manual.

The replacement of maintenance parts, such as spark plugs, filters and similar items used in required maintenance services or the repair or replacement of maintenance parts beyond the first replacement interval.

Any car on which the odometer has been replaced or altered and the true mileage cannot be determined.

The car, if the Vehicle Identification Number (VIN) is altered or cannot be determined, or if the car has been declared a total loss or sold for salvage purposes.

General

The warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTIES HEREIN.

MINI USA, A DIVISION OF BMW NORTH AMERICA, LLC HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT.

For assistance in determining which parts are covered by this warranty, please contact your authorized MINI dealer or MINI USA, a Division of BMW North America, LLC Customer Relations and Services Department at 1 866 ASK-MINI (275-6464). You may obtain further information concerning the emissions warranty or report violations of warranty terms, by contacting Air Resources Board (ARB), Mobile Source Division, 9528 Telstar Avenue, El Monte, CA 91731. Please include the title of the MINI service department head and telephone number.

California Emission Control System Limited Warranty Parts List

The following components are covered for defects by the California Emission Control System Limited Warranty for a period of 8 years or 100,000 miles, whichever comes first.

Models:	MINI Cooper Clubman Cooper Convertible Cooper Countryman Cooper Paceman Cooper Coupe Cooper Roadster Cooper Clubvan	MINI Cooper S Clubman Cooper S Convertible Cooper S Countryman Cooper S Paceman Cooper S Coupe Cooper S Roadster Cooper S Countryman ALL4 Cooper S Paceman ALL4	MINI JCW Clubman JCW Convertible JCW Countryman JCW Paceman JCW Coupe JCW Roadster
Coverage:	8 Years 100,000 miles	8 Years 100,000 miles	8 Years 100,000 miles
Catalytic Converter (WU-TWC)		•	•
Catalytic Converter with Front Muffler	•	•	
Engine Control Module	•	•	•
Exhaust Manifold		•	•
Exhaust Manifold Gasket	•	•	•
Exhaust Manifold-to-Turbocharger Gasket		•	•
Exhaust Manifold with Catalyst	•		
Fuel Rail		•	•
Fuel Tank	•	•	•
High Pressure Fuel Pump		•	•
Intake Manifold	•	•	•
Torque Converter	•	•	•
Transmission Control Unit	•	•	•
Transmission Fluid Temperature Sensor	•	•	•
Transmission Speed Sensor	•	•	•
Turbocharger		•	•
Vacuum Pump		•	•
VANOS (VVT) Adjustment Unit	•	•	•

Notice

The "National Traffic and Motor Vehicle Safety Act of 1966" requires manufacturers to be in a position to contact vehicle owners when a correction of a safety-related defect or noncompliance issue with an applicable federal motor vehicle safety standard becomes necessary.

Please see the Correcting, Updating or Changing Vehicle-Related or Ownership Information section.

Correcting, Updating or Changing Vehicle-Related or Ownership Information

To enable MINI to contact you with important vehicle product and safety updates, including vehicles with expired warranty coverage, please update your vehicle-related or ownership information by either:

- ▷ Logging on at MINIUSA.com/OL, to access your MINI OWNERS' LOUNGE account (create a new account as necessary), then click UPDATE PROFILE at the top of the page
- ▷ Contacting the MINI Customer Relations and Services Department at 1 866 275-6464
- ▷ Complete and mail the Information Change Card, located at the back of this booklet

Please have your vehicle's 17-character Vehicle Identification Number (VIN) available.

Tire Warranty Statement

Original equipment tires on new MINI vehicles are warranted by their respective manufacturer as detailed in the applicable tire manufacturer's warranty statement.

The CD ROM MINI provides in the vehicle's documents portfolio contains the warranty statements for the following original equipment tire manufacturers (as applicable to your vehicle):

- ▷ Bridgestone/Firestone
- ▷ Continental
- ▷ Goodyear/Dunlop
- ▷ Hankook
- ▷ Michelin
- ▷ Pirelli

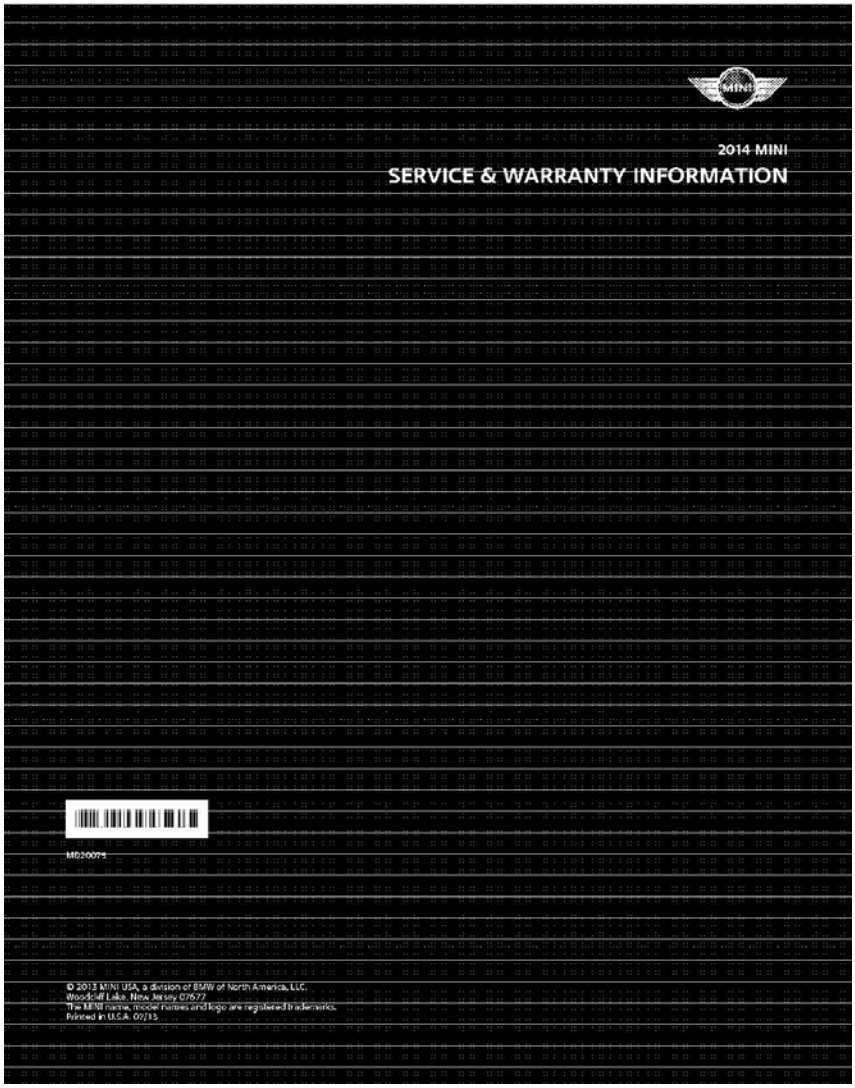
However, we also recommend either contacting or visiting the specific tire manufacturer's website to ensure that you have the most current warranty information that applies to your tires.

Should you have difficulty in obtaining the applicable warranty service from a tire manufacturer, your authorized MINI dealer will assist you in resolving the situation.

Instructions for proper tire care and maintenance are contained in the Wheels and Tires section of your vehicle's Owner's Manual.

Notes:

Complaint


2014 MINI
SERVICE & WARRANTY INFORMATION
MI020075
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Woodcliff Lake, New Jersey 07677
The MINI name, model names and logo are registered trademarks.
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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, 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 BMW of North America, LLC is a Delaware limited liability company with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677. Respondent uses, among others, the trade names MINI USA and the MINI Division of BMW NA.

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"** shall mean BMW of North America, LLC, its successors and assigns and its officers, agents, representatives, and employees.

B. "**MINI Division**" means the MINI Division of BMW of North America, LLC, its successors and assigns and officers, agents, representatives, and employees with responsibilities for the operations of the MINI Division of BMW of North America, LLC or its successors and assigns.

C. **"MINI dealer"** or **"MINI center"** means an authorized dealer of MINI passenger cars operating pursuant to a valid Dealer Agreement for MINI Passenger Cars between such dealer and respondent.

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

E. **"Competent and reliable scientific evidence"** means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.

F. **"Implied warranty"** means an implied warranty arising under State law (as modified by 15 U.S.C. §§ 2308 and 2304(a)) in connection with the sale by a supplier of a consumer product.

G. **"Warrantor"** means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

H. **"Written warranty"** means

1. any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

2. any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any MINI Division good or service shall not:

A. condition any written or implied warranty of any product sold on the consumer's using, in connection with such product, any article or service (other than an article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name unless the Commission has, prior to such conditioning, granted a waiver of this requirement pursuant to 15 U.S.C. 2302(c); or

B. violate any provision of the Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301- 2312), or the rules promulgated by the Commission under the Magnuson-Moss Warranty Act (16 C.F.R. §§ 701, 702, and 703), copies of which are attached as Attachment A.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any MINI Division good or service shall not:

A. represent that the owner, in order for his/her vehicle to operate safely or maintain its value, must have maintenance work performed by a MINI dealer or MINI center, unless the representation, at the time it is made, has been substantiated by Respondent with competent and reliable scientific evidence; or,

B. misrepresent, expressly or by implication, any fact material to consumers concerning any warranty or maintenance requirements of any good or service.

III.

IT IS FURTHER ORDERED that Respondent, within 60 days of entry of this Order, must provide the notice appended to this Order as Attachment B by first class mail to MINI owners who still have coverage under the MINI New Passenger Car Limited Warranty and whose Service and Warranty Information Statement contains any of the following, or similar, statements:

A. "Have maintenance and repair work performed by your MINI dealer. Make sure that the maintenance work is stamped in this Service and Warranty Information Statement. These entries are the evidence of regular maintenance of your vehicle and are a requirement for warranty claims;"

B. While [the owner] may elect to use non-genuine MINI parts for maintenance or repair services, [MINI USA

> or the MINI Division] is not obligated to pay for repairs that include non-genuine MINI parts . . . ."

Provided further that Respondent shall not include any advertising, marketing, or other promotional information in conjunction with providing the information specified above. Moreover, Respondent will employ means to verify the address of any owner whose notice is returned as undeliverable and will attempt to resend the information to the owner by first class mail within 60 days of having the original notice returned as undeliverable. Furthermore, Respondent will post a copy of the notice contained in Attachment B on the miniusa.com website No Cost Maintenance & Warranty page for one year after entry of this Order.

On the 120th, 210th, and 360th days following entry of this Order, Respondent shall provide the Commission the following: (1) a copy of the content of the notice (which shall be in the form of the notice appended to this Order as Attachment B); (2) the number of notices sent by first class mail; (3) the number of the notices returned as undeliverable; (4) a detailed description of the process Respondent used to locate owners whose notices were undeliverable; (5) the number of notices resent; and (6) the number of resent notices returned as undeliverable.

IV.

IT IS FURTHER ORDERED that Respondent and its successors and assigns, 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 Respondent's compliance with the terms and provisions of this Order, including but not limited to:

A. A copy of each Owner's Manual and Service and Warranty Information Statement for each model of passenger car or light truck sold by Respondent after entry of this Order; and

B. Records of all consumer complaints or other consumer correspondence concerning the subject matter of this Order.

V.

IT IS FURTHER ORDERED that Respondent and its successors and assigns, shall deliver a copy of this order to all current and, for the next five (5) years, future principals, officers, directors, managers, and to all current and, for the next five (5) years, future employees, agents, and representatives having responsibilities with respect to the MINI Division and the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*

Respondent shall deliver this order to current personnel with responsibilities with respect to the MINI Division and the subject matter of this order within thirty (30) days after the date of service of this order, and to future personnel with responsibilities with respect to the MINI Division and the subject matter of this order 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 VI, delivery shall be at least ten (10) days prior to the change in structure.

VI.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to a divestiture of the MINI Division or any change in the limited liability company 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 company; 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 company name or address. *Provided, however*, that, with respect to any proposed change in the company about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be 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, D.C. 20580. The subject line must begin: In re BMW of North America, LLC.

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, Respondent shall submit additional true and accurate written reports.

VIII.

This order will terminate on October 21, 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, a consent agreement applicable to BMW of North America, LLC ("respondent").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and 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's MINI Division provides purchasers of new MINI passenger cars a Service and Warranty Information Statement ("Warranty Statement"). According to the FTC complaint, language in the Warranty Statement violates the Magnuson-Moss Warranty Act ("Warranty Act"), 15 U.S.C § 2302(c), by conditioning warranty coverage on the consumer's use of genuine MINI parts and MINI dealers to perform maintenance and repair work.

The FTC enforces the Warranty Act, which regulates consumer warranties and the procedures used to resolve warranty disputes. The broad purposes of the Warranty Act are (1) to improve the adequacy of warranty information available to consumers, and thereby facilitate consumer choice; (2) to prevent deception; and (3) to improve competition in the marketing of consumer products. Among other things, the Warranty Act prohibits a warrantor from conditioning a consumer product's warranty on the consumer's use of an article or a service (other than an article or a service provided without charge) which is

identified by brand, trade, or corporate name. 15 U.S.C. § 2302(c) ("the anti-tying provision").

According to the FTC complaint, in connection with the warranty for certain MINI models, respondent has required owners to have routine maintenance, such as oil changes, performed by MINI dealers and to use genuine MINI parts. The complaint alleges that this requirement appears in two places in the Warranty Statement.

First, in order to have a warranty claim approved, owners must demonstrate that they obtained regular maintenance of their vehicles by having a MINI dealer place a stamp in the warranty booklet. *See* Complaint at ¶ 12. Second, the Warranty Statement states that it "is not obligated to pay for repairs that *include non-genuine MINI parts* . . . ." (emphasis added). Although respondent provides, with the purchase of its vehicles, a free scheduled maintenance program, many of the models have a three-year maintenance program, but a four-year new vehicle warranty. Thus, according to the complaint, there is one year during the warranty period in which consumers must pay for their maintenance and repair work while being required to use MINI dealers and MINI parts to retain warranty coverage.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent, in connection with the sale of any MINI Division good or service, from violating any provision of the Warranty Act, including, but not limited to, the anti-tying provision. Part II prohibits respondent, in connection with the sale of any MINI good or service, from misrepresenting that vehicles, in order to operate safely or maintain value, must have maintenance work performed by a MINI dealer. Part II also prohibits respondent from misrepresenting any material fact concerning any warranty or maintenance requirements of any MINI good or service.

Part III requires respondent to send notices to all affected consumers informing them that their warranties are not conditioned on repair work being performed by MINI dealers or on the use of genuine MINI parts.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires respondent to maintain, and make available to the Commission upon written request, copies of Owner's Manuals and Warranty Statements for each motor vehicle sold by respondent. Part V requires dissemination of the order, now and in the future, to persons with responsibilities relating to the MINI Division and the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that respondent submit an initial compliance report to the FTC, and make subsequent reports available to the FTC, upon request. Part VIII is a provision "sunsetting" the order after twenty (20) years, within 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 order or to modify its terms in any way.

Complaint

IN THE MATTER OF

NICE-PAK PRODUCTS, INC.
D/B/A
NICE-PAK

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

Docket C-4556; File No. 132 3272
Complaint, October 13, 2015 – Decision, October 30, 2015

The consent order addresses Nice-Pak Products, Inc. Nice-Pak Products, Inc. is a manufacturer of "flushable" moist toilet tissue made from non-elemental chlorine bleached wood pulp, bicomponent fibers and EP907 repulpable binder. It advertised the flushable moist toilet tissue as being safe for sewer and septic systems, and breaking apart shortly after flushing. The Commission's complaint alleges that Nice-Pak did not have adequate substantiation for the claims made about their product's effectiveness, because its substantiation did not accurately reflect the real-world conditions that their product encounters. The complaint further alleges that Nice-Pak provided retailers, such as Costco, CVS, Target, and BJ's, that sold the Nice-Pak flushable moist toilet tissue under their private labels with the inadequate substantiation and the retailers then repeated the unsubstantiated claims. Nice-Pak has benefited a great deal from their misinterpretation while consumers have continued to suffer from backed up drains in their homes. The proposed order prohibits Nice-Pak from making claims about any moist toilet tissue unless the company has competent and reliable evidence to support them.

Participants

For the *Commission: Laura Fremont* and *Sylvia Kundig.*

For the *Respondent: Trenton H. Norris, Arnold & Porter.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nice-Pak Products, 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 Nice-Pak Products, Inc. ("Nice-Pak"), also doing business as Nice-Pak, is a New York corporation with its

principal office or place of business at Two Nice-Pak Park, Orangeburg, NY 10962-1376.

2. Respondent Nice-Pak has packaged, labeled, advertised, offered for sale, sold, or distributed moist toilet tissue, a personal hygiene product, throughout the United States. This moist toilet tissue is composed of non-woven fabric, specifically non-elemental chlorine bleached wood pulp, bicomponent fibers, and EP907 repulpable binder (the "Nice-Pak wipe"). Because of their composition, non-woven fabrics do not break down in water in a reasonably short amount of time. As a result, products made from them can clog household plumbing systems, household septic systems, public sewer systems, and sewage treatment plant systems after being flushed.

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 Activities

4. Respondent disseminated to trade customers materials purporting to substantiate certain claims for its Nice-Pak Wipes. These materials concerned tests which did not accurately reflect real-world conditions Nice-Pak Wipes would encounter after being flushed (i.e., conditions that exist in household toilets, plumbing, or septic systems, or in public sewer systems or public wastewater treatment facilities). Moreover, alone or in concert with others, Respondent developed unsubstantiated flushability claims for use by its trade customers based on this purported substantiation. Through these means, Respondent provided trade customers with the means and instrumentalities to deceive consumers by disseminating these unsubstantiated flushability claims in marketing Respondent's Nice-Pak Wipes under private labels, such as Costco's Kirkland Signature Moist Flushable Wipes, CVS's Flushable Cleansing Wipes, Target's Up & Up Flushable Moist Wipes, and BJ's Family & Toddler Moist Wipes.

5. Alone or in concert with others, Respondent has disseminated or has caused to be disseminated advertisements, packaging, labeling, and purported substantiation materials for its Nice-Pak Wipes, including but not necessarily limited to the

attached Exhibit A. This material contains the following statements and depictions:

a. Exhibit A, product label:

"Kirkland Signature moist flushable wipes"

"Safe for Sewer & Septic"

"Kirkland Signature Moist Flushable Wipes are … safe for sewer and septic systems because they begin to break down after flushing."

The label also contains the following depiction, which includes the statement, "BREAKS APART after flushing":

Count I

Unsubstantiated Performance Claims

6. In connection with the advertising, labeling, packaging, promotion, offering for sale, sale, or distribution of the Nice-Pak Wipes, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. The Nice-Pak Wipes are safe for sewer systems;

b. The Nice-Pak Wipes are safe for septic systems;

c. The Nice-Pak Wipes break apart shortly after flushing; and

d. The Nice-Pak Wipes are safe to flush; that is, they are safe for household plumbing systems, household septic systems, and public sewer systems.

7. The representations set forth in Paragraph 6 were not substantiated at the time the representations were made.

Count II

Means and Instrumentalities

8. Respondent has provided to its trade customers advertising, labeling, packaging, or purported substantiation materials referred to in Paragraphs 4 and 5 which contain, among other things, unsubstantiated representations, as described in Paragraph 6, above.

9. By providing its trade customers with these advertising, labeling, packaging, or purported substantiation materials, Respondent has provided its trade customers the means and instrumentalities for the commission of deceptive acts and practices.

Violations of Section 5

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

THEREFORE, the Federal Trade Commission this thirtieth day of October, 2015, has issued this Complaint against Respondent.

By the Commission.

Exhibit A

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 Nice-Pak Products, Inc. is a New York corporation with its principal office or place of business at Two Nice-Pak Park, Orangeburg, NY 10962-1376.

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

ORDER

DEFINITIONS

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

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

B. "Covered Product" shall mean all wipes, including but not limited to Kirkland Signature Moist Flushable Wipes, and any moist toilet tissue or cloth.

C. Unless otherwise specified, "respondent" shall mean Nice-Pak Products, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.

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, packaging, 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 product name, endorsement, depiction, illustration, trademark, or trade name, that the Covered Product:

A. is safe for sewer systems;

B. is safe for septic systems;

C. breaks apart shortly after flushing;

D. will not clog household plumbing systems;

E. will not clog household septic systems;

F. is safe for plumbing;

G. is safe to flush;

H. dissolves or disperses when interacting with water; or

I. is flushable,

unless the representation is non-misleading, and, at the time the representation is made, Respondent possesses and relies upon competent and reliable evidence, which, when appropriate based on the expertise of professionals in the relevant area must be competent and reliable scientific evidence, that, when considered in light of the entire body of relevant and reliable evidence, is sufficient in quantity and quality based on standards generally accepted in the relevant fields to substantiate that the representation is true. For the purposes of this Part, "competent and reliable 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 qualified persons, using procedures generally

accepted in the profession to yield accurate and reliable results. For the purposes of this Part, "competent and reliable scientific evidence" means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results. Specifically, any tests, analyses, research, studies, or other evidence purporting to substantiate any of the above representations must at least:

1. demonstrate that the Covered Product disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment; and

2. substantially replicate the physical conditions of the environment in which the Covered Product is claimed, directly or indirectly, expressly or by implication, to be properly disposed of; or, if no specific environment is claimed, then in all environments in which the product will likely be disposed of.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any moist toilet tissue or cloth, in or affecting commerce, shall not make any representation, other than the representations covered by Part I of this Order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, about the benefits, performance, or efficacy of such product or service, unless the representation is non-misleading, and, at the time the representation is made, Respondent possesses and relies upon competent and reliable evidence, which, when appropriate based on the expertise of professionals in the relevant area must be competent and reliable scientific evidence, that, when considered in light of the entire body of relevant and

reliable evidence, is sufficient in quantity and quality based on standards generally accepted in the relevant fields to substantiate that the representation is true. For the purposes of this Part, "competent and reliable 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 qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results. For the purposes of this Part, "competent and reliable scientific evidence" means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of the Covered Product, or any other product or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make any representation prohibited by Part I or II above. For the purposes of this Part, "means and instrumentalities" means any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of such product or service.

IV.

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

A. All advertisements, labeling, packaging and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. All acknowledgments of receipt of this order obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that Nice-Pak Products, Inc. and its successors and assigns shall, for five (5) years after entry of this order, 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, 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. Nice-Pak Products, Inc. and its successors and assigns shall deliver this order to such persons within thirty (30) days after the date of service of this order, and to future such persons within thirty (30) days after such person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Nice-Pak Products, Inc. and its successors and assigns shall send as soon as practicable, but in no event later than thirty (30) days after entry of this order, by first-class mail, postage prepaid and return receipt requested, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to all of its trade customers, wholesalers, and retailers for or to whom it has manufactured, labeled, packaged, advertised, promoted, offered for sale, sold, or distributed any Covered Product that was advertised, promoted,

offered for sale, sold, or distributed, with any of the representations, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, enumerated in Part I A through I of this Order. The notice required by this paragraph shall include a copy of this order, but shall not include any other document or enclosures and shall be sent to the principal place of business of each entity**.**

VII.

IT IS FURTHER ORDERED that Nice-Pak Products, Inc., 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 Nice-Pak Products, Inc. and its successors and assigns learn less than thirty (30) days prior to the date such action is to take place, it 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 the Matter of Nice-Pak Products, Inc., Docket No. C-4556, FTC File Number 132 3272."

VIII.

IT IS FURTHER ORDERED that Nice-Pak Products, Inc., and its successors and assigns, 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.

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 the Matter of Nice-Pak Products, Inc., Docket No. C-4556, File No. 132 3272."

IX.

This order will terminate on October 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.

ATTACHMENT A

[ON NICE-PAK PRODUCTS, INC. LETTERHEAD]

[insert addressee name] [insert addressee address]

Dear [name of retailer]:

You have purchased Nice-Pak Products, Inc. ("Nice-Pak") moist wipes for resale under your private label. In a recent enforcement action, the Federal Trade Commission (FTC) alleged that Nice-Pak made misleading representations in its advertising and marketing of "flushable" moist wipes made of non-elemental chlorine bleached word pulp, bicomponent fibers, and EP907 repulpable binder. Among other things, the FTC alleged that Nice-Pak lacked adequate substantiation for the claim that this product is safe for household plumbing, household septic systems, and public sewer systems.

Nice-Pak resolved this matter with the FTC by a settlement and has agreed to send this notification to you.

Nice-Pak requests that you immediately stop using all packaging, advertising, and marketing materials previously provided to you by Nice-Pak about these wipes. Also, please ensure such claims are removed from your website and do not appear in any other advertising or marketing.

For further information about this matter, go to www.ftc.gov and search for "Nice-Pak."

Very truly yours,

Robert P. Julius, CEO

Nice-Pak Products, Inc.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from Nice-Pak Products, Inc. ("Nice-Pak").

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.

Nice-Pak is a manufacturer of "flushable" moist toilet tissue made from non-elemental chlorine bleached wood pulp, bicomponent fibers and EP907 repulpable binder. It advertised the flushable moist toilet tissue as being safe for sewer and septic systems, and breaking apart shortly after flushing. The Commission's complaint, however, alleges that Nice-Pak did not have adequate substantiation for the claims, because its substantiation did not accurately reflect the real-world conditions that the moist toilet tissue encounters after flushing. In addition, the complaint alleges that Nice-Pak provided retailers, such as Costco, CVS, Target, and BJ's, that sold the Nice-Pak flushable moist toilet tissue under their private labels with the inadequate substantiation and the retailers then repeated the unsubstantiated claims.

The proposed consent order contains provisions designed to prevent Nice-Pak from engaging in similar acts or practices in the future.

Part I of the order prohibits Nice-Pak from misrepresenting that any wipe is safe to flush unless Nice-Pak's substantiation demonstrates that the wipe will disperse in a sufficiently short amount of time after flushing to avoid clogging or other operational problems in household and municipal sewage lines, septic systems and other standard wastewater equipment, and that those tests substantially replicate the physical conditions of the environment the wipe will be disposed in.

Part II of the proposed order prohibits Nice-Pak from making any representation about moist toilet tissue unless the representation is non-misleading, and, at the time it is made, Nice-Pak possesses and relies upon competent and reliable evidence that substantiates the representation.

Part III of the proposed order prohibits Nice-Pak from providing the means and instrumentalities to others to make the representations that Nice-Pak would be prohibited from making by Parts I and II of the proposed order.

Part IV of the proposed order contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through III of the order.

Parts V, VII and VIII of the proposed order require Nice-Pak 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 VI of the proposed order requires Nice-Pak to provide notice of the order to its private label customers.

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

STERIS CORPORATION
AND
SYNERGY HEALTH PLC

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

Docket No. 9365; File No. 151 0032
Complaint, May 28, 2015 – Decision, October 30, 2015

This case addresses the $1.9 billion acquisition by STERIS Corporation of certain assets of Synergy Health plc. The complaint alleges that the acquisition, if consummated, will violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for contract radiation sterilization services in North America. The Order dismisses the Complaint.

Participants

For the *Commission*: *Jordan Andrew, Michael Barnett, Peter Colwell, Meghan Iorianni, Lynda Lao, Steven Lavender, Jacqueline Mendel, Joseph Neeiy, Chrisiine Perez, Noah Pinegar, Amy Posner, Jonaihan Ripa, Mark Silvia,* and *Christine Tasso.*

For the *Respondents*: *Damian Didden* and *Nelson Fitts, Wachtell, Lipton, Rosen & Katz; Ryan Thomas, Jones Day; Steven Levitsky* and *Paolo Morante, DLA Piper LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (the "Commission"), having reason to believe that Respondents Steris Corporation ("Steris") and Synergy Health plc ("Synergy") (collectively "Respondents") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section

5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Respondents are the second- and third-largest sterilization companies in the world, while Sterigenics International, Inc. ("Sterigenics") is the largest. Sterilization is a critical final step in the manufacture of many healthcare products, as it is necessary to eliminate bacteria and other microorganisms living on or within products and is required by the U.S. Food and Drug Administration ("FDA").

2. Steris is the largest provider of gamma radiation sterilization services in the United States with fourteen facilities, as well as ten ethylene oxide ("EO") gas sterilization facilities. Sterigenics also operates fourteen gamma sterilization facilities in the United States, along with ten EO facilities, and one electron-beam ("e-beam") radiation facility. Sterigenics also operates gamma, e-beam, and EO facilities outside the United States. Synergy operates more than three dozen contract sterilization facilities, including numerous gamma sterilization facilities outside of the United States, and currently offers only e-beam and EO sterilization services in the United States. Absent the proposed merger between Respondents (the "Merger"), Synergy planned to [redacted] and [redacted] If consummated, the Merger would allow Steris to insulate itself against this competitive threat, which would have targeted Steris and Sterigenics' customers, especially its core gamma sterilization customers, and resulted in lower prices, improved quality, and increased choice for contract sterilization.

3. There are three primary methods of sterilization currently used in the United States: gamma radiation, e-beam radiation, and EO gas. Customers choose sterilization methods based on each product's physical characteristics and packaging, the volume of products requiring sterilization, and the capabilities of each sterilization modality. Gamma radiation sterilizes by exposure to

a radioactive isotope, Cobalt 60. Gamma radiation has deep penetration capabilities and is favored by customers that need to sterilize dense products, such as implantable medical devices, and products with heterogeneity of density, such as products packaged in large quantities. E-beam, a second type of radiation sterilization, does not penetrate as deeply as gamma radiation, though it can be effective for low-density products sterilized in low volumes. EO is a non-radiation form of sterilization that exposes products to gas to kill unwanted organisms. EO is effective only if gas diffuses freely through packaging and makes contact with all product surfaces requiring sterilization.

4. X-ray radiation sterilization will be a close substitute for gamma sterilization. X-ray sterilization offers comparable, and possibly superior, depth of penetration, allowing it to compete for products that customers currently sterilize economically with gamma radiation. For many products, x-ray is the only functional alternative to gamma because of the limitations of e-beam sterilization. According to Synergy, [redacted]

5. The relevant product market in which to analyze the effects of the Merger is no broader than contract radiation sterilization services. EO sterilization is not an economical and practical substitute for contract radiation sterilization services, because EO gas can leave a harmful residue on products, making it unsuitable for many healthcare customers. EO sterilization also requires the use of specialized, breathable packaging and faces significant restrictions in how densely products can be packed into boxes and how those boxes can be configured in the sterilization chamber, limiting the types and volumes of products that can effectively use EO. It typically takes longer to complete than radiation sterilization as well. Thus, EO sterilization is properly excluded from the relevant market.

6. A small number of medical device manufacturers use their own in-house sterilization facilities to sterilize a portion of their products. In-house sterilization is properly excluded from the relevant market because only the largest suppliers of medical devices and other products can cost-effectively sterilize any portion of their products in-house. Performing gamma

sterilization internally makes economic sense only if a company produces or distributes a very large volume of product [redacted] at a single facility. Very few companies produce the single-location volume required to justify the large upfront investment and ongoing costs associated with establishing and operating in-house sterilization. Industry trends show that medical device manufacturers and other customers are shifting more of their sterilization needs to contract providers, rather than using more in-house sterilization. Even those that have in-house capabilities rely on contract sterilizers to provide some portion of their sterilization needs as well as back-up sterilization services in the event the in-house facilities temporarily shut down.

7. Today, e-beam is an uneconomical alternative for the vast majority of products that are sterilized with gamma radiation. Indeed, although e-beam has been available for thirty years, it still represents only about [redacted] of all contract radiation sterilization services sold in the United States while gamma accounts for the remaining [redacted]. At current prices, the amount of product that customers would likely switch to e-beam sterilization in the face of a small, but significant and non-transitory increase in price ("SSNIP") for contract gamma sterilization services would be small. However, some customers are concerned about the availability and pricing of gamma sterilization in the future due to questions about the supply of Cobalt 60. As a result, e-beam may become a closer economic substitute to gamma in the future than it is today. Thus, the relevant market is no broader than contract radiation sterilization.

8. The competitive impact of the proposed merger will be most pronounced for customers that would not switch to e-beam even if gamma sterilization prices were to increase by substantially more than a SSNIP. Thus, there is also a relevant market for contract gamma and x-ray sterilization services sold to targeted customers that would not switch to e-beam in the event of a SSNIP.

9. Customers purchase gamma sterilization services from suppliers located near their manufacturing or distribution sites in order to minimize transportation costs and turnaround times. The relevant geographic markets initially affected by the proposed

transaction are the areas that Synergy would have served through its planned x-ray facilities in the [redacted], area and [redacted], which were set to open in [redacted]. Synergy also planned to begin operating x-ray plants in [redacted]. All Synergy plants would have competed directly with nearby Steris facilities.

10. The Merger will result in substantial competitive harm in all [redacted] relevant markets, each of which is already highly concentrated under the Merger Guidelines and case law. The [redacted] million market for all contract radiation sterilization services surrounding [redacted] currently has an HHI level of over [redacted] while the other four markets—[redacted]—are also highly concentrated with HHIs ranging from at least [redacted] to more than [redacted]. Analyzing the impact of the merger in the [redacted] market for contract gamma and x-ray sterilization services sold to targeted customers, which has [redacted] million in sales, yields an HHI of approximately [redacted]. Similarly, each of the other [redacted] geographic areas has an even higher current concentration level in a market for contract gamma and x-ray sterilization services sold to targeted customers.

11. Synergy, although a significant competitor outside the United States, is a small U.S. contract radiation player today because it offers only e-beam sterilization services. Synergy is an actual potential entrant with its x-ray sterilization business, which would substantially augment its competitive significance. Synergy's entry with contract x-ray services would reduce concentration substantially in each relevant market and result in other procompetitive effects.

12. [redacted] Since then, Synergy has taken numerous steps to further that plan. By September 2014, Synergy's Senior Executive Board ("SEB") [redacted]

[redacted] the development team had secured numerous letters of interest from significant customers, and the team had transitioned from planning to implementation.

13. Synergy's proposed merger with Steris was announced on October 13, 2014. In the weeks following, Synergy continued to [redacted] but its focus shifted given that [redacted]

14. In January 2015, the FTC issued Second Requests to Steris and Synergy that made clear that the FTC's investigation was focused on Synergy's efforts to enter the United States with x-ray. In February, the head of Synergy's sterilization business, Andrew McLean, [redacted]. While Mr. McLean claimed [redacted], customers remain interested in x-ray as an alternative to gamma and in Synergy as an alternative to Sterigenics and Steris. In actuality, Synergy [redacted] in an effort to salvage the sale to Steris. The President of Synergy's Applied Sterilization Technologies ("AST") business, Gaet Tyransky, explained to the x-ray team leaders in February: [redacted]

15. Synergy's U.S. x-ray entry would have had a large and lasting competitive impact, and a de-concentrating effect, in each relevant market. Synergy recognized that filling the facilities would take time because Synergy would be introducing a new technology to the market and because customers must validate certain of their products for sterilization in the new x-ray facilities. Synergy conservatively expected its U.S. x-ray sterilization business to grow to a [redacted] of U.S. contract gamma sterilization sales. Synergy's executives anticipated that the [redacted]

[redacted] Synergy assigned a [redacted] that Steris and Sterigenics would [redacted] Customers, including some of the world's largest medical device companies, share Synergy's expectation that its x-ray entry would provide them with an important alternative to contracting with Steris and Sterigenics for gamma sterilization services.

16. New entry or expansion is not likely to prevent the anticompetitive effects of the transaction—Synergy has entry advantages in x-ray that no other firm can match, including its global scale, a reputation as a quality service provider, a head-start of several years, and, as of the date of the transaction, a ten-year exclusive agreement with the world's only supplier of commercially viable x-ray sterilization machines. No other firm is attempting to enter the United States with x-ray sterilization services capable of competing effectively with gamma sterilization.

17. New entry with e-beam sterilization is expensive and time consuming and would not prevent the anticompetitive effects of the acquisition for targeted contract gamma and x-ray sterilization customers. Entry into gamma is extraordinarily costly, difficult, and time consuming, and is unlikely because of the uncertain future availability and pricing of Cobalt 60, and the demanding regulatory environment.

18. Respondents cannot show that efficiencies resulting from the Merger will offset the Merger's anticompetitive effects. Most of the cost savings that Respondents claim will result are neither verifiable nor merger-specific or likely to be passed on to customers. According to the executive tasked with evaluating potential efficiencies, Steris's purported cost savings figures [redacted]

II.

BACKGROUND

A.

Jurisdiction

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

20. The Merger constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.

Respondents

21. Respondent Steris is a publicly traded corporation organized under the laws of Ohio with headquarters in Mentor, Ohio. Steris provides contract sterilization services in the United States and infection prevention and surgical products and services in more than 60 countries around the world. Steris had total revenues of over $1.6 billion in 2014, of which [redacted] derived from contract gamma sterilization services performed at facilities in Ohio, California, Illinois, Massachusetts, New Jersey, New York, Puerto Rico, South Carolina, Texas, and Utah.

22. Respondent Synergy is a publicly traded company registered in the United Kingdom, with its headquarters in Swindon, Wiltshire, United Kingdom. Synergy provides contract sterilization services in more than a dozen countries, as well as sterilization services for reusable surgical instruments and linen servicing for hospitals. Synergy had global revenues of approximately $590 million in 2014. Outside of the United States, Synergy's AST business offers contract gamma, x-ray, e-beam, and EO sterilization services. In the United States, Synergy Health U.S. Holdings Inc. is headquartered in Tampa, Florida. Synergy currently offers U.S. e-beam sterilization

services at facilities in Ohio, California, Colorado, and Pennsylvania and EO sterilization in Florida, which earned [redacted] and [redacted], respectively, in 2014.

C.

The Merger

23. On October 13, 2014, Steris and Synergy signed an agreement and plan of merger ("Merger Agreement"), pursuant to which Steris would acquire all shares of Synergy in a transaction valued at $1.9 billion. The Merger Agreement currently has a termination date of July 12, 2015, which has been extended by mutual agreement of the Respondents twice.

III.

THE RELEVANT PRODUCT MARKET

24. The relevant product market in which to analyze the effects of the Merger is no broader than the market for contract radiation sterilization services. The effects of the Merger can also be analyzed properly in a narrower market for the sale of contract gamma and x-ray sterilization services to targeted customers that cannot economically or functionally switch to e-beam sterilization. Defining the relevant product market broadly or narrowly does not change the fact that Steris, Synergy, and Sterigenics are the only significant market participants or that substantial anticompetitive effects will result from the Merger.

A.

Background on Contract Radiation Sterilization Services

25. Contract radiation sterilization services include gamma, x-ray, and e-beam sterilization services provided by third parties.

Contract Gamma Sterilization Services

26. Gamma sterilization involves exposing products to Cobalt 60, a highly radioactive isotope, to kill microorganisms located on or within products and packaging. As Cobalt 60 decays, it emits energy in the form of photons, which do not have mass or an

electric charge, allowing them to penetrate deeply into dense material.

27. Gamma sterilization is ideal for large volumes of dense products, such as large totes of medical devices, because it can penetrate several feet deep into containers. Gamma irradiators run continuously because Cobalt 60 emits radiation constantly and cannot be turned off. To prepare products for gamma sterilization, contract sterilizers transfer them to irradiation containers, called totes, and place the containers near the Cobalt 60 source, exposing the products to gamma radiation for a set amount of time. The totes range in size from forty to seventy cubic feet, which is significantly larger than the containers used in the e-beam sterilization process. Typically, a batch of products sterilized using gamma radiation has a total turnaround time of about three to four days, including the time required to receive a shipment, irradiate it, and send it back to a customer's facility.

28. In the United States, there are a large number of products that can only be sterilized cost-effectively using contract gamma sterilization services. Steris's website includes a guide for their customers of products "where Gamma Irradiation is the Method of Choice." These include lab ware products; soft tissues that are recovered from donor cadavers, processed in boxes, and shipped on dry ice; liquids; filled media plates; products with a high moisture content; wet dressings that are temperature sensitive or hermetically packaged; prep pads; serums; devices or device components that are designed with occluded areas; filled syringes; and certain biological products. Other products that gamma sterilization is best suited for include products contained in impermeable packaging, orthopedic implants, surgical stents, single-use medical supplies, and many products sterilized efficiently in large batches. Gamma sterilization is particularly well suited for these products, as well as other products of dense or varied and complex construction, because gamma radiation passes more easily through these materials than e-beam particles.

Contract X-ray Sterilization Services

29. X-ray sterilization uses a very high-powered electron beam machine to produce x-ray radiation. Historically, x-ray sterilization has not been used in the United States, in large part

because no machine existed that was capable of sterilizing products as cost effectively as gamma or other sterilization methods. Recently, however, [redacted] has developed equipment that can perform x-ray sterilization at a cost comparable to, and possibly lower than, gamma sterilization. [redacted] accelerators have made x-ray sterilization a commercially viable alternative for products that are currently sterilized with gamma radiation.

30. X-ray sterilization combines the best features of e-beam and gamma sterilization. It offers the depth of penetration of gamma radiation, which makes it suitable for sterilizing dense products and packaging, and the quick turnaround times of e-beam sterilization. X-ray sterilization may provide significant advantages over gamma sterilization. It requires shorter processing times than gamma sterilization, providing potential inventory management advantages. It can also process multiple products with different dose requirements in the same irradiation cycle, making it more efficient than gamma sterilization. X-ray sterilization is also well-suited for processing large batches of products, and, because it uses electricity rather than Cobalt 60, x-ray does not raise many of the environmental and regulatory issues of gamma sterilization. Synergy expects that x-ray will offer quicker turnaround times, less oxidation and discoloration on plastic products, and less temperature-based damage.

Contract E-beam Sterilization Services

31. E-beam sterilization uses electrically powered accelerators to produce high-energy electron beams to kill unwanted microorganisms. The unique characteristics of the e-beam irradiation process often make it the most effective method for sterilizing small volumes of low-density, homogeneous products. E-beam machines are more efficient than using Cobalt 60 because they can be turned on and off as needed, which ensures that they produce radiation only when they are in use. Small batches of products can often be sterilized more quickly with e-beam irradiation than gamma irradiation; an e-beam machine can sterilize some products in only a few minutes.

32. The primary drawback of e-beam sterilization is that the radiation produced does not penetrate nearly as deeply as gamma radiation, and products sterilized with e-beam radiation must be

placed into smaller containers than those used in gamma sterilization. These containers are about twice the size of a copy paper box and can only hold approximately two cubic feet of product, so products delivered from customers must be loaded into small totes and exposed to e-beam radiation one box at a time. For products that are packed in dry ice, such as human tissue, the products must be unpacked from their boxes before being sterilized with e-beam. For large volumes of products, the e-beam loading process requires considerably more handling than gamma sterilization, and e-beam sterilization is not a cost-effective option for denser products. Indeed, according to customers, for many dense products, such as liquids and orthopedic implants, sterilization with e-beam technology is simply "impossible" and "[not] a viable option." Because of the significant differences between the two methods of radiation sterilization, e-beam sterilization is not a cost-effective or practical substitute for most products that currently use gamma sterilization services.

B.

The Market for Contract Radiation Sterilization Services

33. Today, gamma sterilization accounts for [redacted] of radiation sterilization services sold in the United States, and e-beam the remaining [redacted]. The majority of products currently sterilized in the United States using contract gamma sterilization services currently cannot be sterilized practically using any other method of sterilization. Contract x-ray sterilization services would compete directly with contract gamma sterilization services, and may compete with e-beam to some extent. Therefore, it is appropriate to include x-ray in the relevant market for contract radiation sterilization services.

34. Customers currently do not view e-beam sterilization as a functional or economical substitute for gamma (or x-ray) sterilization for the majority of products. Nor do Steris or Sterigenics [redacted]. For this reason, there is little switching between the two sterilization methods.

35. [redacted] Neither of these estimates shows how much volume actually would switch in the face of a SSNIP. In fact, because of the limitations of e-beam, a SSNIP today would not induce customers to switch a significant volume of products from gamma sterilization to e-beam sterilization.

36. In the future, it is possible that, if contract gamma sterilization is more expensive or capacity constrained due to Cobalt 60 supply issues, there could be some switching to e-beam sterilization. Because of the possibility that contract e-beam sterilization services may become a competitive option for more contract gamma customers in the future, it may be appropriate to include contract e-beam services in the relevant product market.

37. Both x-ray and gamma sterilization services are suitable for the same high-density, heterogeneous products. X-ray sterilization services will likely be able to sterilize a number of products as well as, or better than, the gamma sterilization services these products rely on today, including: orthopedic implants, liquids, other dense products, impermeable packaging, and boxes of products that have varying densities. According to Synergy personnel, [redacted] Thus, Synergy's x-ray strategy was to take market share from gamma sterilization. Current gamma sterilization customers confirm that x-ray is a substitute for gamma.

EO Sterilization Is Not a Substitute for Radiation Sterilization Services

38. EO sterilization is properly excluded from the relevant product market. The technical differences between EO sterilization and gamma sterilization are substantial, and very few products can be cost effectively sterilized using both methods of sterilization. Accordingly, customers would not switch from radiation sterilization to EO in the face of SSNIP for contract radiation sterilization services. [redacted]

39. Unlike radiation sterilization methods, EO sterilizes by exposing products to a toxic gas that kills unwanted organisms. EO is a carcinogenic gas that is poisonous to humans. The EO sterilization process involves a number of steps, including placing the product in a chamber, filling the chamber with EO gas, degassing the chamber after sterilization, and aerating the product to remove or reduce EO residue on the product. EO sterilization requires that the design of products and packaging allow EO gas to move freely over material requiring sterilization. Thus, products must be packaged in permeable material and loaded in a configuration that allows the EO gas to reach all surfaces. The volume density and overall configuration of the load can limit gas exposure and removal after processing. The EO sterilization process also exposes products and packaging to a range of pressures at an elevated temperature, so products must be designed to withstand this environment. Even when EO could theoretically be used to sterilize some products, the process often takes significantly longer than other sterilization methods because products that have been exposed to EO must be quarantined for a period of days until all the gas has dissipated and no or acceptable levels of residue remain on the product.

In-House Sterilization Is Not a Viable Substitute for Most Customers

40. In-house gamma sterilization services are properly excluded from the relevant product market. Most customers

cannot use in-house gamma sterilization to meet any of their needs cost effectively, and customers do not rely on in-house gamma sterilization facilities to satisfy all of their requirements. A minimum of approximately [redacted] of gamma-sterilized product annually at a single production or distribution facility is required to justify moving their sterilization for that facility in-house. Generally, only large medical device manufacturers produce sufficient volumes at a single location to justify the large upfront investment and ongoing expenses of opening and operating an in-house gamma facility. Small customers are not capable of bringing gamma sterilization in-house economically, and no in-house sterilizer in the continental United States sells excess capacity to its competitors. Thus, only approximately 20% of gamma sterilization is performed in-house. Further, industry trends show that medical device manufacturers and other customers are shifting more of their sterilization needs to contract providers, rather than using more in-house sterilization.

41. There are substantial regulatory and practical barriers to establishing a gamma facility in the United States. Moreover, it is likely to become more difficult to justify establishing in-house gamma sterilization capabilities in the future because there are questions about the future availability and supply of Cobalt 60. [redacted]

42. Customers would not increase the volume of products sterilized with in-house gamma sterilization by an amount sufficient to make a SSNIP for all contract gamma sterilization services unprofitable. Even large customers that have in-house sterilization capabilities require contract gamma sterilization services as backup when their facilities are down, as well as contract services in areas where they do not produce enough product to justify an in-house facility. Further, even if some customers would switch some of their volume to in-house facilities in response to a SSNIP, a hypothetical monopolist could still profitably increase prices by price discriminating against the

majority of customers who cannot economically switch to in-house.

C.

The Market for Contract Gamma and X-ray Sterilization Services Sold to Targeted Customers

43. The anticompetitive effects of the Merger will be most significant in the market for contract gamma and x-ray sterilization services sold to customers that cannot economically or functionally switch affected products to e-beam sterilization. As Steris noted in a presentation to the FTC, [redacted]

44. [redacted] Thus, contract gamma sterilization providers can target and effectively price discriminate against customers that make products that cannot economically or functionally use any method of sterilization other than gamma radiation, charging them higher prices than customers that could cost-effectively use other means of sterilization.

45. While customers could switch some portion of products currently utilizing contract gamma sterilization services to e-beam sterilization, especially if future prices for contract gamma sterilization increase as a result of Cobalt 60 supply issues, that group is likely relatively small. For those products that cannot switch from contract gamma sterilization services—e.g., dense medical devices, products that contain liquid, and products that are sterilized efficiently in large containers—e-beam sterilization providers will not constrain the prices of contract gamma

sterilization service providers. Nor will the possibility of utilizing an in-house sterilization facility constrain contract gamma sterilization prices. Only contract x-ray sterilization services would provide competition against the contract gamma services that these customers must use today. Thus, even if a SSNIP to *all* contract gamma sterilization and x-ray customers would be unprofitable because some customers would switch to e-beam sterilization, a hypothetical monopolist of contract radiation sterilization services could profitably impose a SSNIP on targeted customers that cannot switch.

IV.

RELEVANT GEOGRAPHIC MARKETS

46. The relevant geographic markets in which to analyze the competitive effects of the Merger are the areas within approximately [redacted] miles of each of the [redacted] locations where Synergy planned to build an x-ray sterilization plant: [redacted]

47. Contract radiation sterilization providers compete for customers generally located within approximately 500 miles of their plants. Contract radiation sterilization customers are located throughout the country, but most strongly prefer to purchase services in the areas around their manufacturing and distribution sites in order to minimize transportation costs and turnaround times. Transportation costs can be a significant part of the total cost of contract sterilization, and the delay and added cost of shipping a product away from a company's supply chain and back again can create significant logistical issues and become cost prohibitive. However, some customers may be able to use sterilization providers that are beyond this radius if the provider has a facility near its regular shipping routes. Contract radiation sterilization companies therefore locate their plants near the customers for which they expect to compete and evaluate competition and set prices regionally.

48. [redacted]

[redacted]

49. In the first phase of its entry into the United States, Synergy planned to build [redacted]

50. Synergy's [redacted] x-ray sterilization facility would compete directly with Steris's [redacted] facilities. Synergy identified potential customers for this facility throughout [redacted] Synergy planned to open its [redacted] x-ray plant in [redacted].

51. Synergy's [redacted] x-ray facility was also set to open in [redacted]. This facility, which would compete with Steris's [redacted] gamma plant and Sterigenics' [redacted] gamma facility, planned to target key customers throughout [redacted].

52. In the second phase of its rollout, Synergy planned to build additional x-ray sterilization facilities in [redacted] in [redacted]. Synergy's [redacted] x-ray plant would compete with Steris's [redacted] gamma facilities. Its [redacted] x-ray facility would compete with Steris's [redacted] gamma plant. And Synergy's [redacted] facility would compete with Steris's gamma plants in [redacted]

53. After building all [redacted] x-ray facilities, Synergy would have a plant within 500 miles of the supply chain of the vast majority of U.S. sterilization customers.

V.

MARKET STRUCTURE

54. Steris and Sterigenics are currently the only providers of contract gamma sterilization services and the leading providers of radiation sterilization services. When the proposed Merger was announced, Synergy had begun implementing its strategy to bring a disruptive product to the U.S. contract sterilization market. Synergy's entry into the United States with contract x-ray sterilization services would compete directly with Steris and Sterigenics' contract gamma businesses, and would produce substantial consumer benefits that no other market participant or potential entrant could replicate.

A.

Market Participants

Contract Gamma Sterilization Services

55. Steris has twelve gamma sterilization facilities in the United States: Ontario, California; Libertyville, Illinois (three separate facilities); Northborough, Massachusetts; Wippany, New Jersey; Chester, New York; Groveport, Ohio; Vega Alta, Puerto Rico; Spartanburg, South Carolina; El Paso, Texas; and Sandy, Utah. Steris achieved $[redacted] in revenues from contract sterilization services in 2014, with approximately $[redacted] coming from its U.S. contract gamma sterilization operations.

56. Sterigenics, the largest contract sterilization services provider in the world, and the only other U.S. contract gamma sterilization provider, is headquartered in Oak Brook, Illinois. It has fourteen U.S. gamma sterilization facilities located in the United States: West Memphis, Arkansas; Corona, California; Gilroy, California; Hayward, California; Tustin, California; Gurnee, Illinois; Schaumburg, Illinois; Rockaway, New Jersey; Salem, New Jersey; Charlotte, North Carolina; Haw River, North Carolina; Westerville, Ohio; Fort Worth, Texas; and Mulberry, Florida. In 2014, Sterigenics earned an estimated $[redacted] from its U.S. contract gamma sterilization facilities.

Contract X-ray Sterilization Services

57. Synergy is the third major global provider of contract sterilization services, but does not offer contract gamma sterilization services in the United States. Synergy had a well-developed strategy to enter the United States with contract x-ray sterilization services that would have competed with contract gamma sterilization services. Outside of the United States, Synergy already owns and operates a facility in Däniken, Switzerland, that performs both gamma and x-ray sterilization services.

58. Prior to the proposed Merger, Synergy expected to win a [redacted] share of U.S. contract gamma sterilization services revenue. Synergy expected that its first [redacted] x-ray facilities in the [redacted] areas would earn a combined $[redacted] in [redacted] and $[redacted] in [redacted], by which time all [redacted] of its facilities would be operational. Synergy forecasted its annual x-ray revenues to reach $[redacted].

59. Some small e-beam sterilization services providers, like [redacted], may attempt to provide x-ray sterilization services by modifying their e-beam machines, but these firms will not be able to compete with gamma sterilization services because, among other reasons, their e-beam machines are incapable of producing the power and throughput of gamma sterilization or Synergy's x-ray sterilization. Instead, they will be relegated to small-scale x-ray sterilization for a limited group of customers.

Contract E-beam Sterilization Services

60. Synergy is the leading provider of contract e-beam sterilization services in the United States with e-beam facilities located in San Diego, California; Denver, Colorado; Saxonburg, Pennsylvania; and Lima, Ohio. Synergy earned $[redacted] from its U.S. e-beam contract sterilization services in 2014. [redacted]

61. Sterigenics operates an e-beam facility in San Diego, California, that generated approximately $[redacted] in sterilization sales in 2014. Sterigenics also operates a facility in Bridgeport, New Jersey, that is dedicated to [redacted] The Bridgeport facility generated $[redacted] in 2014.

62. Steris does not currently provide e-beam sterilization services in the United States [redacted].

63. There are several smaller providers of e-beam sterilization in the United States that operate one or two locations.

- [redacted] headquartered in [redacted] has two contract e-beam sterilization services facilities, one in [redacted] and the other in [redacted]. Medical device customers are skeptical of working with [redacted] for sterilization, however, citing a lack of technical expertise. Steris characterizes [redacted] as being limited to industrial irradiation of wire, cable, and tubing. In 2014, [redacted] earned approximately $[redacted] in revenue from e-beam sterilization services.

- [redacted] operates a contract sterilization facility in [redacted]. In 2014, the company earned approximately $[redacted] in revenue from contract e-beam sterilization services. [redacted] lacks the expertise and efficiency of Steris, Sterigenics, and Synergy.

- [redacted] is a [redacted] company that opened a contract e-beam sterilization facility in [redacted] in [redacted]. In 2014, the company's revenues from the [redacted] facility approached $[redacted], of which approximately $[redacted] were attributable to [redacted] sterilization. [redacted] serves mostly [redacted] because [redacted] question its technical expertise and experience with their products. Even though Steris has [redacted] gamma sterilization facilities serving the area, [redacted].

- [redacted] is based in [redacted] where the company plans to open a facility to provide contract e-beam sterilization services beginning in [redacted]. The company has been working for [redacted] years to establish that facility but has no sales at this time.

B.

Market Concentration

64. Each relevant market is currently highly concentrated under the Horizontal Merger Guidelines and relevant case law, and Synergy's U.S. x-ray strategy would have resulted in substantial de-concentration and procompetitive effects in each relevant market.

65. The Horizontal Merger Guidelines and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). HHI levels are calculated by totaling the squares of the market shares of each firm in the relevant market. Changes in HHI levels are the difference between pre- and post-merger HHI levels. Under the Horizontal Merger Guidelines, a relevant market is "highly concentrated" if it has an HHI level of 2,500 or more. In highly concentrated markets, the Horizontal Merger Guidelines view changes in the HHI level of 200 points or more as evidence

that a merger should be presumed likely to create or enhance market power, unless Respondents rebut this presumption by submitting persuasive evidence showing the merger is unlikely to enhance market power.

66. In the approximately $[redacted] Midwest market for contract radiation sterilization services, the current HHI is over [redacted]. The [redacted] other relevant markets where Synergy plans to establish x-ray sterilization facilities, [redacted] are also highly concentrated, with HHIs of more than [redacted] respectively.

67. Each relevant market for contract gamma and x-ray sterilization services sold to targeted customers is also highly concentrated. There are only two suppliers of contract gamma sterilization services today, and absent the Merger Synergy's x-ray sterilization would provide a third alternative. The high market concentration for these targeted customers is evidenced by the high concentration for contract gamma sterilization services: in the $[redacted] contract gamma sterilization business in the [redacted] the current HHI level is approximately [redacted]. In the other [redacted] areas where Synergy plans to enter, concentration levels are even higher, ranging from [redacted]. The market shares and concentration levels in gamma markets are a good proxy for the market shares and concentration in gamma/x-ray markets for targeted customers.

VI.

ANTICOMPETITIVE EFFECTS

68. The anticompetitive effects of the Merger arise from the elimination of the likely future competition from Synergy's deployment of x-ray sterilization in the United States. Steris and Sterigenics are two of the three significant contract radiation sterilization providers and the only two contract gamma providers in the United States in each of the geographic markets at issue. Synergy, as the only major worldwide sterilization company without a gamma offering in the United States, was on the verge of entering with what it considered to be a disruptive sterilization

technology, x-ray, that would allow it to compete directly for Steris and Sterigenics' customers.

69. By October 2014, just days before the announcement of the Merger, Synergy determined that it would [redacted]. Synergy envisioned building a total of [redacted] sites and achieving broad mainstream adoption of x-ray sterilization technology by [redacted].

70. Synergy also considered the competitive impact its entry would have on U.S. gamma sterilization competitors, and concluded that Steris and Sterigenics would [redacted] With the proposed acquisition, there will be no [redacted], nor will this promising sterilization technology be available to U.S. sterilization customers.

A.

Synergy Was Entering the Relevant Markets Prior to the Merger

The Early Stages of Synergy's U.S. X-ray Plan

71. In 2012, months after Synergy's acquisition of the x-ray facility in Däniken, Switzerland, the company's founder and CEO, Dr. Richard Steeves, proposed a plan to launch x-ray sterilization in the United States to [redacted] This plan, Dr. Steeves explained in an April 2013 Synergy leadership conference, [redacted]

[redacted]

72. In May 2013, Dr. Steeves told Synergy's board of directors (the "PLC Board") that the x-ray launch in the United States [redacted] The following month, [redacted] Before Mr. McLean had even started his job, Dr. Steeves told him that [redacted] and that developing a U.S. x-ray business [redacted]

The X-ray Plan Ramp-Up

73. In 2014, the Synergy x-ray team took the project from the conceptual stage to the planning and implementation phase.

74. The team worked with [redacted] to configure equipment to be used and, on September 15, 2014, reached an agreement with [redacted] for the exclusive right to [redacted] x-ray technology in the United States. [redacted]

75. The x-ray team also worked to cultivate customer interest to support the business case and procured letters of interest ("LOIs") from many customers in August and September 2014. Key customers [redacted] all submitted LOIs, as did T[redacted]

76. The team prepared a business case for [redacted] On September 17, 2014, Synergy's SEB [redacted] There are seven members of the SEB: Synergy's CEO (Dr. Steeves); Synergy's COO (Adrian Coward); Synergy's Group Finance Director (Gavin Hill); Synergy's Group Company Secretary; CEO of the AST business (Mr. McLean); an executive from Synergy's healthcare services division; and a human resources executive. [redacted] The details of the strategy presented to the SEB [redacted] This presentation:

- Sought [redacted] and [redacted]
- Identified [redacted]
- Explained that Synergy will target [redacted]
- Stated that [redacted] would be to [redacted] and [redacted]
- Described [redacted] to be to [redacted] and [redacted]

77. The same day, Mr. McLean emailed the x-ray team that the SEB had [redacted]

[redacted]

[redacted]

78. The day after the SEB meeting, September 18, 2014, Synergy's PLC Board met and discussed the U.S. x-ray strategy. Dr. Steeves, Mr. Coward, and Mr. Hill, all members of the SEB, are three of the seven members of the PLC Board; three of the four remaining members are outside directors, and one is the Non-Executive Chairman of the PLC Board. Mr. Coward explained that Synergy [redacted] He requested that the PLC Board [redacted] Dr. Steeves also explained to his fellow PLC Board members that, [redacted] The PLC Board approved [redacted]

79. After the September SEB and PLC Board meetings, the U.S. x-ray project was renamed [redacted] and implementation of the x-ray plan began. Synergy expanded the size of the team to [redacted] employees, including personnel from operations, engineering, accounting, and maintenance to assist through construction and start-up of operations. On October 7, 2014, Mr. McLean brought the team together for [redacted] The slide presentation that

- [redacted]
- [redacted]

The slides also cautioned that,

80. The Merger of Synergy and Steris was announced less than a week later, on October 13, 2014.

Synergy's Actions Post-Merger Announcement

81. In the weeks following the announcement of the deal, Synergy recognized that As Mr. Tyranski wrote a week after he learned of the transaction, The Synergy x-ray team also recognized that Thus, Synergy but acknowledging that the

82. The PLC Board, in its November 2014 meeting,

83. Synergy's management continued to believe that and that Synergy's senior management expected to while acknowledging that

84. The team leader created a

detailed timeline describing each step needed to begin operations [redacted] the new date set for opening the first facility after the rollout plan was [redacted] The agreement with [redacted] reached on [redacted] was memorialized in writing and executed on [redacted] giving Synergy [redacted] was pushed back from [redacted] to [redacted] to accommodate the anticipated closing of the Steris transaction.

85. The x-ray strategy continued to have the open support of Synergy leadership. The plan to enter the United States with [redacted] followed on by [redacted] was incorporated into the FY 2016 Strategic Plan for the AST business. In a November 4, 2014, statement to investors attached to a security filing, Synergy reported:

> We are pleased to announce that we have signed an agreement with IBA for X-ray technology to be deployed in the United States, supplemented by our in-house knowledge and expertise. Our X-ray services are now the fastest growing of our AST technologies, driven by the higher levels of quality, favourable economics and faster processing speed, which helps our customers to reduce their working inventories. Most recently the first FDA approval of a Class III medical device was achieved by one of our major global customer partners, paving the way for further conversions.

Synergy's Actions After the FTC Issued Second Requests

86. On January 9, 2015, the FTC issued Second Requests to Respondents specifically requesting documents and information relating to potential competition between their x-ray and gamma sterilization businesses.

87. At a February 19, 2015, meeting with FTC staff, Mr. McLean announced that [redacted]

88. On February 24, 2015, Mr. McLean executed a declaration to evidence this [redacted] using an alleged [redacted] as a pretext for doing so. As support for that [redacted], Mr. McLean attached copies of e-mails he personally received just days before. That evening, Mr. Tyranski wrote the x-ray team leaders: [redacted] Mr. Tyranski planned to [redacted] The next day, they informed [redacted] that Synergy would be [redacted] Peter Grief, a [redacted] team member, recognized that it was [redacted] but he was [redacted]

B.

Synergy's U.S. X-ray Entry Would Result in Substantial Procompetitive Effects

Synergy's Entry Would Have a Significant De-concentrating Effect on the Relevant Markets

89. Synergy expected its x-ray entry would have a large and lasting competitive impact. Synergy expected to win a [redacted] share of all of the contract gamma sterilization business of Steris and Sterigenics in the United States.

90. Synergy projected approximately $[redacted] in sales for its [redacted] x-ray facility in [redacted], increasing to approximately $[redacted] annually by [redacted]. Synergy planned to target [redacted] among others, all of whom have expressed interest in converting product to x-ray and who are currently Steris and/or Sterigenics customers.

91. To provide a sense of the magnitude of the de-concentrating effect that Synergy's x-ray entry would have produced, it is informative to calculate future nationwide HHI levels with and without the Merger based on Synergy's ordinary course documents, even though the markets here are local.

Synergy's x-ray entry, at a minimum, would reduce the HHI for U.S. contract radiation sterilization by more than [redacted] points. For contract gamma sterilization, Synergy's x-ray entry, at a minimum, would reduce the HHI by more than [redacted] points.

92. To provide a sense of the magnitude of the de-concentrating effect that Synergy's x-ray entry would have produced on a local level, it is informative to calculate future HHI levels for the [redacted] facility, which would have opened in [redacted]. Based on Synergy's revenue projections, in [redacted], the HHI would have decreased, at a minimum, by more than [redacted] points in the market for contract radiation services and by at least [redacted] points in the contract gamma/x-ray market.

93. [redacted] documents confirms that Synergy's [redacted]

- [redacted]
- [redacted]

Synergy's X-ray Entry Would Have Created Substantial Price and Non-Price Benefits for Customers

94. Synergy expected to enter the highly concentrated relevant markets and win the business of the incumbents' highest value customers. Synergy knew that, in response to its entry, Steris and Sterigenics would vigorously defend their business and fight to keep their core gamma customers by, among other things, lowering prices.

95. Synergy designed its x-ray strategy to [redacted] In response to its entry, Synergy expected Steris and Sterigenics to [redacted] In the face of this competitor response, which

Synergy described as [redacted] Synergy planned to set its x-ray rates at a level that would compete directly with gamma sterilization. Synergy also planned to exploit [redacted] and [redacted]

96. Synergy officials called the U.S. x-ray strategy [redacted] and anticipated a [redacted]. Even after Respondents announced the Merger, Synergy executives continued to tout x-ray's competitive potential. In a November 2014 email, Synergy's CEO told Steris's CEO that [redacted]

97. Mr. Tyranski, Synergy's AST President, testified that the [redacted] for Synergy's U.S. x-ray strategy was [redacted], which Synergy planned to [redacted]. He acknowledged that [redacted] would be the [redacted] for Synergy's U.S. x-ray business. Similarly, Synergy's AST Business Analyst testified that [redacted] He explained that Synergy [redacted] because [redacted]

98. Dr. Steeves testified that Synergy [redacted]

[redacted]

[redacted]

Dr. Steeves concluded that [redacted] given Synergy's goal of [redacted]

99. Customers, including [redacted], share Synergy's expectation that its x-ray entry would provide them with an alternative to contracting with Steris and Sterigenics for gamma sterilization services. Customers believe that Synergy's x-ray services would compete directly with Steris and Sterigenics' gamma sterilization offerings and could be a potentially superior alternative to gamma sterilization. Moreover, many customers state that they would consider validating new products for x-ray sterilization and switching a portion of their products that are currently sterilized with contract gamma radiation to Synergy's x-ray sterilization when it becomes available.

100. Some customers are concerned that, because Sterigenics controls the limited supply of Cobalt 60, their gamma sterilization prices may rise significantly in the future. Thus, these customers are interested in moving their business to x-ray sterilization if Synergy enters, to protect themselves from these anticipated gamma sterilization price increases.

101. Customers anticipate that their purchases of x-ray sterilization services will grow incrementally. Synergy understood that [redacted] and therefore expected [redacted] Despite the time and costs required to switch to x-ray, many customers state that they are willing to switch current and/or future products due to the benefits of contract x-ray sterilization. In fact, even though Synergy has not yet opened a facility in the United States, J&J already invested $[redacted] to validate its Class III medical device,

Surgicel, with Synergy's x-ray sterilization services. The FDA approved x-ray sterilization for Surgicel in September 2014.

102. Other companies, including [redacted], have also tested sample products at Däniken to determine the feasibility and effects of using x-ray sterilization on their products, and several more are interested in doing so. [redacted] and others have been in recent discussions with Synergy regarding the possibility of validating their FDA Class III products at Synergy's Däniken, Switzerland, x-ray facility.

103. Numerous significant purchasers of contract gamma sterilization services have expressed concern that, if Respondents consummate the Merger, the substantial competitive benefits of Synergy's U.S. x-ray entry will never materialize. Customers have explained that having the credible threat of switching to an independent Synergy's x-ray sterilization services would provide them greater bargaining leverage when negotiating contract gamma sterilization prices with Steris and Sterigenics. Even more valuable to these customers is the prospect of a sterilization option that promises to be a superior technology, with better performance, greater efficiency, and possibly lower prices. Customers fear that, if the Merger closes, terminating Synergy's independent entry with x-ray sterilization services will deprive them of these substantial price and non-price benefits.

104. Customers have also expressed concern that Steris likely has significantly less incentive to bring competitive x-ray sterilization services to the United States than an independent Synergy. Moreover, even if the combined company were to proceed with some form of U.S. x-ray rollout, customers would lose the benefits of having an independent alternative to Steris's gamma sterilization services.

VII.

ENTRY WILL NOT PREVENT THE MERGER'S COMPETITIVE HARM

105. Neither new entry nor expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger. Entry by a new gamma or e-beam sterilization

provider would not prevent the harm created by Steris acquiring Synergy and preventing Synergy's independent entry into the U.S. x-ray sterilization business. No other firm could enter the United States with x-ray sterilization services that would recreate the benefits that Synergy's entry would have provided.

A.

Barriers to Entry for X-ray Sterilization Services

Synergy Has X-ray Entry Advantages Unmatched by Any Other Firm

106. Synergy is the firm best positioned to enter the relevant markets with x-ray sterilization services. Synergy's desire to be a global supplier of contract sterilization services provides it with an incentive to enter the United States with x-ray sterilization services that no other firm in the world shares. Today, Synergy is small player in the U.S. contract radiation sterilization services business because the only radiation sterilization that it provides is e-beam, so it cannot compete for the vast majority of customers' business. X-ray is the only technology that can compete directly for all gamma sterilization customers, especially those that need to sterilize large volumes of dense products.

107. At the time Synergy executed the Merger Agreement, it had already devoted over two years to its U.S. x-ray entry strategy, and was in the implementation phase. It acquired the Däniken, Switzerland, x-ray sterilization facility in 2012, and has operated it for more than two years, developing an expertise with x-ray sterilization on a commercial scale. Synergy viewed the Däniken facility as [redacted] For well over a year, customers had been sending products to Däniken for x-ray testing so they could validate products for sterilization at the U.S. x-ray facilities as soon as they became available.

108. At the time of the Merger Agreement, Synergy had also secured a unique technology advantage: exclusive access to IBA's x-ray machines. No other x-ray machine available today can economically achieve the power generation and throughput capabilities of IBA's machines and compete effectively with

contract gamma sterilization services. In fact, Synergy's Däniken facility manager testified that [redacted] He further estimated that [redacted] five to fifteen years to develop technology that could achieve what [redacted] machines can do today. At the time of the Merger announcement, [redacted] had agreed [redacted]. Synergy viewed that [redacted]

109. No potential entrant could replicate the substantial benefits that Synergy's entry into the United States with x-ray sterilization services would have provided. No potential x-ray entrant has the ability to compete as effectively as Synergy would have. In order to enter the United States and compete as effectively as Synergy, a potential entrant would need to win the business of large medical device manufacturers that prefer to sterilize most of their products with the three major sterilization suppliers. Steris, Sterigenics, and Synergy have the experience and scale and scope of operations to meet the needs of large medical device manufacturers effectively and economically. No potential entrant has the reputation or size of operations that these large customers require. Nor does any potential entrant have access to an x-ray plant like Synergy's Däniken facility, where it could test and validate products for potential customers. In addition, no company has an agreement with IBA to use its x-ray equipment, and [redacted] Finally, any firm seeking to enter the United States with x-ray sterilization services would be two or more years behind where Synergy was at the time it executed the Merger Agreement with Steris.

110. No firm is currently working to enter the United States with x-ray sterilization services that could compete as effectively as Synergy. [redacted]

[redacted] Some companies have contemplated converting low-power e-beam sterilization machines into low-power x-ray sterilization machines; however, these machines could not compete effectively or economically with contract gamma sterilization as Synergy planned to do with its high-power x-ray machines. Low-power x-ray machines, like e-beam machines, lack the penetration and throughput capabilities to sterilize large volumes of dense products. Only gamma sterilization and high-power x-ray sterilization services can sterilize these products economically and effectively.

B.

Barriers to Entry for Gamma Sterilization Services

111. Entry by establishing a gamma sterilization plant is extraordinarily difficult and time consuming, and is very unlikely to occur in a timely fashion, if ever. Despite the growth in demand for gamma sterilization services, no contract provider has built a new gamma sterilization facility in the United States in over fifteen years. The barriers to entry for a gamma sterilization facility are significant. Establishment of a commercial-scale gamma sterilization business requires a substantial sunk investment, significant technical expertise, and regulatory authorizations that are difficult or impossible to obtain. Strict regulations govern gamma sterilization facilities because of the safety and environmental risks associated with storage of large volumes of radioactive material, and future legislative restrictions threaten to prohibit opening a new gamma facility in the United States altogether.

112. It is expensive to build and operate a gamma sterilization facility. The initial capital investment to build a single plant is between [redacted]. Further, to compete effectively for gamma sterilization business, an entrant would likely have to establish at least two facilities to be able to ensure that services are not interrupted during routine or unexpected shutdown periods.

113. Even more significant than the capital investment required are the regulatory barriers to entry. Cobalt 60 is an unsafe material that poses considerable environmental and health risks,

so its procurement, handling, and storage are heavily regulated. The Nuclear Regulatory Commission and the International Atomic Energy Agency regulate the design of gamma sterilization facilities and the shipping of Cobalt 60. The Environmental Protection Agency and state agencies also regulate environmental safety aspects of handling and storing Cobalt 60 at gamma sterilization facilities. Because of this strict regulatory regime, building and licensing a gamma sterilization facility can take years, if future plant construction will be permitted at all.

114. In addition to the high cost and challenging regulatory environment, the future of gamma sterilization in general is uncertain. According to the CEO of Synergy's AST business, [redacted] The future availability of Cobalt 60 is also unpredictable, and the prices for this essential input are expected to increase. A new gamma sterilization entrant would have to secure Cobalt 60 from Sterigenics, with which it would also have to compete. The many obstacles to gamma sterilization entry contributed to Synergy's decision to pursue entry with x-ray technology, rather than gamma, to target the U.S. gamma sterilization business.

C.

Barriers to Entry for E-beam Sterilization Services

115. E-beam sterilization entry is time-consuming, expensive, difficult, and would not prevent the competitive harm from the proposed transaction. It takes [redacted] to plan and open an e-beam sterilization facility, and may take significantly longer. For example, one firm seeking to open [redacted] After building a sterilization plant, a potential entrant would need to secure customers willing to use its facility. Most customers need to test and validate their products with a potential e-beam sterilization provider before committing to use its services. It is difficult, and sometimes impossible, to conduct such testing before an e-beam facility is operational. Opening a new e-beam sterilization facility typically costs [redacted]

[redacted] including the costs for obtaining a building, a conveyor system, an electron accelerator, and required shielding equipment. Customers, even smaller localized ones, generally require contract e-beam sterilization providers to offer backup facilities for times when an e-beam machine is unavailable, whether for maintenance or in case of mechanical failure. Thus, an entrant would likely have to build a facility with multiple e-beam machines or multiple facilities to enter and compete effectively for any significant amount of business.

116. Even if it were possible to enter the market in a timely fashion with e-beam sterilization services, such entry would not prevent the anticompetitive harm from the Merger. The evidence shows that there is a large universe of contract gamma sterilization customers that cannot switch to e-beam, but would switch to x-ray if it were available. E-beam entry would not affect the ability of contract gamma or x-ray sterilization providers to target these customers for price increases. Moreover, there is no evidence that any small fringe e-beam sterilization firm, or a *de novo* entrant, is likely to expand or enter the market in a significant manner. As Steris explains:

As a result, these fringe providers have been unable to grow beyond a tiny share, collectively, of contract radiation sterilization services.

117. The only company likely to enter into the e-beam sterilization business in the future and have a significant market impact is [redacted]

VIII.

EFFICIENCIES WILL NOT COUNTERACT THE MERGER'S COMPETITIVE HARM

118. Extraordinary merger-specific efficiencies are necessary to outweigh the Merger's likely significant harm to competition in the relevant markets. Respondents cannot demonstrate cognizable efficiencies sufficient to outweigh the substantial competitive harm likely to result from the Merger.

119. The cost savings that Respondents claim will result are not verifiable, nor are they merger-specific or likely to be passed on to customers. According to the executive tasked with evaluating potential efficiencies, Steris' purported cost savings figures [redacted]

IX.

VIOLATION

COUNT I—ILLEGAL AGREEMENT

120. The allegations of Paragraphs 1 through 119 above are incorporated by reference as though fully set forth.

121. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II—ILLEGAL ACQUISITION

122. The allegations of Paragraphs 1 through 119 above are incorporated by reference as though fully set forth.

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

NOTICE

Notice is hereby given to the Respondents that the twenty-eighth day of October, 2015, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings. Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.2l(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.3l(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such services as Steris and Synergy were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between Steris and Synergy that combines their businesses, except as may be approved by the Commission.

3. A requirement that, for a period of time, Steris and Synergy provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Synergy as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-eighth day of May, 2015.

By the Commission.

ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On October 7, 2015, this matter was withdrawn from adjudication pursuant to Rule 3.26(c) of the Commission Rules of Practice, 16 C.F.R. § 3.26(c). The Commission has now determined to return this matter to adjudication for the sole purpose of dismissing the Complaint. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, returned to adjudication;

and

IT IS FURTHER ORDERED that the Complaint in this matter be, and it hereby is, dismissed.

By the Commission.

Statement of the Commission

We have voted unanimously today to end the administrative litigation regarding Steris Corporation's acquisition of Synergy Health PLC. Although we still have competitive concerns about this acquisition, we have concluded that further adjudication would not serve the public interest.

This matter involves the merger between Steris and Synergy, the second and third largest sterilization companies in the world. Until recently, Synergy sought to introduce emerging x-ray sterilization technology in the United States to compete with Steris and other providers of sterilization services. The Commission investigated whether the transaction would harm competition by terminating those entry plans.

On May 28, 2015, the Commission voted unanimously to issue an administrative complaint alleging that the transaction violated Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act because it was likely to substantially lessen future competition for contract radiation sterilization services in certain regional markets in the United States. The following day, the Commission asked the United States District Court for the Northern District of Ohio to enjoin the transaction pending the conclusion of the administrative litigation. On September 24, following a hearing, the district court denied our request for injunctive relief. We elected not to appeal that ruling. On October 1, Steris made a motion to withdraw this matter from administrative litigation and to terminate it.[1]

In evaluating whether to dismiss administrative litigation following the denial of a preliminary injunction, the Commission considers the following factors: the district court's findings, any new evidence developed during the preliminary injunction proceeding, whether the transaction raises important issues

[1] Under Commission Rule 3.26, upon such a motion, an administrative case is automatically removed from adjudication pending a determination by the Commission about whether to proceed with the administrative proceeding, unless Complaint Counsel argues that the motion is procedurally improper. 16 C.F.R. § 3.26(c). Here, Complaint Counsel did not raise any procedural objection.

requiring resolution, the costs and benefits of further litigation, and any other matter that bears on the public interest.[2] Although we still have reason to believe that Steris's acquisition of Synergy is likely to have anticompetitive effects, after considering these factors, we have decided that, on balance, it is appropriate to dismiss this case.

Foremost in our thinking is the fact that the district court's denial of preliminary relief would render it difficult for us to craft meaningful relief were we to find the merger unlawful at the conclusion of the administrative proceeding. In particular, because Steris currently provides contract sterilization services using an alternative technology, gamma radiation, the merged company is unlikely to continue Synergy's efforts to bring x-ray sterilization technology into the United States market. Thus, even if the transaction were found to be anticompetitive following an administrative hearing, it is unlikely that there would be any asset or business to divest that would recreate the competitive environment that likely would have emerged in the absence of the merger, at least for the foreseeable future.

This inability to devise meaningful relief largely negates the potential benefits of continuing the administrative litigation, whereas the costs remain substantial. We therefore conclude that the public interest warrants terminating the administrative litigation.

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[2] Fed. Trade Comm'n, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39741 (Aug. 3, 1995), *available at* https://www.ftc.gov/sites/default/files/documents/federal_register_notices/administrative-litigation-following-denial-preliminary-injunction-policy-statement/950803administrativelitigation.pdf. The Commission recently affirmed that it will continue to consider these factors. *See* Fed. Trade Comm'n, Revisions to Rules of Practice, 80 Fed. Reg. 15157, 15158 (Mar. 23, 2015), *available at* https://www ftc.gov/system/files/documents/federal_register_notices/2015/03/150323rulespracticefrn.pdf.

Complaint

IN THE MATTER OF

NATIONAL ASSOCIATION OF ANIMAL BREEDERS, INC.

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

Docket C-4558; File No. 141 0215
Complaint, November 02, 2015 – Decision, November 02, 2015

The complaint alleges that National Association of Animal Breeders, Inc. (hereinafter "NAAB") acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members. NAAB is a non-profit corporation of animal breeders, with about twenty-four regular members, and about twenty-seven non-voting associate members. Many of NAAB's members are organizations that are in the business of artificial insemination. In order to become a member of the NAAB, organizations must agree to and operate under their code of ethics. NAAB restrained competition by adopting and maintaining provisions in its Code of Ethics that restrain its members from naming competitors in printed materials that contain certain information about the competitors, and disclosing or publicizing prices of bulls purchased or sold. The consent order requires NAAB to cease and desist from restraining its members from naming members or other competitors when making statements comparing the products and services of a member with the products and services of any other member or competitor, and publicizing or disclosing price information relating to the purchase or sale of animals.

Participants

For the *Commission: Armando Irizarry, and Karen Mills.*

For the *Respondent: Gregory J. Commins Jr., BakerHostetler.*

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 National Association of Animal Breeders, Inc. ("Respondent" or "NAAB"), 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:

RESPONDENT

1. Respondent National Association of Animal Breeders, Inc. is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Missouri, with its office and principal place of business located at 401 Bernadette Drive, Columbia, Missouri 65203.

2. Respondent is a trade association of animal breeders, with about twenty-four regular members, and about twenty-seven non-voting associate members. Many of Respondent's members are organizations in the business of collecting, processing, marketing and selling dairy and beef cattle semen for artificial insemination ("AI"). Members include small, family-owned breeding operations, cooperatives, and multinational corporations. 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 AI organizations.

3. Respondent's members have market power in the market for bull semen used to inseminate dairy cows in the United States. Respondent's members account for over ninety percent of the dairy cattle semen sales in the United States.

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. 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.

NATURE OF THE CASE

6. Respondent maintains a Code of Ethics applicable to the commercial activities of its members. Respondent's bylaws require that members comply with the Code of Ethics.

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 through its Code of Ethics the ability of its members to disclose truthful and non-deceptive information and to advertise by comparing their products to the products of other members. Specifically, Respondent's Code of Ethics contains the following provisions:

- "Member competitors will not be named in printed material comparing averages between members."

- "The purchase price of sires, purchased at private treaty, by NAAB members shall not be disclosed by the Buyer, and the Seller shall be requested not to quote the selling price. Also, prices of bulls purchased at public auction by AI organizations shall not be quoted in their printed statements, advertising, and/or publicity material."

8. Respondent's members comply with the Code of Ethics. Attachments A, B, and C contain examples of marketing materials prepared by NAAB members that comply with the provision requiring that "[m]ember competitors will not be named in printed material comparing averages between members."

9. Respondent established a process for receiving complaints about and resolving alleged violations of the Code of Ethics, including by allowing its members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

VIOLATION CHARGED

10. The purpose, effects, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs

6 through 9 has been and is to restrain competition unreasonably and to injure consumers by restricting the disclosure of truthful and non-deceptive information, by restricting comparative advertising among AI organizations, and by depriving consumers and others of the benefits of free and open competition among AI organizations.

11. The combination, agreement, acts and practices alleged in Paragraphs 6 through 9 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 second day of November, 2015, issues its Complaint against Respondent.

By the Commission.

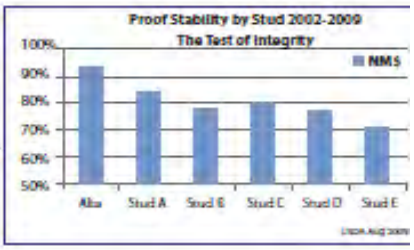
Attachment A

Alta Genetics Souvenir Program for its 2011 Wisconsin Showcase, May 2011. Article on page 4 contains chart comparing proof stability among AI firms (*i.e.*, studs), but does not name Alta Genetics' competitors.

Complaint

The Pride of Program Integrity

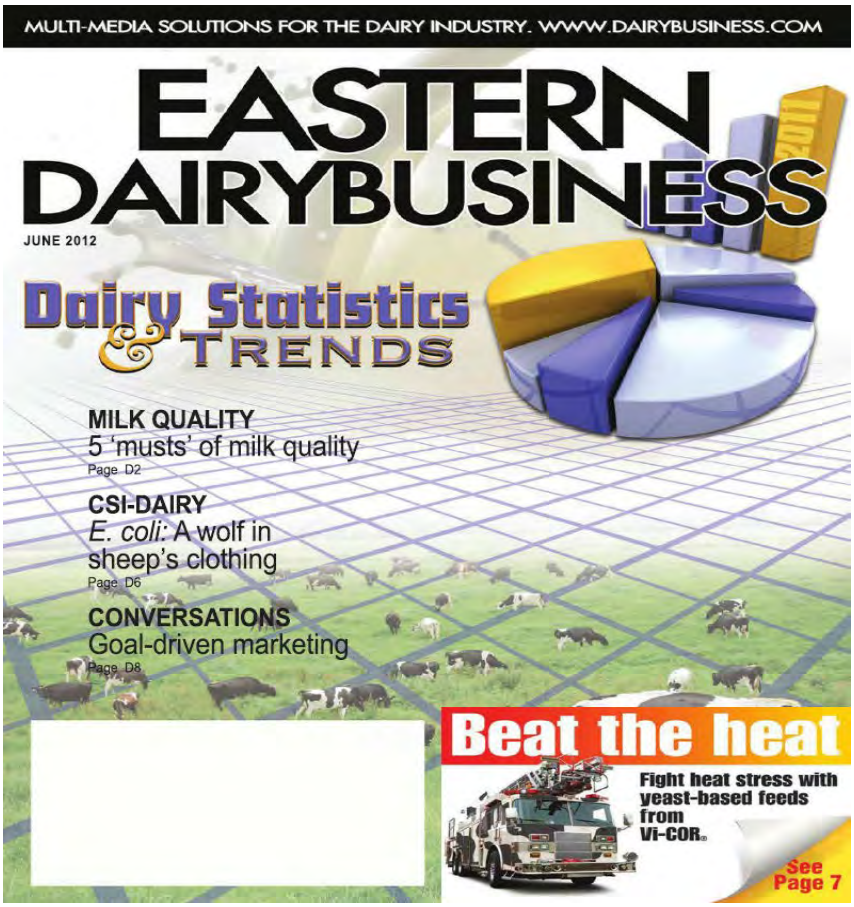
Compared to traditional Progeny Testing programs, AltaAdvantage® is anything but the norm. The Advantage® program combines strict testing standards, large contemporary groups and commercial testing environments – to provide the dairy industry with the most accurate sire proofs ever.



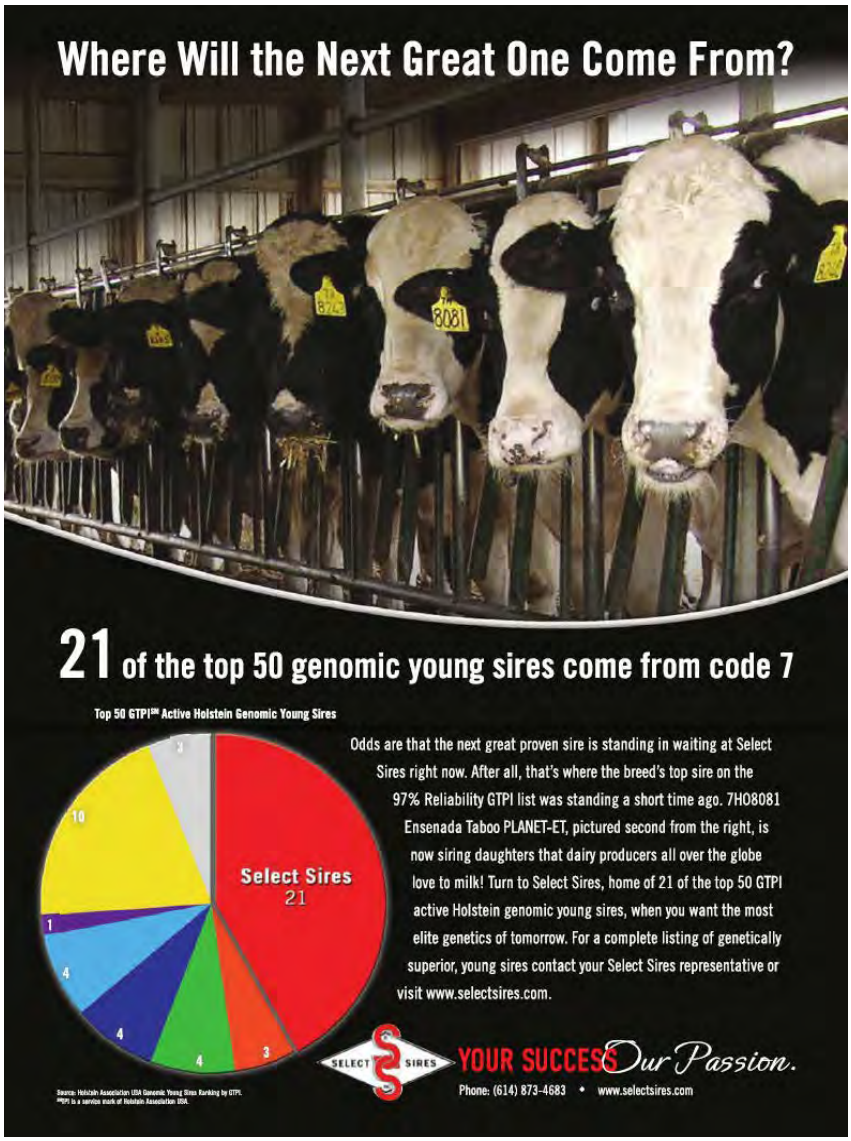
Highly accurate proofs translate into Alta being the leader for proof stability (see nearby graph). We have shown that proven sires from the AltaAdvantage® program hold up to the promise of their first crop Advantage proof, and consistently return cows that live up to and beyond expectations.

Attachment B

Select Sires ad in trade publication Eastern Dairy Business, June 2012. Ad for Select Sires on page 46 contains chart comparing the number of genomic young sires in the top 50 by AI firm, but does not name Select Sires' competitors.

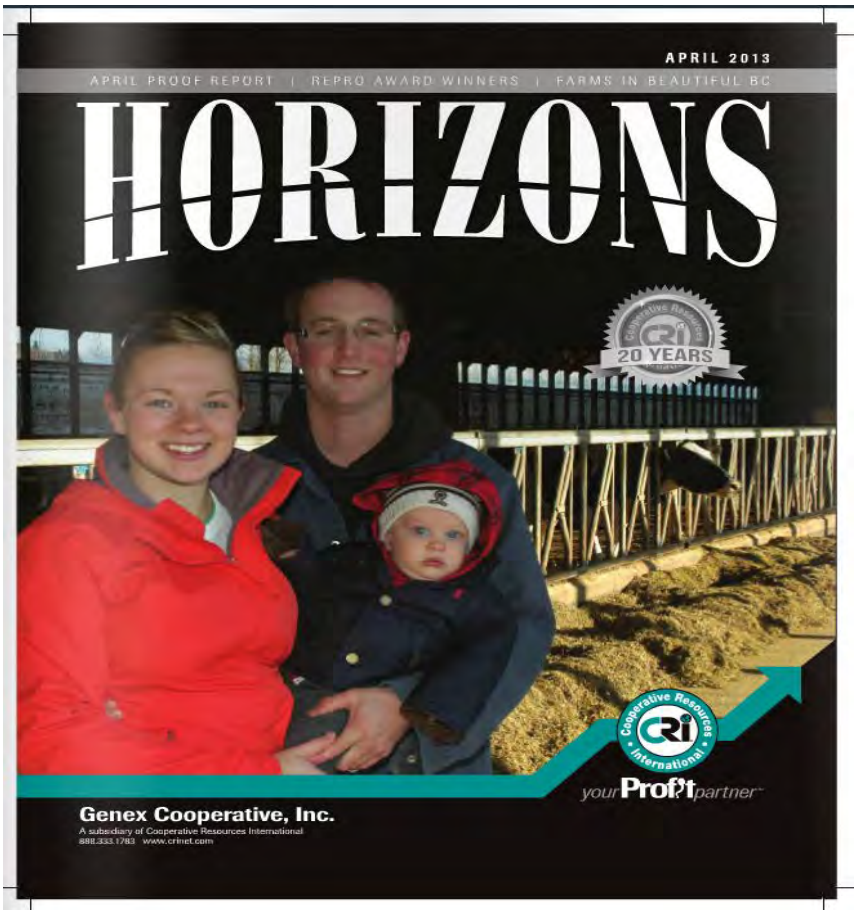


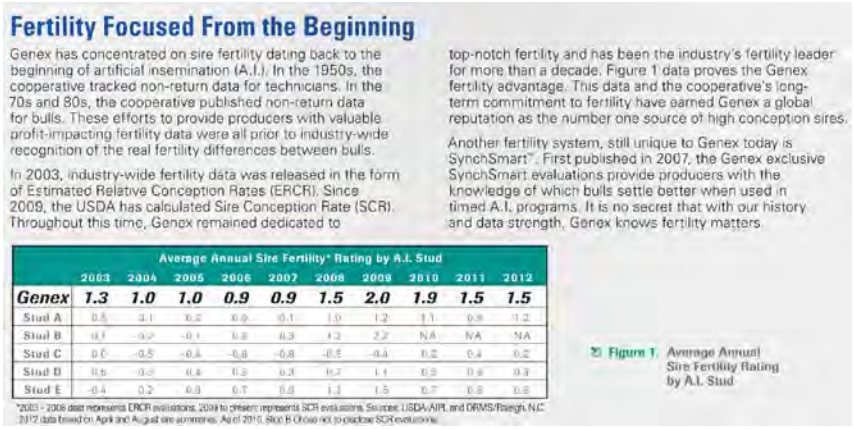
Complaint


Where Will the Next Great One Come From?
8081
21 of the top 50 genomic young sires come from code 7
Top 50 GTPI℠ Active Holstein Genomic Young Sires
Select Sires
21
10
4
4
4
3
3
1
Odds are that the next great proven sire is standing in waiting at Select Sires right now. After all, that's where the breed's top sire on the 97% Reliability GTPI list was standing a short time ago. 7HO8081 Ensenada Taboo PLANET-ET, pictured second from the right, is now siring daughters that dairy producers all over the globe love to milk! Turn to Select Sires, home of 21 of the top 50 GTPI active Holstein genomic young sires, when you want the most elite genetics of tomorrow. For a complete listing of genetically superior, young sires contact your Select Sires representative or visit www.selectsires.com.
SELECT SIRES
YOUR SUCCESS Our Passion.
Phone: (614) 873-4683 • www.selectsires.com
Source: Holstein Association USA Genomic Young Sires Ranking by GTPI.
℠GPI is a service mark of Holstein Association USA.

Attachment C

CRI/Genex cooperative Horizons magazine, April 2013, at 16. Article on page 16 contains chart comparing average fertility rating by AI firm (*i.e.,* stud), but does not name Genex's competitors.





Fertility Focused From the Beginning

Genex has concentrated on sire fertility dating back to the beginning of artificial insemination (A.I.). In the 1950s, the cooperative tracked non-return data for technicians. In the 70s and 80s, the cooperative published non-return data for bulls. These efforts to provide producers with valuable profit-impacting fertility data were all prior to industry-wide recognition of the real fertility differences between bulls.

In 2003, industry-wide fertility data was released in the form of Estimated Relative Conception Rates (ERCR). Since 2009, the USDA has calculated Sire Conception Rate (SCR). Throughout this time, Genex remained dedicated to top-notch fertility and has been the industry's fertility leader for more than a decade. Figure 1 data proves the Genex fertility advantage. This data and the cooperative's long-term commitment to fertility have earned Genex a global reputation as the number one source of high conception sires.

Another fertility system, still unique to Genex today is SynchSmart™. First published in 2007, the Genex exclusive SynchSmart evaluations provide producers with the knowledge of which bulls settle better when used in timed A.I. programs. It is no secret that with our history and data strength, Genex knows fertility matters.

Average Annual Sire Fertility* Rating by A.I. Stud

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Genex	**1.3**	**1.0**	**1.0**	**0.9**	**0.9**	**1.5**	**2.0**	**1.9**	**1.5**	**1.5**
Stud A	0.5	0.1	0.2	0.0	0.1	1.0	1.2	1.1	0.9	1.2
Stud B	0.1	-0.2	-0.1	0.8	0.3	1.3	2.2	NA	NA	NA
Stud C	0.0	-0.5	-0.4	-0.8	-0.8	-0.5	-0.4	0.2	0.4	0.2
Stud D	0.5	0.0	0.4	0.3	0.3	0.7	1.1	0.9	0.8	0.3
Stud E	-0.4	0.2	0.3	0.7	0.8	1.3	1.5	0.7	0.8	0.8

*2003 - 2008 data represents ERCR evaluations. 2009 to present represents SCR evaluations. Sources: USDA-ARS and DRMS/Raleigh, N.C. 2012 data based on April and August sire summaries. As of 2010, Stud B chose not to disclose SCR evaluations.

Figure 1. Average Annual Sire Fertility Rating by A.I. Stud

DECISION AND ORDER

The Federal Trade Commission, ("Commission"), having initiated an investigation of certain acts and practices of National Association of Animal Breeders, Inc. ("Respondent" or "NAAB") 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, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order ("Order"):

1. Respondent National Association of Animal Breeders, Inc., is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Missouri, with its office and principal place of business located at 401 Bernadette Drive, Columbia, Missouri 65203.

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 "NAAB" means National Association of Animal Breeders, Inc., its directors, boards, officers, employees, agents, representatives, committees, foundations, divisions, successors, and assigns.

B. "Antitrust Counsel" means a lawyer admitted to practice law in a Federal court or in the highest court of any State or Territory of the United States whose practice areas include antitrust law.

C. "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.*

D. "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.

E. "FTC Settlement Statement" means the statement attached to this Order as Appendix A.

F. "Member" means a member of NAAB, including any regular or associate member.

G. "Organization Documents" means any document 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, training materials, or guidelines.

H. "Regulating" means (1) adopting, maintaining, recommending, or encouraging that Members follow any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against the advertising, publishing, stating, or disseminating by any Member of the prices, terms, availability, characteristics, or conditions of sale of animal

breeding services, including but not limited to, the adoption or maintenance of any principle, rule, guideline, or policy that restricts any Member from:

A. Naming members or other competitors when making statements comparing the products and services of a Member with the products and services of any other Member or competitor, including restrictions against naming Members in printed material comparing the average performance of a Member's products and services with the average performance of any other Member's or competitor's products and services, or in any other context; and

B. Publicizing or disclosing price information relating to the purchase or sale of animals, whether an animal was purchased or sold at private treaty, public auction, or in any other context.

Provided, however, that nothing in this Paragraph II. shall prohibit Respondent from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of its Members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

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 Code of Ethics page of NAAB's website, together with a link from Respondent's home or menu page that is entitled "Antitrust Compliance," the following items:

a. An announcement that states "NAAB 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 the advertising, publishing, stating, or disseminating of information 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.

2. Distribute electronically or by other means a copy of the FTC Settlement Statement to its board of directors, officers, employees, and Members.

B. No later than sixty (60) days from the date this Order is issued Respondent shall:

1. Remove from NAAB's Organization Documents and NAAB's website any statement that does not comply with Paragraph II. of this Order; and

2. Publish on NAAB's website any revisions of NAAB's Organization Documents.

C. For a period of five (5) years after this Order is issued, Respondent shall 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. For a period of five (5) years after this Order is issued, Respondent shall require that each Member delegate certify that he or she has received and read the FTC Settlement Statement as a condition to allowing the Member delegate to attend Respondent's annual

convention or any other Respondent event in which Member delegates participate.

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 Antitrust Counsel for the duration of this Order to supervise Respondent's antitrust compliance program.

B. 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 directors, 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 NAAB's annual convention that summarizes Respondent's obligations under this Order and provides context-

appropriate guidance on compliance with the Antitrust Laws.

C. 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 directors, officers, employees, Members, Member delegates, 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 directors, 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 ninety (90) 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 November 2, 2035.

By the Commission.

APPENDIX A

(Letterhead of NAAB)

Dear Member:

As you may know, the Federal Trade Commission conducted an investigation concerning the provisions in NAAB's Code of Ethics ("Code of Ethics") that stated:

Member competitors will not be named in printed material comparing averages between members.

The purchase price of sires, purchased at private treaty, by NAAB members shall not be disclosed by the Buyer, and the Seller shall be requested not to quote the selling price.

Also, prices of bulls purchased at public auction by AI organizations shall not be quoted in their printed statements, advertising, and/or publicity material.

The Federal Trade Commission alleges that these provisions in the Code of Ethics violate the Federal Trade Commission Act because they unnecessarily restrict members of NAAB from competing for customers, thereby depriving customers of the benefits of competition among organizations engaged in the artificial insemination of dairy and beef cattle and other livestock.

To end the investigation expeditiously and to avoid disruption to its core functions, NAAB 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, NAAB is in the process of revising its Code of Ethics, and will implement an antitrust compliance program.

In general, the Federal Trade Commission has prohibited NAAB from maintaining bylaws, code of ethics, operational policies, or membership requirements that restricts members from advertising, publishing, publicizing, disclosing, stating, or disseminating the prices, terms, availability, characteristics, averages, or conditions of sale of animals or artificial insemination services.

Under the Decision and Order, NAAB may not restrict members from making statements comparing their products and services with the products and services of any other member. In particular, NAAB may not restrict members from naming members or other competitors when making statements comparing the products and services of a member with the products and services of any other member or competitor, whether the statements are made in printed material, whether the statements compare the average performance of a member's products and services with the average performance of any other member's products and services, or in any other context. NAAB also may not restrict members from publicizing or disclosing price information relating to the purchase or sale of animals, including restrictions on disclosing the purchase price, whether the animal was purchased or sold at private treaty, public auction, or in any other context.

The Decision and Order does not prohibit NAAB from adopting and enforcing Codes of Ethics or similar documents that govern the conduct of members with respect to representations that NAAB reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

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 NAAB 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 National Association of Animal Breeders, Inc. (hereinafter "NAAB"). The Commission's complaint ("Complaint") alleges that NAAB, 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. NAAB restrained competition by adopting and maintaining provisions in its Code of Ethics that restrain its members from (1) naming competitors in printed materials that contain certain information about the competitors, and (2) disclosing or publicizing prices of bulls purchased or sold.

Under the terms of the proposed Consent Agreement, NAAB is required to cease and desist from restraining its members from (1) naming members or other competitors when making statements comparing the products and services of a member with the products and services of any other member or competitor, and (2) publicizing or disclosing price information relating to the purchase or sale of animals.

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 NAAB 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

NAAB is a non-profit corporation of animal breeders, with about twenty-four regular members, and about twenty-seven non-voting associate members. Many of NAAB's members are organizations in the business of collecting, processing, marketing and selling dairy and beef cattle semen for artificial insemination ("AI"). Members include small, family-owned breeding operations, cooperatives, and multinational corporations.

B. The Anticompetitive Conduct

NAAB maintains a Code of Ethics applicable to the commercial activities of its members. NAAB's bylaws require that members comply with the Code of Ethics. NAAB maintains the following provisions in its Code of Ethics:

- "Member competitors will not be named in printed material comparing averages between members."

- "The purchase price of sires, purchased at private treaty, by NAAB members shall not be disclosed by the Buyer, and the Seller shall be requested not to quote the selling price. Also, prices of bulls purchased at public auction by AI organizations shall not be quoted in their printed statements, advertising, and/or publicity material."

NAAB also established a process for receiving complaints about and resolving alleged violations of the Code of Ethics, including by allowing its members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which NAAB may sanction violations of the Code of Ethics.

The Complaint alleges that NAAB has violated Section 5 of the Federal Trade Commission Act by adopting and maintaining provisions in its Code of Ethics that restrain its members from (1) making advertisements comparing AI organizations, and (2) disclosing truthful and non-deceptive information. The Complaint alleges that the purpose, effects, tendency, or capacity of the combination, agreement, acts and practices of NAAB has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among AI organizations, and by depriving consumers and others of the benefits of free and open competition among AI organizations.

C. The Proposed Order

The Proposed Order has the following substantive provisions. Paragraph II requires NAAB to cease and desist from restraining its members from (1) naming members or other competitors when making statements comparing the products and services of a member with the products and services of any other member or competitor, and (2) publicizing or disclosing price information relating to the purchase or sale of animals. The Proposed Order does not prohibit NAAB from adopting and enforcing reasonable restraints with respect to representations that NAAB reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

Paragraph III of the Proposed Order requires NAAB to remove from its website and organization documents any statement that does not comply with the Proposed Order, and to publish on the website any revision to the organization documents. NAAB must publish an announcement that it has changed its Code of Ethics, and a statement describing the Consent Agreement ("the Settlement Statement"). NAAB must distribute the Settlement Statement to NAAB's board of directors, officers, employees, and members. Paragraph III also requires NAAB 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 NAAB to design, maintain, and operate an antitrust compliance program. NAAB will have to appoint Antitrust Counsel for the duration of

the Proposed Order. For a period of five years, NAAB will have to provide in-person annual training to its board of directors, officers, and employees, and conduct a presentation at its annual convention that summarizes NAAB's obligations under the Proposed Order and provides context-appropriate guidance on compliance with the antitrust laws. NAAB 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 board of directors, officers, employees, members, and agents for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed Order impose certain standard reporting and compliance requirements on NAAB.

The Proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

WRIGHT MEDICAL GROUP, INC.
AND
TORNIER N.V.

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

Docket C-4559; File No. 151 0018
Complaint, November 05, 2015 – Decision, November 05, 2015

This consent order addresses the $3.3 billion all-stock transaction between Wright an Tornier. The complaint alleges that the Proposed Merger would violate Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for total ankle replacements and total silastic toe joint replacements. Both Wright and Tornier are global device companies headquartered in the United States. They both respond directly to competition from each other with improved products, better service, and lower prices. By eliminating this direct and substantial head-to-head competition, the Proposed Merger likely would allow the combined firm to exercise market power unilaterally, resulting in less innovation and higher prices for consumers. The Order requires the parties to enter into a transitional services agreement with Integra to assist the company in establishing its manufacturing capabilities and securing all necessary FDA approvals. The Order also requires the parties to appoint Quantic Regulatory Services, LLC as interim monitor to ensure the parties comply with the obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the assets and rights to Integra.

Participants

For the *Commission: Kenneth A. Libby* and *Aylin M. Skroejer*

For the *Respondents: Jeffrey B. Kom* and *Agathe Richard, Willkie Farr & Gallagher LLP; Jonathan S. Klarfeld* and *Christian Rowan, Ropes & Gray LLP; Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton 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 Wright Medical Group, Inc. ("Wright"),

a corporation subject to the jurisdiction of the Commission, has agreed to merge with Respondent Tornier N.V. ("Tornier"), 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, and that such merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, 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 Wright 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 1023 Cherry Road, Memphis, Tennessee, 38117.

2. Respondent Tornier is a public limited company organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its global headquarters located at Prins Bernhardplein 200, 1097 JB, Amsterdam, Netherlands. The headquarters for Tornier's U.S. subsidiary, Tornier, Inc., is located at 10801 Nesbitt Avenue South, Bloomington, Minnesota, 55437.

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 MERGER

4. Pursuant to an Agreement and Plan of Merger dated October 27, 2014, Tornier and Wright propose to merge in an all-stock transaction valued at approximately $3.3 billion (the "Merger"). The Merger 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 Merger are the development, manufacture, license, marketing, distribution, and sale of the following reconstructive joint implants: (1) total ankle replacements; (2) total silastic big toe joint replacements; and (3) total silastic toe joint replacements for the second through fifth "lesser" toes.

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

IV. THE STRUCTURE OF THE MARKETS

7. Total ankle replacements are used to treat end-stage ankle arthritis, which develops when cartilage on the bones of the ankle joint wears away and causes bone-on-bone grinding down of the joint surface. Wright and Tornier are each other's closest competitor and two of only three significant suppliers of total ankle replacements in the United States. The companies offer similar technologies and the only options for revision surgeries, i.e., surgeries to redo a prior total ankle replacement procedure. Wright and Tornier control approximately 44% and 19% of the market, respectively. The other leading supplier, Stryker Corporation, accounts for approximately 31% of the market. The only other U.S. supplier, Zimmer Holdings, Inc., offers a more differentiated technology and maintains a fringe position in the market.

8. Total silastic big toe joint replacements are used to treat severe cases of *hallux rigidus*, an arthritic condition in the first metatarsophalangeal ("MTP") joint of the big toe. Wright and Tornier are the two major suppliers of total silastic big toe joint replacements in the United States, with approximately 60% and 38% of the market, respectively.

9. Total silastic lesser toe joint replacements are used to treat severe arthritis in the lesser MTP joints of the second through fifth toes. Wright has a market share of approximately 44% and Tornier has a share of approximately 32%. Wright and Tornier

are also each other's closest competitor. The next largest competitor, OsteoMed, has a market share of approximately 24%.

V. CONDITIONS OF ENTRY AND EXPANSION

10. Entry into the relevant markets described in Paragraphs 5 and 6 would not be likely or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Merger. De novo entry would not take place in a timely manner because the product development times, U.S. Food and Drug Administration approval requirements, and market adoption times are lengthy. A potential entrant into the relevant markets would need to develop a reputation for consistent quality and service before surgeons are familiar enough with the products to substitute them for currently marketed devices. No other entry is likely to occur to deter or counteract the competitive harm likely to result from the Merger.

VI. EFFECTS OF THE MERGER

12. The effects of the Merger, 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 Wright and Tornier in the markets for total ankle replacements and total silastic toe joint replacements, thereby increasing the likelihood in these markets that: (1) a combined Wright-Tornier would be able to unilaterally exercise market power; (2) research and development would be reduced; and (3) customers would be forced to pay higher prices.

VII. VIOLATIONS CHARGED

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

14. The Merger 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 fifth day of November, 2015 issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the merger between Respondent Wright Medical Group, Inc. ("Wright") and Respondent Tornier N.V. ("Tornier"), 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 Wright 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 1023 Cherry Road, Memphis, Tennessee, 38117.

2. Respondent Tornier is a public limited company organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its global headquarters located at Prins Bernhardplein 200, 1097 JB, Amsterdam, Netherlands. The headquarters for Tornier's U.S. subsidiary, Tornier, Inc., is located at 10801 Nesbitt Avenue South, Bloomington, Minnesota, 55437.

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. "Wright" means Wright Medical Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates in each case controlled by Wright Medical Group, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Merger, Wright shall include Tornier.

B. "Tornier" means Tornier N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tornier N.V., including but not limited to Tornier S.A.S. and Tornier, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondent(s)" means Wright and Tornier, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "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.

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 the Total Ankle Replacement Products and Total Silastic Toe Joint Replacement Products, as the case may be. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

G. "Ankle and Toe Intellectual Property" means all of the following to the extent primarily related to the research, Development, manufacture, marketing, distribution, or sale of Ankle Products or Toe Products in the United States:

1. United States patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, 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).

H. "Ankle and Toe 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 related to the manufacture of Ankle Products or Toe Products for sale in or into the United States, 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.

I. "Ankle and Toe 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 related to the research, Development, manufacture, marketing, distribution, or sale of Ankle Products or Toe Products in or into the United States.

J. "Ankle Products" means Tornier's Total Ankle Replacement Products sold in the United States or under Development as of the Closing Date, including, but not limited to, Salto, Salto Talaris™, Salto Talaris XT, Salto XT 2, Salto 2.1, and related instruments.

K. "Assets To Be Divested" means the U.S. Ankle and Toe Business and the Background IP License.

L. "Background IP" means all patents, copyrights, trade secrets or other intellectual property rights owned by Tornier as of the Closing Date (other than trademarks or trade dress), that are related to and used in or would otherwise be infringed by the U.S. Ankle and Toe Business as of the Closing Date but that are not included in the U.S. Ankle and Toe Business.

M. "Background IP License" means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the U.S. Ankle and Toe Business under any Background IP to operate the U.S. Ankle and Toe Business, including the research, Development, manufacture, distribution, marketing or sale of Total Ankle Replacement Products and Total Silastic Toe Joint Replacement Products in the United States.

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 satisfy the requirements of an Agency in connection with any product and any other human study used in research and Development of a product.

O. "Closing Date" means the date Respondents divest the Assets To Be Divested to a Commission-Approved Acquirer pursuant to a Remedial Agreement.

P. "Commission-Approved Acquirer" means the following:

1. Integra; or

2. An entity that receives the prior approval of the Commission to acquire the Assets To Be Divested.

Q. "Confidential Business Information" means competitively sensitive, proprietary, and 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 U.S Ankle and Toe 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 U.S. Ankle and Toe Business;

2. Information that is contained in documents, records or books of any Respondent that are provided to a Commission-Approved Acquirer by a Respondent that is unrelated to the U.S. Ankle and Toe Business 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 Merger 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 U.S. Ankle and Toe Business that Wright can demonstrate it obtained without the assistance of Tornier prior to the Merger;

6. Information that is required by Law to be disclosed;

7. Information that does not directly relate to the U.S. Ankle and Toe 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 Merger or the transaction under the Remedial Agreement; or

   d. Is disclosed in complying with this Order.

R. "Development" means all preclinical and clinical medical device development activities, 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, product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

S. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

T. "Exclusive Supplier Contract" means any contract for the supply of finished goods of, inputs to, or

instrumentation for, the Ankle Products or the Toe Products where under the terms of the contract with Respondents, the Commission-Approved Acquirer would be prevented from entering into a contract for the supply of such finished goods, inputs, or instrumentation with such Supplier.

U. "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.

V. "Integra" means Integra LifeSciences Corporation, a corporation organized under the laws of the state of Delaware with its principal place of business at 311 Enterprise Drive, Plainsboro, NJ 08536

W. "Integra Agreement" means the "Asset Purchase Agreement" by and between Tornier SAS, Tornier, Inc. and Integra LifeSciences Corporation, dated as of August 31, 2015, 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 Integra Agreement is attached to this Order as Non-Public Appendix A.

X. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order.

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

Z. "Merger" means the transaction between Wright and Tornier consisting of the exchange of Wright common stock for Tornier common stock pursuant to the Agreement and Plan of Merger between Wright and Tornier dated as of October 27, 2014.

AA. "Merger Date" means the date on which the Merger is consummated.

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

CC. "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.

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

1. The Integra Agreement;

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.

EE. "Retained Business" means:

1. All right, title and interest in and to the names "Wright" and "Tornier," 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 what is included in the U.S. Ankle and Toe Business;

2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products; and

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.

FF. "Retained Products" means any product researched, Developed, manufactured, marketed, sold or distributed by Respondents other than Ankle Products, or Toe Products in the United States. For the avoidance of doubt, Retained Product includes Ankle Products, and Toe Products for sale exclusively outside the United States.

GG. "Supplier" means any Third Party provider of finished goods of, inputs to, or instrumentation for, the Ankle Products or the Toe Products.

HH. "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.

II. "Third Party(ies)" means any non-governmental Person other than the Respondents, or the Commission-Approved Acquirer.

JJ. "Toe Products" means Tornier's Total Silastic Toe Joint Replacement Products sold in the United States or under Development as of the Closing Date, including, but not limited to, the Futura™ Primus Great Toe Implant, the Futura™ Classic Flexible Great Toe Implant and the Futura™ Lesser Metatarsal Phalangeal Implant and related instruments.

KK. "Total Ankle Replacement Products" means reconstructive joint implants that replace damaged bone and cartilage in the ankle with metal and plastic components in order to treat end-stage ankle arthritis.

LL. "Total Silastic Toe Joint Replacement Products" means silastic reconstructive joint implants that replace damaged bone and cartilage in the big and lesser toes in order to treat severe forms of toe arthritis.

MM. "U.S. Ankle and Toe Business" means all of the rights, titles and interest in the United States in the Ankle Products and Toe Products, any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale in the United States only, including, but not limited to:

1. Finished product inventory designated for the United States;

2. Instrumentation inventory for the Ankle Products and Toe Products in the United States;

3. Advertising, marketing and promotional materials for the Ankle Products and Toe Products in the United States;

4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Ankle Products and Toe Products;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes in the United States and copies of all training materials that are used for training in the proper use of the Ankle Products and Toe Products in the United States;

6. Copies of all testing and clinical performance reports, market research reports and other

marketing related information and materials for the Ankle Products and Toe Products;

7. Copies of all Ankle and Toe Manufacturing Technology;

8. Copies of all Ankle and Toe Scientific and Regulatory Material;

9. Ankle and Toe Intellectual Property;

10. A list of existing and past customers for the Ankle Products and Toe Products in the United States;

11. Copies of customer credit and other records for the Ankle Products and Toe Products in the United States;

12. Copies of all books, ledgers and other business records for the Ankle Products and Toe Products in the United States;

13. Copies of clinical, regulatory, and customer sales databases for the Ankle Products and Toe Products in the United States; and

14. All licenses, permits and authorizations related to the Ankle Products or the Toe Products in the United States, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Ankle Products and Toe Products in the United States.

provided, however, that "U.S. Ankle and Toe Business" does not include (a) the Retained Business, or (b) rights to any products or intellectual property owned by, or licensed to, Wright before the closing of the Merger; and

provided further, however, that with respect to documents or other materials included in the U.S. Ankle and Toe Business that contain information (a) that relates both to Ankle Products or Toe Products

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 Ankle Products and Toe Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Merger Date, Respondents shall divest the Assets To Be Divested, absolutely and in good faith, to Integra pursuant to, and in accordance with, the Integra 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 Respondents 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 Integra 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 Integra is not an acceptable purchaser of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Integra, 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 Integra 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 Integra (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 if the Respondents divest the Futura™ trademark, they may retain a non-exclusive license to use the Futura™ trademark in the United States for products other than Total Silastic Toe Joint Replacement Products.

B. Respondents shall secure all consents and waivers with respect to any rights expressly granted to Tornier by Third Parties or Government Entities, or to Third Parties or Government Entities by Tornier, 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 Total Ankle Replacement Products and Total Silastic Toe Joint Replacement Products in the United States by the Commission-Approved Acquirer.

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 U.S. Ankle and Toe Business for the manufacture, Development, marketing or sale of Total Ankle Replacement Products or Total Silastic Toe Joint Replacement Products in or into the United States, 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 U.S. Ankle and Toe Business that Respondents can demonstrate to the Commission that Wright obtained other than in connection with the Merger;

2. This Paragraph II.D. shall not apply to any Confidential Business Information to the extent related to Retained Products or the Retained Business;

3. 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

4. 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 further. however, that Respondents shall require any Tornier employees or agents who as of the Closing Date have access to Confidential Business Information related to the U.S. Ankle and Toe 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. Until the Closing Date, Respondents shall take such actions as are necessary to:

1. maintain the full economic viability and marketability of the U.S. Ankle and Toe Business;

2. minimize any risk of loss of competitive potential for the U.S. Ankle and Toe Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the U.S. Ankle and Toe Business; and

4. not sell, transfer, encumber, or otherwise impair the U.S. Ankle and Toe Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the U.S. Ankle and Toe Business.

F. Respondents shall enter into an agreement to supply Ankle Products and Toe Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of not longer than three (3) years.

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 not longer than three (3) years.

H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Commission-Approved Acquirer from entering into a contract with the Supplier for the supply of finished goods of, inputs to, or instrumentation for, the Ankle Products or the Toe Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.

I. 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 markets for the Development, license, manufacture, marketing, distribution, and sale of Total Ankle Replacement Products and Total Silastic Toe Joint Replacement Products in the United States and to

remedy the lessening of competition from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("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 Agreement shall require that, not later than three (3) days after the Commission accepts the Order for comment, Respondents transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order, and Respondents shall effectuate such transfer.

C. 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 last supply agreement entered into pursuant to Paragraphs II.F. of this Order, and (ii) the end of the Transition Services Agreement entered into pursuant to Paragraph II.G. of this Order.

D. 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 their obligations under this Order, including, but not limited to, their 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.

E. 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.

F. 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 malfeasance, gross

negligence, willful or wanton acts, or bad faith by the Interim Monitor.

G. 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.

H. 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.

I. 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.

J. 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.

K. 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.

L. 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, 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, 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 malfeasance, 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.

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 Merger, Respondents shall submit to the Commission a letter certifying the date on which the Merger 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 relevant 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; in each case that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, and the creation or dissolution of subsidiaries.

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, 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. 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 November 5, 2025.

By the Commission.

Non-Public Appendix A

Integra Agreement

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

Appendix B

Monitor Agreement

INTERIM MONITOR AGREEMENT

This Interim Monitor Agreement ("Monitor Agreement") entered into among Quantic Regulatory Services, LLC ("Quantic"), Wright Medical Group, Inc. ("Wright") and Tornier N.V. ("Tornier"), (where "Respondents" as used herein means Wright and Tornier individually and collectively), provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission"), in *In the Matter of Wright Medical Group, Inc. and Tornier N.V.*, has accepted or will shortly accept for Public Comment an *Agreement Containing Consent Order*, incorporating a Decision and Order ("Decision and Order"), with Wright and Tornier (collectively, the "Orders"), which, among other things, require Respondents to divest or transfer certain defined assets and maintain those assets pending such divestiture or transfer, and provide for the appointment of one or more Interim Monitors to ensure that Respondents comply with their obligations under the Orders;

WHEREAS, the Commission may appoint Quantic as such monitor (the "Interim Monitor") pursuant to the Orders to monitor Respondents' compliance with the terms of the Consent Agreement and Orders and with the Remedial Agreement referenced in the Orders, and to monitor the efforts of the Commission-approved Acquirers (as defined in the Orders) to obtain all necessary FDA approvals, as applicable, and Quantic has consented to such appointment;

WHEREAS, the Orders further provide or will provide that Respondents shall execute a Monitor Agreement, subject to the prior approval of the Commission, conferring all the rights, powers and authority necessary to permit the Interim Monitor to carry out such duties and responsibilities pursuant to the Orders;

WHEREAS, this Monitor Agreement, although executed by the Interim Monitor and Wright and Tornier, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondents or the Interim Monitor under the Orders, until it has been approved by the Commission (except for any pre-approval rights and responsibilities specifically contemplated by the Orders); and

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

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Consent Agreement and the Orders. The term "Divestiture Products" means, individually and collectively, the U.S. Ankle and Toe Business and the Background Intellectual Property License.

2. The Interim Monitor shall have all of the powers and responsibilities conferred upon the Interim Monitor by the Orders, including but not limited to:

   a. supervising the transfer of the Divestiture Products, including tangible assets, contracts, Product Intellectual Property and Confidential Business Information to Commission-approved Acquirers;

b. supervising any redaction of Confidential Business Information retained by Respondents as required by the Orders; and

c. supervising the performance of any transition services, including Contract Manufacture, required by the Orders.

3. Respondents hereby agree that, no later than three (3) business days after the Commission approves this Monitor Agreement, Respondents will fully comply with all terms of the Orders requiring them to confer all rights, powers, authority and privileges upon the Interim Monitor, or to impose upon themselves any duties or obligations with respect to the Interim Monitor, to enable the Interim Monitor to perform the duties and responsibilities of the Interim Monitor thereunder.

4. Respondents further agree that:

a. they will use their best efforts to ensure that any Commission-approved Acquirer enters into an agreement with the Interim Monitor at or about the Closing Date governing the facilitation of the Interim Monitor's duties under the Orders and the exchange of information between such Commission-approved Acquirer and the Interim Monitor;

b. no later than ten (10) business days after the Commission approves this Monitor Agreement, they will provide the Interim Monitor with the following, as applicable:

(1) a complete inventory and description of the Divestiture Products, identifying, in particular, those Divestiture Products which may require actions to maintain their viability and marketability, and the person(s) responsible for taking those actions;

(2) a complete inventory of all existing FDA approvals and pending FDA approvals for the Products included in the Divestiture Products identifying actions required to maintain or complete such approvals and identifying the person(s) responsible for taking such actions;

(3) a complete inventory of all activities or operations worldwide that relate to the manufacture of the Products relating to the Divestiture Products, and which relate to Respondents' compliance with the Orders, including processes and process validations which are under development, identifying the person(s) responsible for maintaining or pursuing such activities and giving an inventory of materials and records relating to such manufacture;

(4) full and complete details of all dealings with any Commission-approved Acquirer of the Divestiture Products , including copies of all correspondence and written reports of all contacts and discussions with any such future Commission-approved Acquirer and any draft and/or

executed complete agreements, including any attached exhibits, schedules and appendices;

(5) a complete inventory of all Patents included in the Divestiture Products related to the manufacture or sale of the Divestiture Products in the United States, identifying actions needed to maintain such Patents and the person(s) responsible for such actions; and

(6) such other information as reasonably requested by the Interim Monitor in order to carry out its duties and responsibilities under the Orders and Consent Agreement.

c. they will designate a senior individual as a primary contact for the Interim Monitor and provide a written list of the principal individuals to be involved in the transitioning of the Divestiture Products to the Commission-approved Acquirers, together with their locations, telephone numbers, electronic mail addresses (if available), and responsibilities, and will provide the Interim Monitor with written notice of any changes in such personnel occurring thereafter;

d. they will provide the Interim Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the development, manufacture, registration, regulatory approvals, marketing, sale and divestiture of the Divestiture Products, and such meetings may be attended by the Interim Monitor or its representative, at the Interim Monitor's option or at the request of the Commission or staff of the Commission;

e. they will provide the Interim Monitor with the minutes, if any, of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondents;

f. they will provide the Interim Monitor with all correspondence, meeting minutes, telephone summaries, reports, sent to or received from the FDA relating to the Divestiture Products;

g. they will provide the Interim Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Consent Agreement and the Orders, simultaneous with the submission of such reports to the Commission;

h. to the extent not reflected in the reports submitted to the Commission pursuant to the Consent Agreement and the Orders, they will provide every (3) months commencing one (1) month after the Consent Agreement is accepted by the Commission for public comment, or as reasonably requested by the Interim Monitor, electronic or hard copy reports to the Interim Monitor reasonably describing Respondents' activities and obligations under the Orders concerning the Divestiture Products including, without limitation to the extent applicable:

(1) all significant activities concerned with the manufacture, supply and technology transfer of the relevant Products that are identified in the Divestiture Products, including, without limitation, negotiation and operation of supply agreements, actual supply and inventory;

(2) all minutes and records of significant meetings, action plans, and follow-ups to action plans and meetings with the Commission-approved Acquirers related to the manufacture, supply, and technology transfer of the Products identified in the Divestiture Products;

(3) all significant activities concerning the assistance, advice and consultation provided to any Commission-approved Acquirer generally as provided in the Decision and Order; and

(4) on request, Respondents will provide the Interim Monitor with any and all records that relate to the manufacture of the Products identified in the Divestiture Products with the right to use them to achieve the purposes of the Orders;

provided, however, that, at the time the Decision and Order becomes final, the reports described in this paragraph shall be due to the Interim Monitor either as requested by the Interim Monitor or within five (5) business days of the date that Respondents file the Respondents' reports with the Commission as required pursuant to the Decision and Order;

i. they will comply with the Interim Monitor's reasonable requests for onsite visits and audits of Respondents' facilities (or any contract manufacturer's facility) used to manufacture the Products identified in the Divestiture Products;

j. they will comply with the Interim Monitor's reasonable requests for follow-up discussions or supplementary information concerning any reports provided to or requested by the Interim Monitor pursuant to this Agreement, including, as applicable, meetings and discussions with the principal staff involved in any activities relating to the research, development, manufacture, sale and/or divestiture of the Divestiture Products or any Product comprised therein and, further including, actions necessary to maintain all necessary FDA or other foreign regulatory agency equivalent approvals to manufacture and sell any of the Divestiture Products, to maintain the viability and marketability of the Divestiture Products, as well as the tangible assets of the facilities used to manufacture and sell all of the Divestiture Products, and to prevent the destruction, removal, wasting, deterioration or impairment of the Divestiture Products, and will provide the Interim Monitor with access to and hard copies of all other data, records or other information that the Interim Monitor reasonably believes are necessary to the proper discharge of its responsibilities under the Orders; and

k. they will provide prompt notice of any meetings or events affecting or likely to affect the maintenance of the Divestiture Products, including, but not limited to, any and all meetings or communications with the FDA.

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

6. Respondents agree that to the extent authorized by the Orders, the Interim Monitor shall have the authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities, including but not limited to supervising the transfer of Confidential Business Information.

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

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

   a. persons employed by, or working with, the Interim Monitor under this Agreement; or

   b. persons employed at the Commission and working on this matter.

9. Upon (i) termination of the Interim Monitor's duties under this Monitor Agreement, (ii) written request by Respondents, the Interim Monitor shall promptly return to Respondents all material provided to the Interim Monitor by Respondents that is confidential to Respondents and that they are entitled to have returned to them under the Orders, and shall destroy any written material prepared by the Interim Monitor that contains or reflects any confidential information of Respondents, provided, that, notwithstanding the foregoing, Interim Monitor shall be entitled to keep one copy of such information in its confidential files and all electronic records thereof. Nothing herein shall abrogate the Interim Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of ten (10) years after the termination of this Monitor Agreement;

10. To the extent that the Interim Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Interim Monitor in accordance with the Orders, the Interim Monitor shall ensure that, prior to being retained, such persons agree to confidentiality restrictions consistent with those set forth herein.

    For the purposes of this Section and Sections 8, 9 and 10, 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 Interim Monitor or by any employee, agent, affiliate or consultant of the Interim 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 or becomes known to the recipient from a source other than Respondents, or any director, officer, employee, agent, consultant or affiliate of Respondents, when such source is entitled to make such disclosure to such recipient or such information was independently developed by the Interim Monitor as evidenced by written records.

11. Nothing in this Monitor Agreement shall require Respondents to disclose any material or 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.

12. The Interim Monitor shall not have a fiduciary responsibility to the Respondents, but shall have fiduciary duties to the Commission.

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

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

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

    b. Any expense charged to a credit card incurred in a currency other than U.S. dollars shall be converted into dollars for expense reimbursement purposes at the exchange rate used for said credit card transaction and any ancillary cash

expenses for which a credit card is not possible shall be converted at the exchange rate for which said currency was purchased.

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

d. To the extent that the Interim Monitor is requested to travel in the performance of the Interim Monitor's duties, the Interim Monitor shall use such travel time, to the extent practicable, to work on the FTC monitor process.

15. Respondents hereby confirm their obligation to indemnify the Interim Monitor and hold the Interim Monitor harmless in accordance with and to the extent required by the Orders (and, upon direction by the Commission to the Interim Monitor to divest any Divestiture Products).

Without in any way limiting the generality of the foregoing, Respondents shall indemnify the Interim Monitor and any subcontractor and their respective consultants, agents, partners, principals, directors, officers, members, managers and employees (the "Indemnified Parties") and hold the Indemnified Parties harmless (regardless of form of action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities or expenses arising out of or in connection with, the performance of the Interim Monitor's duties and obligations under this Monitor Agreement 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 are finally judicially determined to result from the willful misconduct of the Interim Monitor.

16. The Interim Monitor's maximum liability to the Respondents relating to services rendered pursuant to this Agreement (regardless of the form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the lesser of $75,000 or the total sum of the fees paid to the Interim Monitor by Respondents. IN NO CIRCUMSTANCES WHATSOEVER SHALL INTERIM MONITOR BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES.

17. Respondents agree that the Respondents' obligations to indemnify the Interim Monitor extend to any agreement that is entered between the Interim Monitor and any Commission-approved Acquirer and relates to the Interim Monitor's responsibilities under the Monitor Agreement and/or the Orders.

18. Upon this Monitor Agreement becoming effective, the Interim Monitor shall be permitted, and Respondents shall be required, to notify all current Commission-approved Acquirers and potential future Acquirers with respect to its appointment as Interim Monitor.

19. In the event of a disagreement or dispute between Respondents and the Interim Monitor concerning Respondents' obligations under the Orders and, in the event that such

disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve this issue. In the case of any disagreement or dispute between Respondents and the Interim Monitor not relating to Respondents' obligations under the Orders, and in the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning the Respondents' obligations pursuant to the Orders. Any fees and expenses of the arbitration shall be split between the parties.

20. This Monitor Agreement shall be subject to the substantive law of the State of New Jersey (regardless of any other jurisdiction's choice of law principles).

21. This Monitor Agreement shall terminate upon the latter of (i) the end of the Transitional Supply Agreement, and (ii) the end of the Transition Services Agreement, entered into in connection with the Orders. The Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. The confidentiality, indemnity and limitation of liability provisions of this Monitor Agreement shall survive its termination.

22. It is understood that the Interim Monitor will be serving under this Interim Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Interim Monitor and Wright or Tornier.

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

24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral. Any amendment, waiver, or modification of this Agreement shall not be valid unless in writing and signed by the parties. Purchase Order terms and conditions shall not be applicable.

25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, reputable overnight courier or fax (with acknowledgment of receipt of such fax having been received), to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Interim Monitor, to:

Quantic Regulatory Services, LLC
R. Owen Richards
President
5N Regents Street
Suite 502
Livingston, NJ 07039

If to Wright:

Wright Medical Group, Inc.
Clay Bethell, Esq.
Assistant General Counsel
1023 Cherry Road
Memphis, TN 38117

If to Tornier:

Tornier, Inc.
Kevin Klemz, Esq.
General Counsel
10801 Nesbitt Avenue South
Bloomington, MN 55437

If to the Commission:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attn.: Ken Libby, Esq.
Telephone: 202-326-2694
Email: klibby@ftc.gov

26. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Orders have been accepted for public comment.

27. This Monitor Agreement may be signed in counterparts, each of which shall be deemed an original but when taken together shall constitute one and the same agreement.

[Remainder of Page Intentionally Left Blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the 4th of September, 2015.

Quantic Regulatory Services, LLC

R. Owen Richards
President

Tornier N.V.

Kevin Klemz
Senior Vice President & Chief Legal Officer

Wright Medical Group, Inc.

Clay Bethell
Assistant General Counsel

Confidential Appendix A

Quantic Hourly Billing Rates:

Quantic will bill Wright for its expert consulting services on an hourly basis at its standard rates, which currently are [redacted] per hour for its employees and consultants. Reasonable and customary out-of-pocket expenses shall be billed separately at Quantic's cost. To the extent that Quantic is requested to travel in connection with this retention, it shall use the travel time, to the extent practicable, to work on the FTC Monitor Process.

Non-Public Appendix C

Monitor Compensation

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Wright Medical Group, Inc. ("Wright") and Tornier N.V. ("Tornier") designed to remedy the anticompetitive effects resulting from the proposed merger of Wright and Tornier. Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, the parties are required to divest to Integra Lifesciences Corporation ("Integra") all of Tornier's rights and assets related to the following reconstructive joint markets: (1) total ankle replacements; (2) total silastic big toe joint replacements; and (3) total silastic toe joint replacements for the second through fifth "lesser" toes.

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

Pursuant to an Agreement and Plan of Merger dated October 27, 2014, Wright and Tornier propose to merge in an all-stock transaction valued at approximately $3.3 billion (the "Proposed Merger"). The Commission's Complaint alleges that the Proposed Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for total ankle replacements and total silastic toe joint replacements. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the Proposed Merger.

THE PARTIES

Headquartered in Memphis, Tennessee, Wright is a global orthopedic company that divides its business into three categories: foot and ankle hardware; upper extremity reconstructive devices; and biologics products.

Tornier is a global medical device company based in Amsterdam, the Netherlands, with U.S. operations headquartered in Bloomington, Minnesota. Tornier's U.S. products include those for the upper extremity joints; lower extremity joints; sports medicine; and biologics.

THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

I. Total Ankle Replacements

Total ankle replacements are used to treat end-stage ankle arthritis, which develops when cartilage on the bones of the ankle joint wears away and causes bone-on-bone grinding down of the

joint surface. Patients with end-stage ankle arthritis experience pain and swelling at the ankle along with difficulty walking. Total ankle replacements reduce the pain while maintaining the motion at the ankle joint. They replace damaged bone and cartilage with a metal tibial tray, a metal talar dome, and a polyethylene bearing. In a fixed bearing total ankle replacement, the polyethylene bearing is locked to the tibial component, while in a mobile bearing system it moves independently. Physicians and their patients would not switch to an alternative product or therapy in response to a small but significant increase in the price of total ankle replacements.

Wright, Tornier, and Stryker Corporation ("Stryker") are the only significant suppliers in the U.S. market for total ankle replacements, accounting for 44%, 19%, and 31% of 2014 sales, respectively. Wright and Tornier are each other's closest competitor. These companies both offer fixed bearing technologies and the only options for revision surgeries, i.e., surgeries to redo a prior total ankle replacement procedure. The other leading supplier, Stryker, supplies the only mobile bearing system in the United States, making it a more distant competitor to Wright and Tornier. The only other U.S. supplier of total ankle replacements, Zimmer Holdings, Inc. ("Zimmer") offers a technology that typically is used only in specialized cases. Zimmer maintains a fringe position in the market.

II. Total Silastic Toe Joint Replacements

Total big toe joint replacements treat severe cases of *hallux rigidus*, an arthritic condition in the first metatarsophalangeal ("MTP") joint of the big toe. Pain and inflammation at the first MTP joint restricts movement of the big toe and leads to difficulty walking. Total big toe joint replacements relieve pain and preserve motion in the big toe.

There are two types of total big toe joint replacements: metal and silastic. Total silastic big toe joint replacements are a distinct antitrust market. Surgeons that favor total silastic big toe joint replacements over metal implants do so for the silastic implants' flexibility and longevity. The silastic implants are also significantly less expensive than total metal big toe joint replacements. Physicians and patients do not view total silastic

and total metal big toe joint replacements as reasonably interchangeable. A small but significant increase in the price of total silastic big toe joint replacements would not cause physicians or patients to switch to other products or therapies.

The U.S. market for total silastic big toe joint replacements is highly concentrated. Wright and Tornier are the only significant suppliers of the product, accounting for approximately 60% and 38% of the market, respectively. The next closest competitor to Wright and Tornier—Sgarlato Med LLC—accounts for a nominal share of the market.

Although more rare than in the big toes, severe arthritis also occurs in the MTP joints of the lesser toes. Physicians and patients who use total silastic lesser toe joint replacements would not switch to any other product or procedure in response to a small but significant increase in the price of the total silastic toe joint implants. Wright, Tornier, and OsteoMed supply total silastic lesser toe joint replacements in the United States, and Wright and Tornier are each other's closest competitor. The Proposed Merger would result in a combined market share of approximately 76%.

The relevant geographic market for total ankle replacements and total silastic toe joint replacements is the United States. These products are medical devices regulated by the U.S. Food and Drug Administration ("FDA"). Medical devices sold outside of the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

ENTRY CONDITIONS

Entry in the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Merger. To enter or effectively expand in any of the relevant markets successfully, a supplier would need to design and manufacture an effective product, obtain FDA approval, and develop clinical history supporting the long-term efficacy of its product. The new entrant or expanding firm would also need to develop and foster product loyalty and establish a nationwide sales network capable

of marketing the product and providing on-site service at hospitals nationwide. Establishing a track record for quality, service, and consistency is difficult, expensive, and typically spans several years.

COMPETITIVE EFFECTS OF THE MERGER

The Proposed Merger would likely result in significant competitive harm to consumers in the markets for total ankle replacements and total silastic toe joint replacements. As particularly close substitutes in each relevant market, Wright and Tornier respond directly to competition from each other with improved products, better service, and lower prices. By eliminating this direct and substantial head-to-head competition, the Proposed Merger likely would allow the combined firm to exercise market power unilaterally, resulting in less innovation and higher prices for consumers.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the Proposed Merger by requiring the parties to divest to Integra all of the rights and assets needed for it to become an independent, viable, and effective competitor in the U.S. markets for total ankle replacements and total silastic toe joint replacements. The divestitures will maintain the competition that currently exists in each of the relevant markets.

Integra is well positioned to restore the competition that otherwise would be lost through the Proposed Merger. Headquartered in Plainsboro, New Jersey, Integra is a global medical device company that has experience manufacturing, marketing, and distributing orthopedic devices in the United States, and a track record for quality, service, and consistency. Integra's lower extremity product portfolio is also highly complementary to Tornier's total ankle replacements and total silastic toe joint replacements.

The Order requires Tornier to divest all U.S. assets and rights related to the relevant products, including intellectual property, manufacturing technology, and existing inventory. In order to ensure continuity of supply, the Order requires that the parties

supply Integra with total ankle replacements for up to three years and total silastic toe joint replacements for up to one year while Integra transitions to independent manufacturing and works to obtain FDA approval.

To ensure that the divestitures are successful, the Order requires the parties to enter into a transitional services agreement with Integra 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 Integra, as well as provide access to employees who possess or are able to identify such information. Integra also will have the right to interview and offer employment to employees associated with the relevant products.

The parties must accomplish these divestitures and relinquish their rights to Integra no later than ten days after the Proposed Merger is consummated. If the Commission determines that Integra 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 Integra 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 Order also requires the parties to appoint Quantic Regulatory Services, LLC as interim monitor to ensure the parties comply with the obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the assets and rights to Integra.

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

Complaint

IN THE MATTER OF

ENDO INTERNATIONAL PLC

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

Docket C-4539; File No. 151 0137
Complaint, September 24, 2015 – Decision, November 10, 2015

This consent order addresses the $8 billion acquisition by Endo International PLC ("Endo") of certain assets of Pharmaceutical Companies, Inc. ("Par"). Endo and Par, are both global pharmaceutical company specializing in the development, production, and marketing of generic pharmaceutical productions. Endo's proposed acquisition of Para raises competitive concerns in the U.S. market for generic glycopyrrolate tablets and methimazole tablets. Individually, Endo and Par are two of a small number of competitors but a merger would allow Endo to become larger player in the market, which would likely lead to higher prices in each market. The complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, as amended by lessening current competition in the markets for generic glycopyrrolate tablets and generic methimazole tablets. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be eliminated by the proposed acquisition. The consent order requires Endo to divest all its rights to generic glycopyrrolate tablets and generic methimazole tablets to Rising Pharmaceuticals. If the Commission determines that Rising Pharmaceuticals 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 Rising Pharmaceuticals and then divest the products to a Commission-approved acquirer within six months of the date the Order becomes final.

Participants

For the *Commission: Stephanie C. Bovee.*

For the *Respondent: Cliff Aronson, Skadden, Arps, Slate, Meagher & Flom LLP; Johnathan Klarfeld* and *Michael McFalls, Ropes & Gray 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 Endo International plc ("Endo"), a

corporation subject to the jurisdiction of the Commission, has agreed to acquire Par Pharmaceutical Holdings, Inc. ("Par"), 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 Endo is a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Ireland, with its executive offices and principal place of business located at First Floor, Minerva House, Simmonscourt Road, Ballsbridge, Dublin 4, Ireland.

2. Par is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at One Ram Ridge Road, Chestnut Ridge, New York, 10977.

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

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger executed May 18, 2015, Endo proposes to acquire 100% of the outstanding voting securities of Par in a transaction valued at approximately $8 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following generic pharmaceutical products:

a. glycopyrrolate tablets; and

b. methimazole tablets.

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

IV. THE STRUCTURE OF THE MARKETS

7. Glycopyrrolate tablets are used to reduce secretions in the mouth, throat, airway, and stomach, mitigating the side effects of peptic ulcer medicines. In the United States, Endo, Par, and Leading Pharma, LLC currently supply generic glycopyrrolate tablets. The proposed transaction would reduce the number of generic suppliers from three to two, and produce a firm controlling in excess of 63%. The post-acquisition Herfindahl-Hirschman Index ("HHI") for this market would be 5,038, an increase of 1,905.

8. Methimazole tablets inhibit the production of excess thyroid hormone. In the United States, Par, Endo, Heritage Pharmaceuticals, Inc., and Sandoz currently supply generic methimazole tablets. The proposed transaction would reduce the number of generic suppliers from four to three, and the combined company would account for 67% of generic methimazole sales. The transaction would increase the HHI by 1,417 points to 5,059.

V. ENTRY CONDITIONS

9. Entry into the relevant markets 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 drug development and FDA approval

requirements are extraordinarily time consuming. 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 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 Endo and Par and reducing the number of independent significant competitors in the markets for generic glycopyrrolate tablets and methimazole tablets, thereby increasing the likelihood that: (1) Endo would be able to unilaterally exercise market power in these markets; (2) the remaining competitors would engage in coordinated interaction between or among each other; and (3) customers would be forced to pay higher prices.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of September, 2015 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Endo International plc ("Endo" or "Respondent") of the voting securities of Par Pharmaceutical Holdings, Inc. ("Par"), 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 Endo is a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Ireland with its executive offices and principal place of business located at First Floor, Minerva House, Simmonscourt Road, Ballsbridge, Dublin 4, Ireland.

2. Par is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at One Ram Ridge Road, Chestnut Ridge, New York, 10977.

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 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. "Endo" or "Respondent" means: Endo International plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Endo (including, without limitation, Hawk Acquisition ULC, Endo Limited, Endo Health Solutions Inc., and Vintage Pharmaceuticals, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Endo shall include Par.

B. "Par" means: Par Pharmaceutical 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 Par (including, without limitation, Par Pharmaceutical Companies, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Decision and Order" means the:

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

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

E. "Divestiture Product Business(es)" means the Business of Respondent within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the 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. "Transition Period" means, for each Glycopyrrolate Product and each Methimazole Product, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the Acquirer directs the Respondent to cease the marketing, distribution, and sale of the Glycopyrrolate Product(s) and the Methimazole Product(s), respectively; (ii) the date on which the Acquirer commences the marketing, distribution, and sale of the Glycopyrrolate Product(s) and the Methimazole Product(s), respectively; or (iii) the date four (4) months from the Closing Date for the Divestiture Products.

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 each of the respective Divestiture Product Assets to an Acquirer, Respondent 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. Respondent 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 Respondent fully transfers and delivers each of the respective Divestiture Product Assets to an Acquirer, Respondent 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 its 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.

Order to Maintain Assets

Respondent's 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 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 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. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to May 18, 2015, at the related High Volume Accounts;

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

6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such Divestiture 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 Divestiture Product Assets 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 Divestiture Products for the relevant Divestiture Product's last fiscal year.

D. Respondent shall:

1. for a period of twelve (12) months from the Closing Date or until the hiring of twenty (20) Divestiture 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 Divestiture Product Core Employees. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent 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 Divestiture Product Core Employees. Failure by Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *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 Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture 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 Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondent shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondent from continuing to employ any Divestiture 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 or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture 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 Divestiture Product 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 Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

provided, however, Respondent 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 the 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 Respondent to

terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

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 Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts the Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondent.

E. With respect to the the Glycopyrrolate Products and the Methimazole Products, during the Transition Period, Respondent, in consultation with the Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of these Products by the Acquirer is not delayed or impaired by the Respondent;

2. designate employees of Respondent knowledgeable about the marketing, distribution and sale related to each of these Products 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 the Business related to these Products to the Acquirer;

3. maintain and manage inventory levels of these Products in consideration of the marketing and distribution transition to the Acquirer;

4. continue to market, distribute and sell these Products;

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

6. provide the Acquirer with a listing of inventory levels (week of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) on a regular basis and in a timely manner;

7. provide the Acquirer with anticipated reorder dates for each customer on a regular basis and in a timely manner; and

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

F. Pending divestiture of the Divestiture Product Assets, Respondent shall:

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

   a. the requirements of this Order;

   b. Respondent's obligations to each respective 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 Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and

4. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent's personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

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 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 relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

I. 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.

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

III.

IT IS FURTHER ORDERED that:

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 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 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) date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondent and Par; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondent of its intention to abandon its efforts to manufacture such 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 relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date *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; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph VII.B. of the

Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer or the Acquirer's Manufacturing Designee 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 Respondent and Par.

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 relevant 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 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 Divestiture Product Assets, as required by and described in the Decision and Order, has been completed;

C. the day after the Product Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to the provision of the Product Manufacturing Technology are complete; or

D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Endo International plc ("Endo" or "Respondent") of the voting securities of Par Pharmaceutical Holdings, Inc. ("Par"), 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 Endo is a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Ireland with its executive offices and principal place of business located at First Floor, Minerva House, Simmonscourt Road, Ballsbridge, Dublin 4, Ireland.

2. Par is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at One Ram Ridge Road, Chestnut Ridge, New York 10977.

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. "Endo" or "Respondent" means: Endo International plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Endo (including, without limitation, Hawk Acquisition ULC, Endo Limited, Endo Health Solutions Inc., and Vintage Pharmaceuticals, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Endo shall include Par.

B. "Par" means: Par Pharmaceutical 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 Par (including, without limitation, Par Pharmaceutical Companies, Inc.), 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 Respondent Endo's acquisition of fifty percent (50%) or more of the voting securities of Par. Respondent has entered an *Agreement and Plan of Merger*, dated as of May 18, 2015, by and among Endo International plc, Endo Limited, Endo Health Solutions Inc., Banyuls Limited, Hawk Acquisition ULC, Par Pharmaceutical Holdings, Inc., and Shareholder Representative Services LLC in connection with the Acquisition, and has submitted a copy of this agreement to the Commission.

F. "Acquisition Date" means the date on which the Acquisition is consummated.

G. "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").

H. "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.

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

J. "Categorized Assets" means the following assets and rights of the Respondent, 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 maintained by the Respondent in accordance with the Order to Maintain Assets until the Closing Date:

1. all rights to all of the Applications related to the specified Divestiture Product;

2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

3. all Product Approvals related to the specified Divestiture Product;

4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

5. all Product Marketing Materials related to the specified Divestiture Product;

6. all Product Scientific and Regulatory Material related to the specified Divestiture Product;

7. all Website(s) related exclusively to the specified Divestiture Product;

8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;

9. for each specified Divestiture Product that has been marketed or sold by the Respondent prior to the Closing Date, a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:

   a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law 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 the Respondent);

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

e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and *except* as may be required by applicable Law 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);

10. all Product Development Reports related to the specified Divestiture Product;

11. at the option of the Acquirer of the specified Divestiture Product, all Product Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);

12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. for each specified Divestiture Product that has been marketed or sold by the Respondent prior to the Closing Date, a list of all customers and targeted customers for the specified Divestiture Product and a listing of the net sales (in either units

or dollars) of the specified Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;

14. for each specified Divestiture Product, a list of all active pharmaceutical ingredient and critical excipient suppliers listed on any Application of a Retained Product that is the therapeutic equivalent (as that term is defined by the FDA) of that Divestiture Product;

15. for each specified Divestiture Product that is a Contract Manufacture Product:

    a. a list of the inventory levels (weeks of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and,

    b. anticipated reorder dates for each customer as of the Closing Date;

16. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the specified Divestiture Product;

17. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the

specified Divestiture Product not later than five (5) days after the Closing Date;

18. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and,

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

provided, however, that "Categorized Assets" shall not include: (i) documents relating to the Respondent's general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, *however*, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of the Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Divestiture Product; 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 Divestiture Product, the Respondent shall provide that Acquirer access to original documents under circumstances where copies of documents are

insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the 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).

K. "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.

L. "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.

M. "Closing Date" means, as to each Divestiture Product, the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.

N. "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 a Divestiture Product(s). 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 Divestiture Products;

2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);

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

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

O. "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.

P. "Contract Manufacture Product(s)" means:

1. the Glycopyrrolate Products;

2. the Methimazole Products; and,

3. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient, excipients or

packaging materials (including, without limitation, drug vials);

provided however, that with the consent of the Acquirer of the specified Product, the Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of the Respondent's agreement to Contract Manufacture.

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 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 a Divestiture Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Divestiture Product.

S. "Divestiture Agreements" means the following:

1. *Asset Purchase Agreement* by and between Vintage Pharmaceuticals, LLC and Rising Pharmaceuticals, Inc. dated as of [insert], 2015;

2. *Supply Agreement* between Vintage Pharmaceuticals, LLC d/b/a Qualitest Pharmaceuticals and Rising Pharmaceuticals, Inc. attached to the *Asset Purchase Agreement* and to be executed on or before the Closing Date; and,

all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Divestiture Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Divestiture Agreements are contained in Non-Public Appendix I.

T. "Divestiture Product(s)" means the following, individually and collectively:

1. the Glycopyrrolate Products; and,

2. the Methimazole Products.

U. "Divestiture Product Assets" means the following, individually and collectively:

1. the Glycopyrrolate Product Assets; and

2. the Methimazole Product Assets.

V. "Divestiture Product Core Employees" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Contract Manufacture Product.

W. "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 Respondent:

1. to research and Develop the specified Divestiture Product(s) for marketing, distribution or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the Geographic Territory;

3. to import or export the specified Divestiture Product(s) to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Products in the Geographic Territory; and

4. to have the specified Divestiture Product(s) 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 or Product Manufacturing Technology 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.

X. "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.

Y. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

Z. "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.

AA. "Drug Master File(s)" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

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

CC. "Glycopyrrolate Products" means the following: the Products manufactured, marketed, sold, in Development, owned or controlled by Respondent Endo pursuant to the following Application: ANDA Number 040821, and any supplements, amendments or revisions to this Application.

DD. "Glycopyrrolate Product Assets" means all rights, title and interest in and to all assets related to the Business of Endo within the Geographic Territory related to each of the Glycopyrrolate Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Glycopyrrolate Products.

EE. "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.

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

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" means any Person other than the Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

JJ. "Methimazole Products" means the following: the Products manufactured, marketed, sold, in Development, owned or controlled by Respondent Endo pursuant to the following Application: ANDA Number 202068, and, any supplements, amendments, or revisions to this Application.

KK. "Methimazole Product Assets" means all rights, title and interest in and to all assets related to the Business of Endo within the Geographic Territory related to each of the Methimazole Products, to the extent legally transferable, including, without limitation, the

Categorized Assets related to the Methimazole Products.

LL. "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.

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

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

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

PP. "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.

QQ. "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.

RR. "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.

SS. "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.

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

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which the Respondent 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 the specified Divestiture Product;

3. relating to any Clinical Trials involving the specified Divestiture Product;

4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;

5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);

6. pursuant to which a Third Party manufactures or plans to manufacture the specified Divestiture Product as a finished Product on behalf of the Respondent;

7. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of Respondent;

8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to the Respondent;

9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;

10. constituting confidentiality agreements involving the specified Divestiture Product;

11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;

12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the specified Divestiture Product to the Respondent

including, but not limited to, consultation arrangements; and/or,

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), the Respondent shall, 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 specified Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

UU. "Product Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product's sales forecasting models, medical education materials, sales training

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); 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.

VV. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Divestiture Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product;

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

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

6. FDA approved Product labeling related to the specified Divestiture Product;

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

8. FDA approved patient circulars and information related to the specified Divestiture Product;

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

10. summary of Product complaints from physicians related to the specified Divestiture Product;

11. summary of Product complaints from customers related to the specified Divestiture Product;

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

13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;

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

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified Divestiture Product that relate to the specifications,

degradation, chemical interactions, testing and historical trends of the production of the specified Divestiture Product;

16. analytical methods development records related to the specified Divestiture Product;

17. manufacturing batch records related to the specified Divestiture Product;

18. stability testing records related to the specified Divestiture Product;

19. change in control history related to the specified Divestiture Product; and,

20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

WW. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the Respondent within ninety (90) days of the execution date of any Remedial Agreement);

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

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, the 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.

XX. "Product Intellectual Property" means all of the following intellectual property related to a Divestiture Product (other than Product Licensed Intellectual Property) that is owned, licensed or controlled by Respondent as of the Closing Date:

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, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Endo" or "Par" 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 Endo, or Par can be identified or defined.

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

1. all of the following intellectual property related to a Divestiture Product that is owned, licensed or controlled by Respondent as of the Closing Date, as follows:

   a. Patents that are related to a Divestiture 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;

   b. 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,

2. in those instances in which Respondent or Par (i) owns, licenses or controls the rights to the Drug Master File of a Product that is the subject of an NDA ("NDA Product") that is the therapeutic

equivalent (as that term is defined by the FDA) of any Divestiture Product that is the subject of an ANDA and (ii) such NDA Product is a Retained Product, a full, complete and unlimited Right of Reference or Use to such Drug Master File to reference or use in any Application related to that Divestiture Product.

ZZ. "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 specified Divestiture Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

AAA. "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, at the Acquirer's option, all such equipment used to manufacture that Product.

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

CCC. "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 specified Divestiture Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

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

EEE. "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.

FFF. "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.

GGG. "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.

HHH. "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 a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between 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 a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

III. "Retained Product" means any Product(s) other than a Divestiture Product.

JJJ. "Right of Reference or Use" means the authority to rely upon, and otherwise use, (i) an investigation of the quality, safety or efficacy of a Product (including any

or all such investigations conducted *in vitro, in vivo,* or *in silico* and any and all Clinical Trials), (ii) Product Development Reports, or (iii) Product Scientific and Regulatory Material 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, Product Development Reports, or Product Scientific and Regulatory Material for FDA audit, if necessary.

KKK. "Rising" means Rising Pharmaceuticals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 3 Pearl Court, Allendale, New Jersey 07401.

LLL. "Supply Cost" means a cost not to exceed the Respondent's average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product.

MMM. "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 Divestiture 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 the specified Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and,

4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

    a. manufacture the specified Divestiture Product in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such Divestiture Product;

    b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and

    c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

NNN. "Third Party(ies)" means any non-governmental Person other than the following: the Respondent; Par; or, the Acquirer of particular assets or rights pursuant to this Order.

OOO. "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 any of the Divestiture Products.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondent shall divest the Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to Rising pursuant to, and in accordance with, the Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Rising or to reduce any obligations of Respondent under such agreements), and each 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 Respondent has divested the Divestiture Product Assets to Rising 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 Rising is not an acceptable purchaser of the Divestiture Product Assets, then

Respondent shall immediately rescind the transaction with Rising, 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 Respondent has divested the Divestiture Product Assets to Rising 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 Divestiture Product Assets to Rising (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 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, 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 an Acquirer, and to permit the Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;

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

D. Respondent shall:

1. submit to each Acquirer, at Respondent's expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;

2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products 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 related to the Business of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

c. applicable Law;

5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the 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.

E. Respondent 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 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 the Respondent related to the Divestiture Products being acquired by that Acquirer.

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 Divestiture

Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, 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 that Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to that Acquirer.

F. Respondent shall:

1. upon reasonable written notice and request from the Acquirer to 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 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 and Par, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of the Respondent from Persons other than Respondent or Par;

2. make representations and warranties to the Acquirer 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, 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 the Respondent to meet cGMP. This obligation may be made contingent upon the 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 the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the Respondent to the Acquirer in an agreement to Contract Manufacture;

provided further, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on the 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 Respondent's own use or sale;

4. make representations and warranties to each Acquirer that Respondent 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 Respondent can demonstrate that the failure was beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent;

provided, however, that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer 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, Respondent shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

7. in the event Respondent becomes (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 Respondent shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from the facility(ies) that Respondent uses or has used to source its own supply of the therapeutically equivalent Product

where such facility(ies) is still suitable for use for such manufacturing;

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 Respondent and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products 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 Par 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.F.1. - 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer (or the Manufacturing Designee(s) of that Acquirer) 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; (ii) the date the Acquirer notifies the Commission and Respondent of its intention to abandon its efforts to manufacture the relevant 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 the relevant Contract Manufacture Product, or (iv) the date five (5) years from the Closing Date.

G. 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 the Divestiture Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

H. 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 the Divestiture Products 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 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.

I. Respondent shall:

1. for a period of twelve (12) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s);"

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *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 Divestiture Product Core Employees the opportunity to enter

into employment contracts during a Divestiture 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 Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondent shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondent from continuing to employ any Divestiture 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 or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to

research, Develop, manufacture and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture 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 Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

provided, however, Respondent 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 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 Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts the Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondent.

J. 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 Divestiture Product to the Acquirer,

1. Respondent shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;

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

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

   d. ensure the assets related to each Divestiture Product are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;

   e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. 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 associated with that Divestiture Product.

K. Respondent 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 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 that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from the Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture

anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from the Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

L. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.

M. 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 Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Product(s), the Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from the Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

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

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

N. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondent by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the Geographic Territory; and

2. to create a viable and effective competitor, that is independent of Respondent and Par in the Business of each Divestiture Product within the Geographic Territory; and,

3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after the 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 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 that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent; (ii) the date the Acquirer of that Divestiture Product notifies the Commission and Respondent 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 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 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; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph VII.B., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer or the Acquirer's Manufacturing Designee 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 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 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, 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, 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 copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

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 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 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 that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by 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 Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondent's obligation to the Acquirer pursuant to this Order.

D. For each Divestiture Product that is a Contract Manufacture Product, Respondent shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of the Respondent, all as soon as reasonably practicable.

E. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

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.1, II.D.2., II.D.3, II.E., 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. 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 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 this Order.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or 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 November 10, 2025.

By the Commission.

NON-PUBLIC APPENDIX I

AGREEMENTS RELATED TO THE DIVESTITURES

[Redacted from the Public Record, but Incorporated by Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Endo International plc ("Endo") that is designed to remedy the anticompetitive effects resulting from Endo's acquisition of Par Pharmaceutical Holdings, Inc. ("Par"). Under the terms of the proposed Consent Agreement, Endo is required to divest all of its rights and assets

related to generic glycopyrrolate tablets and generic methimazole tablets.

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 and Plan of Merger executed on May 18, 2015, Endo proposes to acquire Par for approximately $8 billion. The Commission alleges in its Complaint that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current competition in the markets for generic glycopyrrolate tablets and generic methimazole tablets. 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

A generic pharmaceutical drug contains the same active ingredient as the brand name product, but typically at a much more affordable price. 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.

The Proposed Acquisition would reduce the number of current suppliers in the markets for generic glycopyrrolate tablets and

generic methimazole tablets. Glycopyrrolate tablets are used to reduce secretions in the mouth, throat, airway, and stomach, mitigating the side effects of peptic ulcer medicines. Only three companies Endo, Par, and Leading Pharma, LLC currently supply generic glycopyrrolate tablets in the United States. The proposed transaction would result in a combined market share in excess of 63%. Methimazole tablets inhibit the production of excess thyroid hormone. Four companies Endo, Par, Sandoz, and Heritage Pharmaceuticals, Inc. currently supply generic methimazole in the United States. The combined company would supply approximately 67% of the generic methimazole tablet market.

II. Entry

Entry into the two markets described above 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 United States Food and Drug Administration ("FDA"), is costly and lengthy.

III. Effects

The Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating current competition between Endo and Par in each of these markets. Market participants characterize generic glycopyrrolate tablets and generic methimazole 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 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. Thus, absent a remedy, the proposed acquisition will likely cause U.S. consumers to pay significantly higher prices for generic glycopyrrolate tablets and generic methimazole tablets.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the competitive concerns raised by the acquisition in each relevant market by requiring Endo to divest all its rights to generic glycopyrrolate tablets and generic methimazole tablets to Rising Pharmaceuticals. Owned by Aceto Corporation, Rising Pharmaceuticals develops, sells, and distributes generic pharmaceuticals in the United States. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the proposed acquisition consummates.

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 Rising Pharmaceuticals 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 Rising Pharmaceuticals 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 contains several provisions to help ensure that the divestitures are successful. Rising Pharmaceuticals will acquire Endo's glycopyrrolate and methimazole ANDAs and stream of revenue associated with each product. Endo will supply Rising Pharmaceuticals with glycopyrrolate and methimazole tablets for two years while the company transfers manufacturing technology to Rising Pharmaceuticals' designated manufacturer. The proposed Consent Agreement also requires Endo to provide transitional services to Rising Pharmaceuticals to assist it in establishing independent manufacturing capabilities. These transitional services include technical assistance to manufacture glycopyrrolate and methimazole tablets in substantially the same manner and quality employed or achieved by Endo, and advice and training from knowledgeable employees of the parties.

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.

Initial Decision

IN THE MATTER OF

LABMD, INC.

INITIAL DECISION IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

Docket 9357; File No. 102 3099
Complaint, August 28, 2013 – Initial Decision, November 13, 2015

This Initial Decision addresses allegations that LabMD, Inc. violated Section 5 of the FTC Act by failing to provide "reasonable and appropriate" security for personal information maintained on LabMD's computer networks, and that this conduct "caused or is likely to cause" substantial consumer injury. In August 2013, the Commission filed an administrative complaint against LabMD, alleging that LabMD engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks. Following an administrative hearing, the Administrative Law Judge ("ALJ") ruled that LabMD's alleged unreasonable data security cannot properly be declared an unfair act or practice in violation of Section 5(a) of the FTC Act. The ALJ noted that there is no evidence that any consumer has suffered any substantial injury as a result of LabMD's alleged conduct, and both the quality and quantity of Complaint Counsel's evidence submitted to prove that such injury is, nevertheless, "likely" is unpersuasive.

Participants

For the *Commission: Megan Cox, Maggie Lassack, Ryan Mehm, Laura Riposo VanDruff, Alain Sheer,* and *Ruth Yodaiken.*

For the *Respondent: Stephen Fusco, Fusco & Associates, LLC; Charles C. Murphy, Jr., Vaughan & Murphy; Amber Abassi, Cause of Action.*

INITIAL DECISION

By CHAPPELL, MICHAEL D., Chief Administrative Law Judge.

I. INTRODUCTION

A. SUMMARY OF COMPLAINT AND ANSWER

1. The Complaint

The Administrative Complaint in this case ("Complaint"), issued by the Federal Trade Commission ("FTC" or "Commission") on August 28, 2013, charges that Respondent LabMD, Inc. ("Respondent" or "LabMD"), a clinical testing laboratory, failed to provide "reasonable and appropriate" security for personal information maintained on LabMD's computer networks, and that this conduct "caused or is likely to cause" substantial consumer injury. Therefore, the Complaint alleges, Respondent is liable for "unfair" acts or practices under Section 5(a) of the Federal Trade Commission Act ("FTC Act"). Complaint ¶¶ 10, 17-21, 22-23.

Specifically, the Complaint alleges that "[R]espondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks." Complaint ¶ 10. "Among other things," according to the Complaint, Respondent:

(a) did not develop, implement, or maintain a comprehensive information security program to protect consumers' personal information;

(b) did not use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its networks;

(c) did not use adequate measures to prevent employees from accessing personal information not needed to perform their jobs;

(d) did not adequately train employees to safeguard personal information;

(e) did not require employees, or other users with remote access to the networks, to use common authentication-related security measures;

(f) did not maintain and update operating systems of computers and other devices on its networks; and

(g) did not employ readily available measures to prevent or detect unauthorized access to personal information on its computer networks.

Complaint ¶ 10(a)-(g).

The Complaint alleges two "security incidents" occasioned by Respondent's alleged unreasonable data security. The first incident, according to the Complaint, occurred in May 2008, when a "third party" informed Respondent that a June 2007 insurance aging report was "available" on a peer-to-peer ("P2P") file-sharing network, through a file-sharing application called LimeWire. Complaint ¶ 17. The insurance aging report allegedly contained personal information, such as names, dates of birth, Social Security numbers ("SSNs"), current procedural terminology ("CPT") codes, and health insurance company names, addresses, and policy numbers, for approximately 9,300 patients of LabMD's physician clients. Complaint ¶ 19. This insurance aging report, consisting of 1,718 pages, is referred to herein as the "1718 File."

For the second alleged security incident asserted to have been caused by Respondent's alleged failure to protect data on its computer networks, the Complaint alleges that in October 2012, "more than 35 Day Sheets" and "a small number of copied checks" were found in the possession of individuals who subsequently pleaded "no contest" to identity theft charges (the "Sacramento Documents"). Complaint ¶ 21. The Complaint further claims that the Sacramento Documents included personal information such as names and Social Security numbers, and that some of the Social Security numbers have been used by people with different names, which the Complaint alleges indicates use of Social Security numbers by identity thieves. Complaint ¶ 21.

The Complaint concludes that Respondent's alleged failure to employ "reasonable and appropriate" measures to prevent unauthorized access to personal data caused, or is likely to cause, substantial harm to consumers that is not reasonably avoidable by consumers or outweighed by benefits to consumers or competition, and therefore constitutes an unfair practice under Section 5 of the FTC Act. Complaint ¶¶ 22, 23.

2. Respondent's Answer and Defenses

Respondent filed its Answer and Defenses to the Complaint on September 17, 2013. By Order issued July 27, 2015, Respondent was granted leave to add an additional affirmative defense, and Respondent filed its First Amended Answer and Defenses on July 31, 2015 ("Amended Answer"). The Amended Answer denies all material allegations of the Complaint, except as noted below.

Respondent's Amended Answer admits that it is a Georgia corporation, and further states that it is a clinical laboratory that conducts tests on specimen samples and reports the test results to authorized physicians. Amended Answer ¶¶ 1, 3. Respondent further admits that it files insurance claims for the testing charges with health insurers. Amended Answer ¶ 4. In connection with the foregoing activities, Respondent receives patient names, addresses, dates of birth, gender, telephone numbers, Social Security numbers, lab tests and lab testing codes, and health insurance company names and policy numbers. Amended Answer ¶ 6. Respondent further admits that it uses a computer network in its business to file insurance claims and prepare bills, and that it creates spreadsheets that may include patient information and insurance information. Amended Answer ¶ 9.

With respect to the alleged security incidents set forth in the Complaint, Respondent's Amended Answer states that Tiversa Holding Company ("Tiversa") contacted LabMD in May 2008 claiming to have obtained the 1718 File through LimeWire. Amended Answer ¶ 17. Respondent further states its belief that LimeWire had been downloaded and may have been installed on a computer used by LabMD's billing department manager "no later than" 2006. Amended Answer ¶ 18.

The Amended Answer includes six defenses, including: the Complaint fails to state a valid claim; the Commission lacks subject matter jurisdiction over the claims made in this case; the Commission lacks statutory authority to regulate the acts and practices alleged in the Complaint, making the Commission's actions unlawful; the alleged acts and practices have not caused, and are not likely to cause, substantial injury that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition; the enforcement action against Respondent violates Respondent's due process rights because the Commission has not provided fair notice of the data security standards that the Commission believes Section 5 prohibits or requires; and, the claims alleged in the Complaint are barred by Article II of the United States Constitution because the presiding Administrative Law Judge ("ALJ") is an "inferior officer" that has not been properly appointed by the Commissioners of the FTC, the President, or the Judiciary (the "Appointments Clause" defense). Amended Answer at 5-6.

Respondent presented each of the foregoing defenses, other than the Appointments Clause defense, in a pre-trial Motion to Dismiss filed November 12, 2013. Under the Commission's Rules of Practice, the Motion was decided by the Commission[1] –

[1] The Commission amended Rule 3.22 of its Rules of Practice in 2009 to allow "the Commission to decide legal questions and articulate applicable law when the parties raise purely legal issues." Proposed rule amendments; request for public comment, 73 Fed. Reg. 58,832, 58,836 (Oct. 7, 2008). "[C]ommenters (including the [Section of Antitrust Law of the American Bar Association ('Section')], criticized the [Commission's] proposed Rule change as unfairly invading the province of the independent ALJ and compromising the Commission's dual roles as prosecutor and adjudicator." Interim final rules with request for comment, 74 Fed. Reg. 1804, 1809 (Jan. 13, 2009). "For example, the Section argued that the proposed changes . . . could raise concerns about the impartiality and fairness of the Part 3 proceeding by permitting the Commission to adjudicate dispositive issues, including motions to dismiss challenging the facial sufficiency of a complaint, shortly after the Commission has voted out the complaint finding that it has 'reason to believe' there was a law violation, without the benefit of an opinion by an independent ALJ." *Id.* A joint comment from former FTC Chairman Robert Pitofsky and Michael N. Sohn "similarly argued that the proposed rules, including Rule 3.22, would arguably infringe on the fairness of the Part 3 proceeding if the Commission more frequently 'invades what has heretofore been the province of an independent ALJ.'" *Id.* Dismissing these objections, the Commission

the same entity that, when issuing the Complaint, stated it had "reason to believe" that LabMD violated the provisions of the FTC Act. Complaint at 1. The Commission rejected Respondent's defenses, holding that the statutory prohibition against unfair trade practices in Section 5 could be applied to allegedly unreasonable and injurious data security practices, and declined to dismiss the Complaint. *In re LabMD, Inc.*, 2014 FTC LEXIS 2 (Jan. 16, 2014) ("Commission Order on Motion to Dismiss").

In addition, Respondent filed a pre-trial Motion for Summary Decision on April 21, 2014, which, like Respondent's pre-trial Motion to Dismiss, was also decided by the Commission, pursuant to the Commission's 2009 Rule changes. *See* footnote 1. The Commission denied Respondent's Motion for Summary Decision, holding that there were genuine disputes about some of the factual issues raised by LabMD and that LabMD's liability "for engaging in 'unfair acts or practices' in violation of . . . 15 U.S.C. § 45(a) . . . must be resolved based on factual evidence presented at an evidentiary hearing." *In re LabMD, Inc.*, 2014 FTC LEXIS 126, at *1-2 (May 19, 2014).[2]

Further, concurrent with its Motion to File an Amended Answer to add the Appointments Clause defense, Respondent filed a Motion to Dismiss based on the Appointments Clause defense, the resolution of which the Administrative Law Judge

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amended its Rules of Practice to give to itself the authority to decide "[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision[.]" 16 C.F.R. § 3.22(a).

[2] On December 17, 2013, Respondent filed a Motion to Disqualify Commissioner Brill from participating in this administrative proceeding, arguing that, based on her comments in two public speeches, Commissioner Brill had prejudged the facts of this case. Commissioner Brill issued a statement denying that she had prejudged the case, but concluding nevertheless that, to avoid an undue distraction from the issues raised in the Commission's Complaint against LabMD, she would recuse herself from further participation in the matter. *In re LabMD, Inc.*, 2013 FTC LEXIS 138 (Dec. 24, 2013). Respondent also filed two motions seeking to disqualify Commission Chairwoman Ramirez from participating further in this matter. By Orders dated June 15, 2015 and August 14, 2015, the Commission denied those motions. *In re LabMD, Inc.*, 2015 FTC LEXIS 142 (June 15, 2015); *In re LabMD, Inc.*, 2015 FTC LEXIS 185 (Aug. 14, 2015).

had, on the record, deferred to the Initial Decision. Tr. 1492-1493, 1497-1502. The Commission, exercising its "plenary authority over this adjudication," denied Respondent's Motion to Dismiss based on the Appointments Clause defense, holding "that the Appointments Clause does not apply to the hiring of Commission administrative law judges." However, in order to "put[] to rest any possible claim that this administrative proceeding violates the Appointments Clause," the Commission "ratified Judge Chappell's appointment as a Federal Trade Commission administrative law judge and as the Commission's Chief Administrative Law Judge." *In re LabMD, Inc.*, 2015 FTC LEXIS 215, at *4-6 (Sept. 14, 2015) and Exhibit A thereto (FTC Minute dated September 11, 2015).

B. PROCEDURAL HISTORY

1. Overview

The evidentiary hearing began on May 20, 2014. FTC Complaint Counsel ("Complaint Counsel") rested its case on May 23, 2014. As more fully described below, completion of Respondent's case was delayed by proceedings to obtain prosecutorial immunity for a defense witness, and the case was reconvened on May 5, 2015. After completion of Respondent's witnesses and resolution of certain evidentiary motions,[3] the evidentiary hearing was completed on July 15, 2015. The hearing record was closed by Order dated July 20, 2015.[4]

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 August 10, 2015. The parties filed

[3] *See In re LabMD, Inc.*, 2015 FTC LEXIS 175 (July 15, 2015); *In re LabMD, Inc.*, 2015 FTC LEXIS 154 (June 22, 2015).

[4] Over 1,080 exhibits were admitted into evidence, 39 witnesses testified, either live or by deposition, and there are 1,504 pages of trial transcript. The parties' proposed findings of fact and conclusions of law, post-trial briefs, replies to proposed findings of fact and conclusions of law, and reply briefs total 2,066 pages.

replies to the other's proposed findings of fact and post-trial briefs on September 4, 2015. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on September 16, 2015. Seventy days from the last filed reply proposed findings and conclusions of law and reply briefs is November 16, 2015.

2. Procedural Summary

Proceedings in this matter have been lengthy, with over 200 entries on the docket, including, among other filings, numerous discovery motions, sanctions motions, and motions to dismiss filed before and after commencement of the evidentiary hearing.[5] A detailed history is available on the FTC's website at https://www.ftc.gov/enforcement/cases-proceedings/102-3099/labmd-inc-matter, and in the interest of brevity will not be repeated here. Instead, the following procedural summary focuses on certain events in the evolution of the case that have led to the unusual result of Complaint Counsel retreating from its own evidence – evidence upon which it had relied in substantial part to support its claim of consumer injury in this case – as explained below.

By way of background, the FTC commenced its investigation into LabMD's data security practices in 2010, based upon Tiversa's claim that the 1718 File, containing personal information, had been disclosed by means of a peer-to-peer file-sharing network. *See* Fed. Trade Comm'n, "Widespread Data Breaches uncovered by FTC Probe" (Feb. 22, 2010), *at* https://www.ftc.gov/news-events/press-releases/2010/widespread-data-breaches-uncovered-ftc-probe; *see also* Letter from Commissioner Brill Denying Motion to Limit or Quash Civil Investigative Demand, April 20, 2012 at 2, *at*

[5] At the conclusion of evidence presented by Complaint Counsel, Respondent moved to dismiss the Complaint for failure of Complaint Counsel's evidence to establish a *prima facie* case of unfair trade practices. By Order issued after the close of the record on July 21, 2015, Respondent's motion was denied. *In re LabMD, Inc.*, 2015 FTC LEXIS 182 (July 21, 2015). On April 24, 2015, Respondent filed another motion to dismiss, arguing that Complaint Counsel engaged in "misconduct and indiscretions" in the investigation and prosecution of this case, including with respect to its reliance on evidence provided by Tiversa, a motion which was also denied as premature. *In re LabMD, Inc.*, 2015 FTC LEXIS 122 (May 26, 2015).

https://www.ftc.gov/sites/ default/files/ documents/petitions-quash/labmd-inc./102-3099-lab-md-letter-ruling-04202012.pdf. Dissenting from the above-cited letter by Commissioner Brill denying Respondent's Motion to Quash or Limit Civil Investigative Demand, then-Commissioner Rosch warned against relying on information provided by Tiversa, stating that "Tiversa is more than an ordinary witness, informant, or 'whistle-blower.' It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations." Dissenting Statement of Commissioner J. Thomas Rosch re FTC File No. 1023099 (June 21, 2012) at 1, *at* https://www.ftc.gov/sites/default /files/documents/petitions-quash/labmd-inc./1023099-labmd-full-commission-review-jtr-dissent.pdf. Former Commissioner Rosch further noted that, according to LabMD, after Tiversa's discovery of the 1718 File on a peer-to-peer network in 2008, Tiversa "repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD." *Id.* at 1-2. Former Commissioner Rosch advised that, under these circumstances, the FTC staff should not inquire about the 1718 File, and should not rely on Tiversa for evidence or information, in order to avoid the appearance of impropriety. *Id.*

FTC staff did not heed then-Commissioner Rosch's warning, and also did not follow his advice. Instead, Complaint Counsel chose to further commit to and increase its reliance on Tiversa. During discovery, Complaint Counsel subpoenaed deposition testimony and documents from Tiversa through Tiversa's chief executive officer and deposition designee, Mr. Robert Boback, and then relied on this evidence to claim that the 1718 File, which formed the basis for one of the two "security incidents" alleged in the Complaint, "has been found on a public P2P network as recently as November 2013. It has been downloaded from four different Internet Protocol ('IP') addresses, including IP addresses with 'unrelated sensitive consumer information that could be used to commit identity theft.'"[6] Complaint Counsel's Pre-Trial Brief

[6] Although Complaint Counsel marked this statement in its Pre-Trial Brief as subject to *in camera* treatment, the substance of this statement does not meet the Commission's strict standards for *in camera* treatment. The ALJ may

at 49 (citing CX0703 (Boback Dep.)). Complaint Counsel gave this Tiversa-provided information to its proffered consumer injury expert witness, Mr. Rick Kam, who relied on that information to support his opinion that consumers identified in the 1718 File are at "a significantly higher risk of identity crimes than the general public." CX0742 (Kam Expert Report at 18-19). Complaint Counsel's other proffered consumer injury expert, Mr. James Van Dyke, also relied on Mr. Boback's 2013 deposition testimony to support his projections of likely identity theft harm arising from the exposure of the 1718 File. CX0741 (Van Dyke Expert Report at 7-8, 12-14).

The credibility and reliability of evidence provided by Tiversa regarding the "spread" of the 1718 File, including to IP addresses allegedly belonging to identity thieves, began to unravel on May 30, 2014, shortly after Complaint Counsel had rested its case. Complaint Counsel announced in court that it had identified "a discrepancy" and a "misstatement on the record" of Mr. Boback's deposition "on which certain of our experts relied in making [consumer harm] calculations." Tr. 1227, *in camera*. Complaint Counsel requested to redepose Mr. Boback to allow him to revise his prior deposition testimony, and also requested leave to allow Complaint Counsel's consumer injury experts to revise their expert opinions based on Mr. Boback's anticipated revised testimony. These requests, made in the middle of trial, long after discovery had closed, and, indeed, after Complaint Counsel had rested its case, were denied. Tr. 1227-1229, *in camera*.[7]

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disclose *in camera* material to the extent necessary for the proper disposition of the proceeding. 16 C.F.R. § 3.45(a); *In re General Foods Corp*., 95 F.T.C. 352, 356 n.7, 1980 FTC LEXIS 99, at *11 n.7 (March 10, 1980) (ALJs "retain the power to reassess prior *in camera* rulings at the time of publication of decisions."). In instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not in fact require *in camera* treatment, such material is disclosed in this public Initial Decision.

[7] Complaint Counsel further explained in court: "it is also the representation of Mr. Boback's counsel that he has looked for the [1718 F]ile more recently and found it more recently, and on that basis we would seek to take a second deposition of Mr. Boback." Tr. 1227-1228, *in camera*. Complaint Counsel's explanation in court clearly indicated that Mr. Boback's "misstatement" was in regard to *when* Tiversa allegedly searched peer-to-peer networks and found the

Also on May 30, 2014, counsel for Respondent reported that the House Committee on Oversight and Government Reform ("OGR") had begun an investigation of Tiversa in conjunction with Tiversa's work with federal government agencies, and that Respondent's proposed witness for May 30, 2014, Tiversa's former employee, Mr. Richard Wallace, had just been informed by OGR that OGR was seeking to interview Mr. Wallace. Tr. 1225, *in camera*; *see* JX0003. It was further disclosed that, if called to testify in the administrative proceedings, Mr. Wallace would invoke his constitutional privilege against self-incrimination, pending his effort to obtain a grant of prosecutorial immunity. Tr. 1225, 1231-1232, 1241-1242, *in camera*; *see* 16 C.F.R. § 3.39.

On June 12, 2014, counsel for Respondent stated on the record that Mr. Wallace was expected to testify in this case that the Tiversa-provided evidence that the 1718 File had been found at four IP addresses other than LabMD's, including IP addresses of identity thieves, had been manufactured, and that, in fact, the 1718 File had not been found at any IP address other than LabMD's. Tr. 1293. Also on June 12, 2014, Mr. Wallace took the stand and invoked his privilege against self-incrimination in response to Respondent's questioning. Tr. 1301-1302.

Proceedings were recessed to allow Mr. Wallace to seek prosecutorial immunity for the OGR testimony and for testimony in these administrative proceedings. *In re LabMD, Inc.*, 2014 FTC LEXIS 246 (Oct. 9, 2014). On December 29, 2014, on

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1718 File in "multiple locations" and not *whether* Tiversa had in fact located the file in "multiple locations." Moreover, notwithstanding the denial of Complaint Counsel's request to redepose Mr. Boback, Complaint Counsel, over Respondent's objection, elicited testimony from Mr. Boback at Respondent's June 7, 2014 trial deposition of Mr. Boback (a deposition which was allowed due to Mr. Boback's alleged unavailability to appear at trial (Tr. 1251-1252)), that Tiversa ran a search for the 1718 File on June 3 or 4, 2014, and identified three IP addresses from which the 1718 File had been downloaded, in addition to the four IP addresses on CX0019 (discussed *infra* II.D.3.). RX0541 (Boback Trial Dep.) at 78. Because, as shown *infra*, Mr. Boback's testimony in this case is not credible, and evidence produced by Tiversa is not reliable as to the "spread" of the 1718 File, ultimately such "clarifying" testimony or evidence from Mr. Boback on this issue would not have been entitled to, or given, any weight.

Respondent's motion, and pursuant to authority granted by the Attorney General of the United States on November 14, 2014, an Order was issued granting Mr. Wallace immunity pursuant to Commission Rule 3.39 and directing Mr. Wallace to testify in these proceedings. *See In re LabMD, Inc.*, 2014 FTC LEXIS 314 (Dec. 29, 2014). Proceedings reconvened for Mr. Wallace's testimony on May 5, 2015.[8]

On May 5, 2015, Mr. Wallace appeared and testified. As detailed in Section II.D.3., *infra*, Mr. Wallace testified that Tiversa's business model was to "monetize" documents that it downloaded from peer-to-peer networks, by using those documents to sell data security remediation services to the affected business, including by representing to the affected business that the business' information had "spread" across the Internet via peer-to-peer sharing networks, when such was not necessarily the case, and by manipulating Tiversa's internal database of peer-to-peer network downloads (the "Data Store") to make it appear that a business' information had been found at IP addresses belonging to known identity thieves. Mr. Wallace further testified that these practices were followed with regard to Tiversa's discovery of LabMD's 1718 File. In order to retaliate against LabMD for refusing to purchase Tiversa's services, Mr. Wallace testified, Tiversa reported its discovery of the 1718 File to the FTC; and Mr. Wallace, at the direction of Mr. Boback, manipulated Tiversa's Data Store to make it appear that the 1718 File had been found at four IP addresses, including IP addresses of known identity thieves, and fabricated a list of those IP addresses, which Complaint Counsel introduced into evidence as CX0019.

Complaint Counsel opted not to take Mr. Wallace's deposition after his direct testimony. Tr. 1459. That deposition had been allowed by Order issued December 8, 2014. *In re LabMD, Inc.*, 2014 FTC LEXIS 307 (Dec. 8, 2014). Complaint Counsel also chose not to cross-examine Mr. Wallace. Tr. 1459. Complaint Counsel further decided not to offer any rebuttal to Mr. Wallace's

[8] Although proceedings were to reconvene on March 3, 2015, Mr. Wallace was granted two continuances. *See* Orders of February 24, 2015 and March 4, 2015. On March 12, 2015, the Administrative Law Judge ordered a further continuance *sua sponte* until May 5, 2015.

testimony. Tr. 1459. *See* Complaint Counsel's Notice Regarding Rebuttal, May 12, 2015.[9]

Meanwhile, the OGR's investigation of Tiversa continued, including with respect to Tiversa's dealings with the FTC in this case. *See* RX0542; RX0543. An OGR staff report, dated January 2, 2015, but not released until after the completion of Mr. Wallace's testimony in this matter, concluded, *inter alia*, that Tiversa and Mr. Boback provided incomplete, inconsistent, and/or conflicting information to the FTC for this case. *See* RX0644; *see also In re LabMD, Inc.*, 2015 FTC LEXIS 175 (July 15, 2015).

On June 24, 2015, Complaint Counsel announced for the first time that it "does not intend to cite to Mr. Boback's testimony or CX0019 in its proposed findings of fact. Nor does Complaint Counsel intend to cite to expert conclusions predicated on Mr. Boback's testimony or CX0019." Complaint Counsel's Opposition to Respondent's Motion to Admit Exhibits at 10-11 n.11. *See also* Complaint Counsel's Response to Respondent's Motion to Refer Tiversa and Boback for Criminal Investigation at 2 n.1 (July 1, 2015).[10] Complaint Counsel further explained its retreat from Tiversa-provided evidence in its Post-Trial Brief, stating: "The assertions made on page 49 of Complaint Counsel's pre-trial brief are not repeated here. Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony." Complaint Counsel's Post-Trial Brief at 61 n.3.[11]

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[9] Complaint Counsel's Motion to Issue Subpoenas to Tiversa to develop rebuttal evidence, filed July 8, 2014, before Mr. Wallace's testimony and while Mr. Wallace's request for immunity was still pending with the Attorney General, had been denied as premature. *In re LabMD, Inc.*, 2014 FTC LEXIS 194 (July 23, 2014).

[10] Complaint Counsel did not oppose a criminal referral of Tiversa and Mr. Boback; however, Respondent's motion for such referral was denied for failure to provide sufficient legal authority. *In re LabMD, Inc.*, 2015 FTC LEXIS 177 (July 15, 2015).

[11] The parties filed corrected versions of some of their post-trial filings, as indicated in footnote 13. Citations in this Initial Decision to those filings are to the corrected version of the filing.

However, as shown *infra*, Complaint Counsel does rely on expert opinions that were predicated on Mr. Boback's testimony. In addition, Complaint Counsel relies on Mr. Boback's deposition testimony to counter Respondent's Proposed Findings of Fact. *See, e.g.*, CCRRFF 72b, 73b, 74b.

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 accepted 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 merits of the case. 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.[12]

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[12] Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act 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.*, 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.*, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act ("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."[13]

Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting *in camera* treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment or that the material constituted "sensitive personal information," as that term is defined in Commission Rule 3.45(b). This Initial Decision does not disclose

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[13] 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 Corrected 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
CCCL – Complaint Counsel's Conclusions of Law
RB – Respondent's Corrected Post-Trial Brief
RRB – Respondent's Post-Trial Reply Brief
RFF – Respondent's Proposed Findings of Fact
RRCCFF – Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
RCL – Respondent's Corrected Conclusions of Law

any *in camera* information and there is only a public version of the Initial Decision.

D. SUMMARY OF INITIAL DECISION

Section 5(n) of the FTC Act states that "[t]he Commission shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless [1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Complaint Counsel has failed to carry its burden of proving its theory that Respondent's alleged failure to employ reasonable data security constitutes an unfair trade practice because Complaint Counsel has failed to prove the first prong of the three-part test – that this alleged unreasonable conduct caused or is likely to cause substantial injury to consumers.

First, with respect to the 1718 File, the evidence fails to prove that the limited exposure of the 1718 File has resulted, or is likely to result, in any identity theft-related harm, as argued by Complaint Counsel. Moreover, the evidence fails to prove Complaint Counsel's contention that embarrassment or similar emotional harm is likely to be suffered from the exposure of the 1718 File alone. Even if there were proof of such harm, this would constitute only subjective or emotional harm that, under the facts of this case, where there is no proof of other tangible injury, is not a "substantial injury" within the meaning of Section 5(n).

Second, with respect to the exposure of certain LabMD "day sheets" and check copies, Complaint Counsel has failed to prove that the exposure of these documents is causally connected to any failure of Respondent to reasonably protect data maintained on its computer network, as alleged in the Complaint, because the evidence fails to show that these documents were maintained on, or taken from, Respondent's computer network. In addition, Complaint Counsel has failed to prove that this exposure has caused, or is likely to cause, any consumer harm.

Third, Complaint Counsel's argument that identity theft-related harm is likely for all consumers whose personal

information is maintained on LabMD's computer networks, even if their information has been not exposed in a data breach, on the theory that LabMD's computer networks are "at risk" of a future data breach, is rejected. In summary, the evidence fails to assess the degree of the alleged risk, or otherwise demonstrate the probability that a data breach will occur. To impose liability for unfair conduct under Section 5(a) of the FTC Act, where there is no proof of actual injury to any consumer, based only on an unspecified and theoretical "risk" of a future data breach and identity theft injury, would require unacceptable speculation and would vitiate the statutory requirement of "likely" substantial consumer injury.

At best, Complaint Counsel has proven the "possibility" of harm, but not any "probability" or likelihood of harm. Fundamental fairness dictates that demonstrating actual or likely substantial consumer injury under Section 5(n) requires proof of more than the hypothetical or theoretical harm that has been submitted by the government in this case. Accordingly, the Complaint is DISMISSED. Because Complaint Counsel has failed to prove its case on the merits, it is not necessary to address Respondent's affirmative defenses set forth in the Amended Answer.

II. FINDINGS OF FACT

A. KEY TERMS

1. **1718 File**: The LabMD Insurance Aging report, containing 1,718 pages, with the filename "insuranceaging_6.05.071.pdf" that is identified as the "P2P [peer-to-peer] insurance aging file" in Paragraphs 17, 18, 19, and 21 of the Complaint, a copy of which is designated as CX0697 (*in camera*), and a redacted copy of which is designated at RX0072. (Joint Stipulations of Fact, JX0001-A at 1).

2. **Consumer**: A natural person. The patients of LabMD's physician clients are consumers, as that term is used in Section 5(n) of the Federal Trade Commission Act, 15 U.S.C. § 45(n). (Joint Stipulations of Fact, JX0001-A at 1, 2).

3. **Personal Information ("PI")**: Individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number ("SSN"); (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a "cookie" or processor serial number. (Joint Stipulations of Fact, JX0001-A at 1-2).

B. TESTIFYING EXPERTS

1. Complaint Counsel's Experts

a. Dr. Raquel Hill

4. Dr. Raquel Hill is a tenured professor of computer science at Indiana University with over 25 years of experience in computing, with expertise in computer security, data privacy, and networking systems. (CX0740 (Hill Expert Report ¶ 1)).

5. Dr. Hill has a Ph.D. in computer science from Harvard University. She has designed and taught classes in information and systems security. (CX0740 (Hill Expert Report ¶¶ 8, 9)).

6. Dr. Hill was asked to assess whether LabMD provided reasonable security for Personal Information within its computer network, and whether any alleged security failures could have been corrected using readily available security measures. Specifically, Dr. Hill was asked to analyze the record evidence relating to the allegations in paragraphs 10 and 11 of the Complaint. (CX0740 (Hill Expert Report ¶¶ 2, 45)).

7. Dr. Hill's conclusions in this case are limited to the time period from January 2005 through July 2010 (the "Relevant Time Period"). Dr. Hill found insufficiently "diverse types of information available" after the Relevant Time Period to offer any opinions after the Relevant Time Period, and did not offer any opinions on the reasonableness of LabMD's security practices after July 2010. (CX0740 (Hill Expert Report ¶¶ 4, 48); Hill, Tr. 84-85, 203).

8. Dr. Hill was asked to evaluate and opine on the expert report of Respondent's expert, Mr. Adam Fisk (F. 20). Specifically, Dr. Hill was asked to opine on Mr. Fisk's rebuttal to Dr. Hill's expert report and Mr. Fisk's opinions regarding LabMD's network security practices. (CX0737 (Hill Rebuttal Expert Report) ¶ 2).

b. Mr. Rick Kam

9. Mr. Rick Kam is a Certified Information Privacy Professional. He is president and co-founder of ID Experts, a company specializing in data breach response and identity theft victim restoration. (CX0742 (Kam Expert Report at 3)).

10. Mr. Kam leads and participates in cross-industry data privacy groups, publishes relevant articles in the field, and works on development of policy and solutions to address the protection of health information and personally identifiable information. Mr. Kam's expertise includes "identifying and remediating the consequences of identity theft and medical identity theft" and "helping organizations develop policies and solutions" to safeguard sensitive personal information. (CX0742 (Kam Expert Report at 3-5, 25, 29-33)).

11. Mr. Kam was asked to "assess the risk of injury to consumers caused by the unauthorized disclosure of [consumers'] sensitive personal information." (CX0742 (Kam Expert Report at 5)).

c. Mr. James Van Dyke

12. Mr. James Van Dyke is the founder and president of Javelin Strategy & Research ("Javelin"), which performs independent research on customer-related security, fraud, payments, and electronic financial services. Mr. Van Dyke has extensive experience in conducting surveys. He leads the publication of an annual, nationally representative victim study of identity crimes in the United States. (Van Dyke, Tr. 574-576, 580-581; CX0741 (Van Dyke Expert Report at 1)).

13. Mr. Van Dyke makes presentations on secure personal financial management, identity fraud, and payments and security to groups including the U.S. House of Representatives, Federal Reserve Bank gatherings, and the RSA Security Conference. (CX0741 (Van Dyke Expert Report at 1)).

14. Mr. Van Dyke's expertise includes consumer behavior, security technologies, personal financial services and payments, how sensitive information is used, and identity theft. (CX0741 (Van Dyke Expert Report at 1-2)).

15. Mr. Van Dyke was asked to "assess the risk of injury to consumers whose personally identifiable information (PII)[[14]] has been disclosed by [LabMD] without authorization and to consumers whose personally identifiable information was not adequately protected from unauthorized disclosure." (CX0741 (Van Dyke Expert Report at 2)).

d. Dr. Clay Shields

16. Dr. Clay Shields is a tenured professor in the computer science department of Georgetown University, with expertise in networking and network protocols, computer

[14] Personally Identifiable Information ("PII") is a subset of the data in Personal Information (F.3) and includes a person's name, address, date of birth, Social Security number, credit card and banking information, and drivers' license number. (CX0742 (Kam Expert Report at 10)).

security, digital forensics, and responding to network and computer system events. (CX0738 (Shields Rebuttal Expert Report ¶ 1)).

17. Dr. Shields has over 20 years of computer science experience, including in digital forensics research and developing and analyzing network protocols. (CX0738 (Shields Rebuttal Expert Report ¶ 5)).

18. Dr. Shields' research includes work on systems for providing anonymity to users through peer-to-peer technology. He was involved in a collaborative effort that resulted in a modified Gnutella client that is widely used by law enforcement.[15] (CX0738 (Shields Rebuttal Expert Report ¶¶ 7, 9)).

19. Dr. Shields was asked to review the expert report of Respondent's expert, Mr. Adam Fisk (F. 20), and provide opinions about Mr. Fisk's conclusions concerning the LimeWire peer-to-peer file-sharing program[16] and the alleged disclosure of the 1718 File. (CX0738 (Shields Rebuttal Expert Report ¶ 2)).

2. Respondent's Expert

a. Mr. Adam Fisk

20. Mr. Adam Fisk is the president and chief executive officer of the Brave New Software Project, Inc., the creators of Lantern, a peer-to-peer tool for bypassing government censors in countries such as Iran and China that censor citizens' access to the Internet. Mr. Fisk is the former lead engineer at LimeWire LLC, the creators of the LimeWire file-sharing application, and has extensive experience in peer-to-peer software, computer networking, and data security, including 13 years of professional experience building peer-to-peer applications, with a focus on

[15] Peer-to-peer technology and the Gnutella client are discussed *infra* II.D.1.

[16] The LimeWire peer-to-peer file-sharing program is discussed *infra* II.D.1.

computer networking and security. (RX0533 (Fisk Expert Report at 3-4)).

21. Mr. Fisk was asked to provide an opinion as to whether LabMD provided adequate security to secure Protected Health Information[17] contained within its computer network from January 2005 through July 2010 (the "Relevant Time Period" assessed by Dr. Hill). Mr. Fisk also provided his review of LimeWire functionality, an analysis of LabMD's network, an analysis of the 1718 File on the LabMD network, and a rebuttal to the expert report of Dr. Hill. (RX0533 (Fisk Expert Report at 3-4)).

22. Mr. Fisk based his opinions of the facts of this case on his extensive experience and documents provided to him by Respondent. (RX0533 (Fisk Expert Report at 3-4, 37)).

23. In forming his opinions, Mr. Fisk considered an analysis of the equipment LabMD had in place, including whether or not LabMD had firewalls in place, an analysis of the depositions describing the network and the practices in place at the company, and an analysis of a report conducted for LabMD by an outside contractor that looked at any vulnerabilities on LabMD's network. (Fisk, Tr. 1158-1159).

C. RESPONDENT

1. Background Information

24. LabMD is a privately held Georgia corporation, incorporated in 1996 by Mr. Michael J. Daugherty. (Daugherty, Tr. 939; CX0766 at 2).

25. Mr. Daugherty is the sole owner of LabMD and is its president and chief executive officer. (Daugherty, Tr. 936; CX0709 (Daugherty, Dep. at 12)).

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[17] Protected Health Information, as defined in 45 C.F.R. § 160.103, is a subset of the data in Personal Information. (Joint Stipulations of Fact, JX0001-A at 1, 2).

26. From at least 2001 through approximately December 2013 or January 2014, LabMD was in the business of conducting clinical laboratory tests on urological specimen samples from patients and reporting test results to physician customers. (Answer ¶ 3; CX0766 at 3; CX0291; Daugherty, Tr. 952).

27. During the period LabMD was operational (F. 26, 39), LabMD operated as a small, medical services company providing uro-pathology cancer detection services to urologists who wanted their patients' tissue samples analyzed by pathologists who specialized in prostate cancer or bladder cancer. (Daugherty, Tr. 941-943, 952).

28. During the period LabMD was operational (F. 26, 39), LabMD tested samples from patients in multiple states, including Alabama, Mississippi, Florida, Georgia, Missouri, Louisiana, and Arizona. (Answer ¶ 5; CX0766 at 3).

29. The patients whose samples LabMD tested and from whom LabMD collected payments were located throughout the United States. (CX0766 at 3; CX0088, *in camera* (LabMD Copied Checks); CX0726 (Maxey, SUN Designee, Dep. at 17); CX0718 (Hudson, Dep. at 15-17); CX0722 (Knox, Dep. at 19); CX0706 (Brown, Dep. at 16-18); CX0715-A (Gilbreth, Dep. at 50-51); CX0713-A (Gardner, Dep. at 25-26)).

30. The acts and practices of Respondent alleged in the Complaint were in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Fact, JX0001-A at 1).

31. From January 1, 2005 through February 10, 2014, LabMD's total revenue was approximately $35-40 million. (Daugherty, Tr. 1059; CX0709 (Daugherty, Dep. at 127-128)).

32. LabMD's peak annual revenue was approximately $10 million. (CX0709 (Daugherty, Dep. at 128)).

33. From 2005 through 2012, LabMD's approximate blended profit margin was 25%. (Daugherty, Tr. 1058-1059).

34. In 2013, LabMD's revenue was approximately $2 million. (CX0709 (Daugherty, Dep. at 128)).

35. LabMD's principal place of business from April 2009 through approximately January 2014 was 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339. (Answer ¶ 1; CX0766 at 2).

36. In January 2014, LabMD began winding down its operations. At that time, LabMD stopped accepting specimen samples and conducting tests. (CX0765 at 6; CX0710-A (Daugherty, LabMD Designee, Dep. at 195); CX0725-A (Martin, Dep. at 25)).

37. LabMD notified its physician clients by letter dated January 6, 2014, that it would not be accepting new specimens after January 11, 2014, and that all test results would be provided in the following week. LabMD further told its physician clients that LabMD would be closed for telephone calls and internet access after January 15, 2014, and that for the remainder of 2014, requests for past results or to obtain specimens for second opinions, could be made by facsimile. In addition, the January 6, 2014 letter stated, "billing operations" would continue through 2014. (CX0291; Daugherty, Tr. 1031).

38. After January 2014, in order to obtain an historical result report, as referred to in F. 37, the physician client had to send a facsimile requesting the results and LabMD would then fax the report back to the physician client. (CX0725-A (Martin, Dep. at 20)).

39. As of the start of the evidentiary hearing, May 2014, LabMD's operations were limited to preserving tissue samples for LabMD's physician clients, so the physicians could send out slides for second opinions, and to providing test results to physicians if they did not have them. (Daugherty, Tr. 1031; CX0291).

40. LabMD has continued to possess its computer equipment; its "Lytec" server (on which LabMD's electronic billing records are stored); and the laboratory information system (on which LabMD's electronic medical records are stored). Both of these servers can be turned on. (CX0709 (Daugherty, Dep. at 22-23); CX0766 at 2-3). *See also* CX0725-A (Martin, Dep. at 11-12); CX0705-A (Bradley, Dep. at 20)).

41. As of May 2014, LabMD continues to exist as a corporation, with Mr. Daugherty as it sole employee. (Daugherty, Tr. 1031; CX0291).

2. Collection of Personal Information in Connection with Lab Testing

42. In connection with performing tests, LabMD has collected and continues to maintain Personal Information for over 750,000 consumers. (Joint Stipulations of Fact, JX0001-A at 3; CX0765 at 10-11; CX0766 at 5; CX0710-A (Daugherty, LabMD Designee, Dep. at 193-194); CX0709 (Daugherty, Dep. at 21-23)).

43. In connection with performing tests for its physician clients, LabMD's Information Technology ("IT") staff set up data transfer of patients' Personal Information from LabMD's physician clients' databases to LabMD. (CX0718 (Hudson, Dep. at 36-39)).

44. The Personal Information that physicians transferred to LabMD included names, addresses, dates of birth, Social Security numbers, insurance information, diagnosis codes, physician orders for tests and services, and other information. (CX0717 (Howard, Dep. at 34-35, 38); CX0718 (Hudson, Dep. at 59-60, 62); CX0726 (Maxey, SUN Designee, Dep. at 41-42); CX0728 (Randolph, Dep. at 48, 50-51)).

45. Patient Personal Information typically was transmitted to LabMD using a secure file transfer protocol, through which information flowed from the doctors' offices to a LabMD server on its network. (CX0711 (Dooley Dep. at

131-132); CX0730 (Simmons, Dep. at 61, 128); CX0717 (Howard, Dep. at 34-37, 54); CX0724 (Maire, Dep. at 41-43); CX0725-A (Martin, Dep. at 56-60)).

46. Once consumers' Personal Information was loaded in LabMD's laboratory application, LabSoft, staff at the physician clients' practice could order tests for the patients through LabSoft using LabMD's online portal by searching for the patient's name, selecting the correct patient from a list of patients in that practice, and entering the current procedural terminology ("CPT") code for the testing ordered. (CX0718 (Hudson, Dep. at 24-25); CX0709 (Daugherty, Dep. at 86-87); CX0725-A (Martin, Dep. at 56-57)).

47. A doctor's office employee could search by name, date of birth, or Social Security number to find a patient's record to order a test. (CX0726 (Maxey, SUN Designee, Dep. at 40, 47-48)).

48. When a doctor's office made a request for a test, a report and labels for the specimen would be printed at the doctor's office. The patient's specimen and the report were then sent to LabMD via Federal Express. (CX0725-A (Martin, Dep. at 56-57)).

49. Once a LabMD pathologist read a specimen and had a test result, the result was entered into a database. (CX0711 (Dooley Dep. at 132-133); CX0717 (Howard, Dep. at 49-50)).

50. The results from the tests LabMD performed could be accessed by LabMD's physician clients through a web portal using a user ID and password through LabMD-provided computers or the doctors' offices own computers. (CX0726 (Maxey, SUN Designee, Dep. at 29-31, 48-49); CX0728 (Randolph, Dep. at 21-22, 57-58); CX0704-A (Boyle, Dep. at 16, 22-23); CX0722 (Knox, Dep. at 76-78); CX0717 (Howard, Dep. at 59-60); Daugherty, Tr. 977).

51. In some instances, LabMD supplied computer equipment to doctors' offices, including computers, monitors, bar coder machines, and printers. (CX0730 (Simmons, Dep. at 61-62); CX0726 (Maxey, SUN Designee, Dep. at 23-24, 21, 27-28); CX0728 (Randolph, Dep. at 27-31, 42); CX0717 (Howard, Dep. at 59); CX0709 (Daugherty, Dep. at 83)).

3. Insurance Aging Reports

52. Insurance aging reports are spreadsheets of insurance claims and payments, which may include consumers' names, dates of birth, and Social Security numbers; the CPT codes for the laboratory tests conducted; and health insurance company names, addresses, and policy numbers. (Answer ¶ 9(a); CX0706 (Brown, Dep. at 54)).

53. Insurance aging reports were generated by LabMD's billing department to show accounts receivable that had not been paid and so that billing staff could attempt to collect payments on outstanding claims from patients' insurance companies. (CX0706 (Brown, Dep. at 20); CX0714-A ([Former LabMD Employee],[18] Dep. at 48-49)).

54. Insurance aging reports were based on a report from LabMD's Lytec billing system that displayed past-due payments from insurance companies. (CX0706 (Brown, Dep. at 23-24); CX0714-A ([Former LabMD Employee], Dep. at 52)).

55. Insurance aging reports were saved to the billing manager's workstation. (Daugherty, Tr. 982).

56. [The Former LabMD Employee] (*see* footnote 18) received hard copies of insurance aging reports from LabMD's

[18] By Order dated May 6, 2014, and for the reasons stated therein, *in camera* treatment was granted to the name of one particular former LabMD employee in the billing department. Disclosure of this employee's name is not necessary for the proper disposition of the proceeding and therefore it is replaced with the designation "[the Former LabMD Employee]" in this Initial Decision.

billing manager every month. Based on the information in the report, the employee would contact the insurance company, obtain the status of the denied claim, and attempt to find ways for the insurance company to pay the claim. (CX0714-A ([Former LabMD Employee], Dep. at 49-50)).

4. Collection of Personal Information in Connection with Payments

57. Insured patients could pay the part of LabMD's charges not covered by insurance, and uninsured patients could be responsible for the full amount of the charges. (Answer ¶ 4).

58. Consumers could pay LabMD's charges with credit cards, debit cards, or personal checks. (CX0766 at 6; CX0706 (Brown, Dep. at 39-40); CX0765 at 8).

59. When consumers paid LabMD by credit card, the billing department ran the credit card number and posted the payment in LabMD's system. (CX0716 (Harris, Dep. at 20-21)).

60. When consumers paid LabMD by check or money order and LabMD received that payment by mail, it was LabMD's practice for LabMD staff to make a photocopy of the check or money order. LabMD did not scan checks or money orders in the 2005 to 2010 time period. (CX0716 (Harris, Dep. at 23-24, 27); CX0706 (Brown, Dep. at 28-29); CX0715-A (Gilbreth, Dep. at 50-51)).

61. When consumers paid LabMD by check or money order, the photocopy (F. 60) would be given to the billing department. The billing department would post the payment and retain the photocopy of the check. Original checks were kept for six months, and then were shredded. (CX0713-A (Gardner, Dep. at 26-27)).

62. Personal checks contain a consumer's account number, bank routing number, signature, and often an address and

phone number. (*E.g.*, CX0088, *in camera* (LabMD Copied Checks)).

D. THE 1718 FILE INCIDENT

1. Peer-to-Peer Networks

63. Peer-to-peer file-sharing applications enable one computer user to make a request to search for all files that have been made available for sharing by another (or "host") computer that is also using the file-sharing application. (Hill, Tr. 119-120; Shields, Tr. 826; CX0738 (Shields Rebuttal Expert Report ¶¶ 15, 18)).

64. Peer-to-peer networks are often used to share music, videos, pictures, and other materials. (CX0738 (Shields Rebuttal Expert Report ¶ 14); Answer ¶ 13; CX0740 (Hill Expert Report ¶ 42); Shields, Tr. 851).

65. Typically, users will perform a search using terms related to the particular file they hope to find and receive a list of possible matches. The user then chooses a file they want to download from the list. This file is then downloaded from other peers who possess that file. (CX0738 (Shields Rebuttal Expert Report ¶ 18)).

66. A document being "shared" or "made available for sharing" on a peer-to-peer network is available to be downloaded by another computer user on the same peer-to-peer network. The fact that a document is being shared, or made available for sharing, does not mean the document has been "downloaded" for viewing. (Shields, Tr. 891-892).

67. It is very difficult for a user to know what is in a document found on a peer-to-peer network without downloading and opening the document. (Wallace Tr. 1343).

68. The contents of a file that is available for sharing are not disclosed until the file is downloaded and viewed. (F. 65-67).

69. LimeWire is a peer-to-peer file-sharing application that can be used to transport files across the Internet. LimeWire is one of a number of applications that use a protocol called Gnutella (F. 70). (RX0533 (Fisk Expert Report at 9)).

70. Gnutella is a program that connects computers together in a direct peer-to-peer fashion to facilitate file sharing through searching and downloading. (RX0533 (Fisk Expert Report at 9); CX0738 (Shields Rebuttal Expert Report ¶17)).

71. A Gnutella "client" refers to the piece of software that understands the Gnutella protocol and allows a peer to interact with other peers using the Gnutella protocol. (Shields, Tr. 827).

72. In order to share a file or folder on LimeWire, the user must actively choose the file or folder to share. (RX0533 (Fisk Expert Report at 10)).

73. The 1718 File, discussed *infra* Section II.D.2., has the computer filename "insuranceaging_6.05.071.pdf". (F. 1, 78).

74. When a user makes a file available for sharing on LimeWire, LimeWire breaks apart the file names into keywords to allow other users to search for them. (RX0533 (Fisk Expert Report at 11, 13)).

75. In this case, LimeWire would break apart the "insuranceaging_6.05.071.pdf" file name into the keywords "insuranceaging" and "6.05.071" because LimeWire only recognizes the "_" as a word delimiter and does not recognize that "insuranceaging" is, in fact, the words "insurance" and "aging" merged together. (Fisk, Tr. 1154-1156; RX0533 (Fisk Expert Report at 11-12)).

76. A search for "insurance" or for "aging" would not return a search result for "insuranceaging_6.05.071.pdf". (Fisk, Tr. 1155-1156; RX0533 (Fisk Expert Report at 11-12)).

77. In order for a searcher to receive a search result for the "insuranceaging_6.05.071.pdf" file, he or she would have to enter the search terms "insuranceaging" or "6.05.071". Both of those searches are highly unusual, and it is extremely unlikely that any LimeWire user would ever enter them. (Fisk, Tr. 1155-1156; RX0533 (Fisk Expert Report at 11-12)).

2. The 1718 File

a. Background facts

78. The "1718 File" is a LabMD insurance aging report, containing 1,718 pages, dated June 2007, with the filename "insuranceaging_6.05.071.pdf". (F. 1; Joint Stipulations of Fact, JX0001-A at 1; CX0697, *in camera* (1718 File)). The peer-to-peer sharing and subsequent disclosure of the 1718 File is referred to herein as the "1718 File Incident."

79. The 1718 File was created and stored on a LabMD computer. (Daugherty, Tr. 1078-1079).

80. The 1718 File had been maintained on the LabMD computer used by LabMD's billing manager, Ms. Rosalind Woodson ("Billing Computer"). (CX0766 at 9; Daugherty, Tr. 1079).

81. The 1718 File is a billing file generated from LabMD's billing application, the Lytec system. (CX0709 (Daugherty, Dep. at 146); CX0736 (Daugherty, IHT at 83-84); CX0706 (Brown, Dep. at 23-24)).

82. The 1718 File contains the following Personal Information for approximately 9,300 consumers: names; dates of birth; nine digit numbers that appear to be Social Security numbers; CPT codes for laboratory tests conducted; and, in some instances, health insurance company names, addresses, and policy numbers. (CX0766 at 8; Answer ¶ 19; CX0697, *in camera*).

83. The CPT number is a code used for the purpose of having a standardized description of procedures or tests provided for a patient. The CPT numbers do not disclose the laboratory test performed. Determining what test was performed, as reflected by the code, requires additional research, such as going to the website for the American Medical Association or performing a Google search for the code, which is how Mr. Kam, Complaint Counsel's expert, determined the tests reflected by the CPT codes in the 1718 File. (Kam, Tr. 445-447).

84. At the time the 1718 File was downloaded by Tiversa Holding Company ("Tiversa") in February 2008 (*see* F. 121), the 1718 File was in the "My Documents" folder on LabMD's Billing Computer. (CX0710-A (Daugherty, LabMD Designee, Dep. at 200)).

85. In February 2008, the Billing Computer's "My Documents" folder was available for sharing on LimeWire. (CX0156; CX0730 (Simmons, Dep. at 12, 28-29, 32)).

86. Most of the 950 files in the "My Documents" folder on the Billing Computer that were available for sharing via LimeWire at or around the same time as the 1718 File were music or video files. (Answer ¶ 18(b); CX0154; CX0730 (Simmons, Dep. at 33-34)).

87. Eighteen documents were available for sharing in the "My Documents" folder on the Billing Computer at or around the same time as the 1718 File, three of which contained Personal Information. (Wallace, Tr. 1406-1407; RX0645 at 39, 42, 43, *in camera*).

b. LabMD discovery

88. In May 2008, Tiversa contacted LabMD and told LabMD that the 1718 File was available through LimeWire. (Answer ¶ 17; CX0766 at 8; Daugherty, Tr. 981; Joint Stipulations of Fact, JX0001-A at 4).

89. After being contacted by Tiversa in May 2008, LabMD investigated and determined that LimeWire had been downloaded and installed on the Billing Computer in 2005 or 2006. (Answer ¶ 18(a); CX0755 at 4; CX0150; CX0730 (Simmons, Dep. at 10); CX0709 (Daugherty, Dep. at 144); CX0766 at 8-9).

90. In May 2008, as part of LabMD's investigation, LabMD IT Specialist Alison Simmons inspected LabMD's computers manually to identify which computer(s) were sharing files on peer-to-peer network(s) and determined that LimeWire had been installed only on the Billing Computer. (CX0734 (Simmons, IHT at 14); CX0730 (Simmons, Dep. at 10)).

91. As part of LabMD's investigation regarding the 1718 File, Ms. Simmons took screenshots of the Billing Computer, which show the existence of LimeWire and the shared 1718 File. (CX0150; CX0151; CX0152; CX0154; CX0155; CX0156; CX0730 (Simmons, Dep. at 14-15, 21, 23-24, 27, 29, 36-37, 42, 112, 150-152)).

92. After taking the screenshots (F. 91), Ms. Simmons removed LimeWire from the Billing Computer in May 2008. (CX0730 (Simmons, Dep. at 14-15); Answer ¶ 20).

93. As part of LabMD's investigation regarding the 1718 File in May 2008, Ms. Simmons searched all computers at LabMD for file-sharing software. (CX0704 (Boyle, Dep. at 57-66, 74-88); CX0149; CX0150; CX0151; CX0152; CX0153; CX0154; CX0155; CX0156; CX0157).

94. As part of LabMD's investigation regarding the 1718 File in May 2008, Ms. Simmons did not find any file-sharing software on any LabMD computer other than the Billing Computer. (CX0730 (Simmons, Dep. at 10-11)).

95. Mr. John Boyle, LabMD's vice president of operations and general manager from November 1, 2006 until the end of August 2013, assigned Ms. Simmons, and later, IT Manager Jeffrey Martin, to search peer-to-peer networks

to look for the 1718 File. (CX0704-A (Boyle, Dep. at 6-8; 63-64); CX0725-A (Martin, Dep. at 9)).

96. As part of LabMD's investigation regarding the 1718 File in May 2008, Ms. Simmons searched peer-to-peer networks from her home computer to look for the 1718 File. She searched multiple times for at least a month thereafter for the file name insuranceaging_6.05.071.pdf, partial file names, and anything with the name LabMD associated with it. (CX0730 (Simmons, Dep. at 17-18); CX0704-A (Boyle, Dep. at 63-64)).

97. As part of LabMD's investigation regarding the 1718 File, in 2013, Mr. Martin searched peer-to-peer networks for the 1718 File multiple times over the course of a few months, using the file name, and the terms "LabMD," "patient," and "aging." (CX0725-A (Martin, Dep. at 98-101); CX0704-A (Boyle, Dep. at 63-64)).

98. Through their searches (F. 96-97), Ms. Simmons and Mr. Martin were not able to find the 1718 File on any peer-to-peer networks. (CX0730 (Simmons, Dep. at 17-18); CX0725-A (Martin, Dep. at 100); CX0704-A (Boyle, Dep. at 63-64)).

99. The 1718 File was not available from LabMD's computers to be shared via any peer-to-peer networks after May 2008. (F. 92-98).

3. Tiversa

a. Tiversa's business

100. Tiversa Holding Company ("Tiversa") is a data security company that offers breach detection and remediation services. Essentially, Tiversa uses a series of algorithms to search the entire peer-to-peer network for documents of interest to its clients or potential clients, and downloads the documents that are found. (CX0703 (Boback, Tiversa Designee, Dep. at 10-12); RX0541 (Boback Trial Dep. at 19-21); Wallace Tr. 1339-1341).

101. Mr. Robert Boback is the chief executive officer of Tiversa. (CX0703 (Boback, Tiversa Designee, Dep. at 11)).

102. In July 2007, Mr. Boback hired Mr. Richard Wallace as a forensic analyst. (Wallace, Tr. 1337, 1339-1340).

103. As a forensic analyst for Tiversa, Mr. Wallace's job included writing up a narrative for clients or potential clients as to the type of information Tiversa found, where it was found, and who the disclosing source was. (Wallace, Tr. 1339-1341).

104. Mr. Wallace's job included searching peer-to-peer networks using a standard peer-to-peer Gnutella client, such as LimeWire or Kazaa, to supplement information that Tiversa's system may not have downloaded. As an example of a search, if Tiversa were looking for insurance information for a healthcare company, Mr. Wallace would conduct a search using words such as "insurance" or "report," or any word that would identify an exposed file. (Wallace Tr. 1342-1344).

105. Because it is very difficult to know what is in a document found on a peer-to-peer network without downloading and opening the document, Mr. Wallace would begin by viewing the file titles and Internet protocol ("IP") addresses[19] returned from a search. He would then download any and all information that was available from a search. (Wallace Tr. 1343-1345).

106. Tiversa maintained a depository of long servers to store data that Tiversa's searches "pulled down," or downloaded, from peer-to-peer networks, which is referred to as Tiversa's "data store" ("Data Store"). The Data Store contained copies of files that Tiversa had downloaded from the Gnutella network. The Data Store

[19] Computers on the Internet are able to identify each other by the use of IP addresses. The IP address uniquely identifies each computer on a network. (Shields, Tr. 821-825).

also contained information as to where the downloaded file had been located. (Wallace, Tr. 1345, 1371).

107. There are two ways for legitimate data to get into Tiversa's Data Store. Tiversa's program, Eagle Vision, will automatically download files returned from Tiversa's searches, or an analyst, such as Mr. Wallace, can insert data that the analyst has found using a stand-alone computer running a peer-to-peer client. (Wallace, Tr. 1389-1390).

108. Mr. Wallace's job as a forensic analyst included searching for exposed files on peer-to-peer networks, and recording the information disclosed, including the company that had the disclosure, and when the information was disclosed. This information would be included on a spreadsheet that Tiversa analysts would update several times a day. The purpose of the spreadsheet was so that Mr. Boback and the Tiversa sales force could make sales calls to the affected companies. (Wallace, Tr. 1437-1438).

109. When a document was downloaded by Tiversa, Tiversa would record information as to the IP address from which the document was downloaded. When contacting the affected company to sell services, Tiversa's practice was to not reveal the source of the information and to tell the potential client that the IP information had not been recorded by Tiversa. Tiversa would "strip" the IP address off the found documents and remove any metadata[20] relating to the disclosure source, while keeping a separate set of the files which included disclosure source information. (Wallace, Tr. 1344-1345, 1439-1440).

110. When Mr. Wallace, or any other analyst at Tiversa, downloaded a file that was deemed significant, Mr. Boback would be advised, and Mr. Boback would make the decision as to how to proceed to "monetize" the file;

[20] Metadata is structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource. Metadata is often called data about data. http://www.niso.org/publications/press/UnderstandingMetadata.pdf.

i.e., whether the information would be given to a salesperson, or whether Mr. Boback himself would contact the company, to try to sell Tiversa's services. (Wallace, Tr. 1344, 1360).

111. Tiversa would monetize information it obtained from peer-to-peer networks either by selling a monitoring contract, pursuant to which Tiversa would search for certain key words for a period of time, or by selling a "one-off" service, that would remediate just the existing disclosure problem. (Wallace, Tr. 1364).

112. A Tiversa monitoring services contract for a large financial company could cost as much as a million dollars per year, down to a few thousand dollars per month for monitoring contracts for small "mom and pop" companies. (Wallace, Tr. 1366).

113. Tiversa was having problems selling monitoring contracts, so Tiversa started contacting individual companies whose information Tiversa had discovered. Instead of a year-long monitoring contract, Tiversa could try to sell a less expensive one-time service to address the problem. This attempt to "monetize" the information through a "one-off" sale after Tiversa's discovery of information on a peer-to-peer network was known as an "incident response case," or "IRC." (Wallace, Tr. 1359-1361).

114. A hypothetical example of an IRC would be a company that had a single file exposed with 5,000 individuals' personal information, and that company would only need the name of the person exposing the file. (Wallace, Tr. 1360).

115. When a company refused to purchase Tiversa's services, Mr. Wallace observed that Mr. Boback would often respond, in reference to that company, to the effect of, "you think you have a problem now, you just wait." Thereafter, an analyst of Tiversa would input information into Tiversa's Data Store so as to make that company's information "proliferate" in Tiversa's Data Store and thereby make it appear that a file had "spread" to multiple

places. Tiversa could use this Data Store "evidence" to follow up with a company to try again to get the company to purchase Tiversa's remediation services. (Wallace, Tr. 1364-1365).

116. If a potential Tiversa client would not purchase Tiversa's services, another way Tiversa would "monetize" peer-to-peer findings would be to notify an existing Tiversa client of the disclosing source of the client's information and advise the existing client to contact Tiversa's target. Tiversa could "strong-arm people that way as well." (Wallace, Tr. 1451-1452).

117. When a company refused to purchase Tiversa's services after being contacted by Tiversa about a disclosure, Tiversa would need an excuse to make contact with the company again, so it would contact the company to report that the file had proliferated, or "spread," to additional IP addresses, including IP addresses of known "bad actors" or identity thieves. (Wallace, Tr. 1366-1368).

118. Part of Mr. Wallace's job for Tiversa was to make it appear that a company's file had spread to more IP addresses, including to IP addresses of identity thieves. He did this by placing files he might have found outside Tiversa's searching system into a folder in the Data Store and making it appear that Tiversa had located and downloaded the file from the IP address of a known bad actor. As far as the Data Store sees it, the file was downloaded from that IP address, but in reality no data transferred. (Wallace, Tr. 1367-1368).

119. Tiversa's Data Store was a record of files that were found "live" on the Internet, but also included information designed to make it appear that files had been found at other locations on the Internet. (Wallace, Tr. 1441).

120. Tiversa's Data Store is not a credible or reliable source of information as to the disclosure source or the spread of any file purportedly found by Tiversa. (F. 106-109, 115, 117-119).

b. Tiversa's dealings with LabMD

121. On or about February 25, 2008, Mr. Wallace, on behalf of Tiversa, downloaded the 1718 File from a LabMD IP address in Atlanta, Georgia, designated as 64.190.82.42. (Wallace, Tr. 1395, 1410-1411, 1440-1441; CX0307).

122. The 1718 File was found by Mr. Wallace, and was downloaded from a peer-to-peer network, using a stand-alone computer running a standard peer-to-peer client, such as LimeWire. (Wallace, Tr. 1342-1343, 1371-1372, 1440-1441).

123. After locating the 1718 File on February 25, 2008, Mr. Wallace input the information in Tiversa's Data Store. (Wallace, Tr. 1441).

124. In 2008, CIGNA Health Insurance ("CIGNA") was a company for which Tiversa was providing peer-to-peer monitoring services. An "incident record form" was prepared by Tiversa for its then-client CIGNA, and was admitted into evidence as RX0545. (Wallace, Tr. 1449-1451; RX0545).

125. Tiversa's representation to its client CIGNA, in RX0545, that the 1718 File had been found on April 18, 2008 is not correct, but was part of Tiversa's practice of ensuring that information continually flows to clients, so that it would appear that Tiversa was getting things done for the client. (Wallace, Tr. 1449-1451; RX0545 at 1).

126. Within minutes of Mr. Wallace's opening the 1718 File, Mr. Boback was viewing the document over Mr. Wallace's shoulder. Mr. Wallace observed that Mr. Boback was excited about the find. (Wallace, Tr. 1442).

127. Using the "browse host" [21] function, Mr. Wallace also downloaded 18 other LabMD documents in addition to the

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[21] "Browse host" is the ability for one LimeWire user to view all the files another LimeWire user has made available to share. (RX0533 (Fisk Expert Report at 16)).

1718 File, three of which contained Personal Information. (Wallace, Tr. 1372, 1400-1401, 1404-1406, 1415; *see* RX0645, *in camera* (LabMD Documents produced by Wallace at 39, 42-43)).

128. In May 2008, Tiversa began contacting LabMD to try to sell Tiversa's remediation services to LabMD. These efforts included representing to LabMD that the 1718 File had been found on a peer-to-peer network and sending LabMD a Tiversa Incident Response Services Agreement describing Tiversa's proposed fee schedule, payment terms, and services that would be provided. These contacts continued from mid-May through mid-July 2008. In these communications, Tiversa represented that Tiversa had "continued to see individuals [on peer-to-peer networks] searching for and downloading copies" of the 1718 File. (RX0050; RX0051; RX0052; RX0053; RX0054; RX0055; RX0056; RX0057; RX0058; RX0059; CX0021; *see also* Daugherty, Tr. 979-993).

129. Tiversa's representations in its communications with LabMD (F. 128) that the 1718 File was being searched for on peer-to-peer networks, and that the 1718 File had spread across peer-to-peer networks, were not true. These assertions were the "usual sales pitch" to encourage the purchase of remediation services from Tiversa. (Wallace, Tr. 1443).

130. On July 22, 2008, LabMD instructed Tiversa to direct any further communications to LabMD's lawyer. Thereafter, Tiversa ceased to press LabMD to purchase its services. (RX0059; Daugherty, Tr. 988-990).

c. Tiversa's role as source for FTC investigation

131. The FTC offered testimony concerning peer-to-peer file-sharing technology at a July 2007 hearing conducted by the House of Representatives' Committee on Oversight and Government Reform regarding peer-to-peer file-sharing technology ("2007 Congressional Hearing"). (CX0787 (Prepared Statement of FTC on Peer-To-Peer File-Sharing Technology Issues)).

132. Tiversa's Mr. Boback gave testimony at the 2007 Congressional Hearing regarding peer-to-peer file-sharing technology. (Wallace Tr. 1341-1342, 1347).

133. The FTC and Tiversa began communicating approximately two months after the 2007 Congressional Hearing. These communications were as frequent as weekly during some periods. The subject matter of these communications was information available on peer-to-peer networks. (Wallace, Tr. 1346-1347, 1350).

134. In the fall or winter of 2007, representatives of the FTC visited Tiversa's facility in Pennsylvania. Following that meeting, the FTC began requesting that Tiversa provide information to the FTC. (Wallace, Tr. 1350-1351).

135. Tiversa did not want the FTC to issue a formal request for information, such as a Civil Investigative Demand ("CID"), directly to Tiversa because Tiversa had been in talks regarding a possible acquisition and Mr. Boback did not want Tiversa to be "in the middle of a civil investigative demand." Mr. Boback wanted the CID to be issued to a third party to "separate" the CID from Tiversa, "to try to create some distance" from Tiversa. (CX0703 (Boback, Dep. at 142-143); Wallace, Tr. 1351-1353, 1362).

136. The Privacy Institute was created for the purpose of receiving the CID from the FTC. The Privacy Institute did not exist previously. (RX0541 (Boback Trial Dep. at 38-40; 42-44); Wallace, Tr. 1353).

137. In 2009, in order to obtain Tiversa's information and documents, the FTC issued a CID to The Privacy Institute ("FTC CID"), and not to Tiversa, which was the actual target of the CID. (Kaufman, Tr. 1114; RX0525 (Kaufman, Dep. at 11-20) ("There was a request from Tiversa that we issue the CID to The Privacy Institute, and that is the entity that received the CID from the FTC.").

138. In response to the FTC CID to The Privacy Institute (F. 137), the FTC received the 1718 File and other evidence

that "is germane to th[is] case." (CX0697 (*in camera*); Kaufman, Tr. 1114; RX0525 (Kaufman, Dep. at 11-20); *see also* RX0526 (Complaint Counsel's Amended Response to LabMD, Inc.'s First Set of Requests for Admission, Response No. 20 (admitting that as part of Complaint Counsel's Part II investigation of LabMD, the FTC issued a CID to The Privacy Institute and received the 1718 File)).

139. Mr. Wallace assisted in responding to the FTC CID (F. 137) by composing a spreadsheet of names of companies whose information exposure met a threshold of exposing 100 individuals' personal information. He also collected the associated files, which were burned to a computer disc. (Wallace, Tr. 1353-1354).

140. The spreadsheet provided in response to the FTC CID (F. 137) was derived from Tiversa's list of IRC's, *i.e.*, companies that Tiversa had targeted to try to sell Tiversa's remediation services. (F. 113; Wallace, Tr. 1358-1359, 1452-1453; *see* CX0307).

141. Mr. Boback directed Mr. Wallace to "make sure [LabMD is] at the top of the list" being provided to the FTC pursuant to the FTC CID. (Wallace, Tr. 1365).

142. The list of names Tiversa provided to the FTC in response to the FTC CID (F. 137) includes LabMD and identifies LabMD as the "data owner/leaker" of a file identified as "insuranceaging_6.05.071.pdf". (CX0307; Wallace, Tr. 1394).

143. The list of names Tiversa provided to the FTC in response to the FTC CID (F. 137) contained names that did not meet the 100 person exposure threshold described in F. 139. These names were placed on the list at Mr. Boback's direction in order to get Tiversa "more bang for the buck," *i.e.*, in the hope that once the company was contacted by the FTC, the company would then buy Tiversa's services out of fear of an enforcement action. (Wallace, Tr. 1362-1363).

144. The list of names provided by Tiversa to the FTC in response to the FTC CID (F. 137), at Mr. Boback's direction, was "scrubbed" of names of existing or prospective Tiversa clients that otherwise met the 100 person exposure threshold. (Wallace, Tr. 1363-1364).

145. In the fall of 2009, representatives of Tiversa, including Mr. Wallace and Mr. Boback, met with FTC staff, including a member of Complaint Counsel's trial team in this case, to discuss Tiversa's response to the FTC CID (F. 137). (Wallace, Tr. 1385-1386, 1452).

d. CX0019

146. On the return trip from Tiversa's meeting with FTC staff in 2009 (F. 145), based on statements of Mr. Boback, Mr. Wallace understood that Tiversa needed to increase the apparent "spread" of the files identified on the list provided to the FTC pursuant to the FTC CID; that Mr. Wallace was to search for the files again to see if they are available at other IP addresses in addition to the address provided on the list; and that if the files were not, in fact, available at any additional IP addresses, Mr. Wallace was to make it appear that the files were available at additional IP addresses. (Wallace, Tr. 1386-1388).

147. After Tiversa's meeting with FTC staff in 2009 (F. 145), Mr. Wallace searched Tiversa's Data Store to see if the LabMD insurance aging file had been "picked up" from the automatic searches being performed by Tiversa for its healthcare clients, and he determined that it had not been. (Wallace, Tr. 1388-1390).

148. CX0019 purports to show that Tiversa had downloaded the 1718 File from four IP addresses on particular dates and times. Mr. Wallace created CX0019, at Mr. Boback's direction, in 2013, near the time of Boback's deposition, to make it appear that the 1718 File had "spread" to IP addresses belonging to known identity thieves, and that the 1718 File had not been found at an Atlanta IP address, when, in fact, none of this is true. Mr. Boback specifically

asked Mr. Wallace to include a San Diego IP address. (Wallace, Tr. 1368-1370, 1381, 1446-1447).

149. Although it was not true, Mr. Wallace included on CX0019 the IP address 173.16.83.112 as one of the IP addresses where the 1718 File had been found because that IP address belonged to an individual in Apache Junction, Arizona that Wallace believed to be an identity thief, based on data in Tiversa's Data Store indicating that the individual at that address possessed over 3,000 tax returns that he appeared to be selling. (Wallace, Tr. 1376-1377).

150. In order to appear to be providing a client with valuable information, Tiversa would create the appearance of a "spread" of a client's file. (F. 115, 117-119; Wallace, Tr. 1391).

151. It was common practice for Tiversa to create documents such as CX0019 to make it appear that a file had "spread" to various IP addresses. (Wallace, Tr. 1368-1369, 1390-1391).

152. Tiversa had approximately 20 IP addresses that it would use when making it appear as if files had been spread across the Internet, including to identity thieves. Some IP addresses were used more frequently than others. For example, Tiversa knew of IP addresses that had gone "dead" after law enforcement took action. If Tiversa claimed the 1718 File was found at one of these long-gone addresses, such as the IP address at Apache Junction (F.149), there would be no way to contradict Tiversa's claim. (Wallace, Tr. 1376-1377, 1445).

153. The 1718 File was never found at any of the four IP addresses listed on CX0019. (Wallace, Tr. 1370, 1383-1384).

154. To Mr. Wallace's knowledge, the originating disclosing source in Atlanta is the only location at which the 1718 File was ever located. (Wallace, Tr. 1443-1444).

4. Credibility Findings Concerning the 1718 File Incident

155. Based on Mr. Wallace's forthrightness in response to questioning, and his overall demeanor observed during his questioning, Mr. Wallace is a credible witness.

156. Tiversa "has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations." (Dissenting Statement of Commissioner J. Thomas Rosch re FTC File No. 1023099 (June 21, 2012) at 1, *at* https://www.ftc.gov/sites/default /files/documents/petitions-quash/labmd-inc./1023099-labmd-full-commission-review-jtr-dissent.pdf; *see also e.g.*, F. 100, 108-114, 121, 126, 128).

157. Mr. Boback was motivated to retaliate against LabMD for LabMD's refusal to purchase remediation services from Tiversa, including by making the disclosure of the 1718 File appear widespread and dangerous. (F. 115-118, 126, 128-130, 148-154).

158. Mr. Boback's motive to retaliate against LabMD for refusing to purchase remediation services from Tiversa (F. 157) resulted in Tiversa's decision to include LabMD in the information provided to the FTC in response to the FTC CID (F. 137) and in the creation of CX0019. (F. 141-144, 146-149).

159. CX0019 is not credible or reliable evidence to show that the 1718 File spread on any peer-to-peer network. (F. 156-158).

160. Because of Mr. Boback's biased motive, Mr. Boback is not a credible witness concerning LabMD, the 1718 File, or other matters material to the liability of Respondent. (F. 156-159).

161. Mr. Boback has previously asserted that Tiversa found other files that it had not found. (F. 162-163).

162. Mr. Wallace helped Mr. Boback prepare for his testimony before the 2007 Congressional Hearing by giving Boback documents that Wallace had found on the Internet via peer-to-peer sharing from a time period that was before Tiversa had hired Wallace. Mr. Boback testified at the 2007 Congressional Hearing that Tiversa's system had found those documents, when in fact, Mr. Wallace, and not Tiversa or someone using Tiversa's system, had done so. (Wallace, Tr. 1432-1434).

163. There were "multiple times" when Mr. Boback would make statements that a company's documents had spread all over the Internet and then create the appearance that information was found in locations where it never existed. (Wallace, Tr. 1453-1454, 1457-1458) (testifying to a highly publicized instance as one example).

164. In 2014, the Chairman of the United States House Oversight and Government Affairs Committee ("OGR") commenced an investigation of Tiversa regarding its involvement with government agencies. The investigation continued over a period of months and included investigation into Tiversa's relationship with the FTC. (JX0003; RX0542 (June 11, 2014 OGR Letter from Issa to Ramirez); RX0543 (December 1, 2014 OGR Letter from Issa to Ramirez)).

165. The OGR staff report regarding the investigation referred in F. 164 concluded, *inter alia*, that Tiversa and Mr. Boback provided incomplete, inconsistent, and/or conflicting information to the FTC in this matter. (RX0644).

166. Having observed Mr. Boback's June 7, 2014 video deposition (RX0541 (Boback Trial Dep.); Tr. 1268-1269), taken by Respondent for purposes of trial testimony, Mr. Boback was evasive and lacked forthrightness in response to questioning.

167. Based on F. 155-166, and observation of Mr. Boback's overall demeanor during the June 7, 2014 video deposition (RX0541 (Boback Trial Dep.)), Mr. Boback is not a

credible witness concerning LabMD, the 1718 File, or other matters material to the liability of Respondent.

168. Mr. Wallace's testimony, including without limitation regarding CX0019, is credited over any contrary testimony or other evidence provided by Boback or Tiversa. (F. 155-167).

5. Professor Eric Johnson

169. In February 2009, Professor Eric Johnson, while with Dartmouth College ("Dartmouth"), authored an article titled, "Data Hemorrhages in the Health-Care Sector." The article addresses data breaches and inadvertent disclosures of information by healthcare providers (the "Johnson Article"). (CX0382; Johnson, Tr. 753, 757).

170. Tiversa was a research partner for the Johnson Article, and assisted Professor Johnson in his research for the Johnson Article. (Johnson, Tr. 753-755).

171. The Johnson Article represents that the 1718 File was found as a result of Professor Johnson's research. (CX0382 at 11).

172. Tiversa's role in the research was to conduct searches for Professor Johnson and to forward files to him for further analysis. All the files examined in Professor Johnson's research for the Johnson Article were provided to him by Tiversa. (Johnson, Tr. 758-759, 793-794).

173. The first phase of the research, conducted in the first two weeks of January 2008, used a set of search terms, or "digital signature," related to the top ten publicly traded healthcare companies, as well as "generic" healthcare-related terms. The first phase of Professor Johnson's research did not uncover the 1718 File. (Johnson, Tr. 758-759, 765-766, 776-777, 780).

174. The second phase of Professor Johnson's research took place over a six-month period in the spring of 2008. It was Professor Johnson's "understanding" that files

provided by Tiversa in the second phase of the research were files that Tiversa discovered by searching "host" locations found in the first phase of the research, or were files that Tiversa had otherwise discovered on its own. (Johnson, Tr. 762-763).

175. Although Professor Johnson understood that Tiversa had found the 1718 File, he had no knowledge of what search term was used to find the 1718 File. (Johnson, Tr. 764-765).

176. Tiversa employee Mr. Chris Gormley was Professor Johnson's main contact at Tiversa to discuss the research and progress of the Johnson Article. (Johnson, Tr. 770-771).

177. In an email to Mr. Gormley dated April 29, 2008, Professor Johnson stated that it was going "well on the medical files. We are working on the report right now. We turned up some interesting stuff – not as rich as the banks, but I guess that could be expected. Any chance you could share a couple of your recent medical finds that we could use to spice up the report? You told me about the one database you found that could really boost the impact of the report." (RX0483 at 1-2).

178. The 1718 File was one of many files that Tiversa provided to Professor Johnson. Despite persistent questioning, Professor Johnson did not provide a clear response as to: (1) whether Tiversa provided the 1718 File as a product of Professor Johnson's research parameters, including the "host" browsing second phase of Professor Johnson's research, as asserted in the Johnson Article; or (2) whether Tiversa provided the 1718 File in response to Professor Johnson's April 2008 request (F. 177) that Tiversa provide a "recent medical find" to "spice up" the Johnson Article. (Johnson, Tr. 774-777, 779-780; CX0382 at 11 (stating that the 1718 File was discovered in the second phase through examining shared files on hosts where other "dangerous" data had been found); CX0483 at 2).

179. While Professor Johnson was confident that the 1718 File was not found in the first phase of his research, Professor Johnson either does not know, or was unwilling to say, whether the 1718 File was discovered as a result of his search protocol for the second phase of the research, notwithstanding the contrary representation in the Johnson Article. (*See* F. 173-175, 178; Johnson, Tr. 777-780).

180. An FTC attorney contacted Professor Johnson in February 2009, and asked for a copy of the Johnson Article, and Professor Johnson complied by sending a copy. (RX0403; Johnson, Tr. 784).

181. Professor Johnson did not provide the 1718 File to the FTC, and did not share files containing sensitive information with anyone. (Johnson, Tr. 785, 794).

E. THE SACRAMENTO INCIDENT

1. Sacramento Police Department's Discovery of LabMD Documents

182. On October 5, 2012, the Sacramento California Police Department (the "SPD") found 40 LabMD "day sheets," (F. 199) (hereafter, the "Day Sheets"), 9 copied checks, and 1 money order made payable to LabMD in a house in Sacramento, California (collectively, the "Sacramento Documents"). (Joint Stipulations of Fact, JX0001-A at 4; CX0087, *in camera* (LabMD Day Sheets); CX0088, *in camera* (LabMD Copied Checks at 1-10); CX0720 (Jestes, Dep. at 17-18, 22-23, 33-37)). This event is referred to herein as the "Sacramento Incident."

183. The Day Sheets found by the SPD on October 5, 2012 contain the following Personal Information of approximately 600 consumers: names and nine digit chart numbers that appear to be SSNs. (CX0720 (Jestes, Dep. at 35-37); CX0087, *in camera* (LabMD Day Sheets); RRCCFF 1724).

184. The dates of the Day Sheets contained in CX0087 range from June 2007 to March 2009, with 28 from various

months in the year 2008, 10 from various months in 2007, and 2 from March 2009. (CX0087, *in camera* (LabMD Day Sheets)).

185. The nine copied checks found by the SPD on October 5, 2012 contain the following Personal Information of nine consumers: names, addresses (for all but one), and bank account numbers. The money order does not contain any Personal Information. (CX0088 *in camera*, (LabMD Copied Checks at 1-10)).

186. The dates of the nine copied checks found by the SPD on October 5, 2012 range from May 2007 to March 2009. (CX0088, *in camera* (LabMD Copied Checks at 1-9) (4 checks from 2007; 4 checks from 2008; 1 check from 2009)).

187. The date of the one money order found by the SPD on October 5, 2012 is August 21, 2008. (CX0088, *in camera* (LabMD Copied Checks at 10)).

188. Detective Karina Jestes of the SPD participated in an investigation of 5661 Wilkinson Street in Sacramento, California ("5661 Wilkinson"), initiated on October 5, 2012, along with three other officers. (CX0720 (Jestes, Dep. at 17-18)).

189. The SPD investigation concerned a woman whose utility bill had been compromised and who was then receiving an additional utility bill for an address at 5661 Wilkinson, to which she had no connection. (CX0720 (Jestes, Dep. at 17-18)).

190. Detective Jestes went to 5661 Wilkinson, entered the property, and executed a search. (CX0720 (Jestes, Dep. at 17-19)).

191. Detective Jestes concluded that the search of 5661 Wilkinson revealed evidence of utility billing theft, evidence that the occupants of the home were using someone else's name for the gas utility bill, narcotics paraphernalia, narcotics, and several additional items that,

Detective Jestes believed, showed that identity theft was occurring at the house. (CX0720 (Jestes Dep. at 19-20)).

192. The search of 5661 Wilkinson also uncovered the Sacramento Documents, described in F. 182-187. (Joint Stipulations of Fact, JX0001-A at 4; CX0720 (Jestes, Dep. at 23)).

193. On October 5, 2012, Mr. Erick Garcia and Ms. Josie Maldonado were arrested and charged with identity theft, receiving stolen property, possession of methamphetamine, and the possession of narcotics paraphernalia. (CX0720 (Jestes, Dep. at 25)).

194. Mr. Garcia and Ms. Maldonado pled *nolo contendere* to identity theft and were sentenced to probation and a sheriff's work project. (CX0720 (Jestes, Dep. at 43-45)).

195. The Day Sheets found by the SPD during the search of 5661 Wilkinson on October 5, 2012 were seized by the SPD and booked into evidence. (CX0720 (Jestes, Dep. at 30-31)).

196. The copies of checks and the canceled money order found by the SPD during the search of 5661 Wilkinson on October 5, 2012 were seized by the SPD and booked into evidence. (CX0720 (Jestes, Dep. at 31-32)).

2. Connection between the Sacramento Documents and LabMD's Computer Network

197. The Sacramento Documents were found in paper form, not in electronic form. (CX0720 (Jestes, Dep. at 58)).

198. As part of its consumer billing process, LabMD produced reports called day sheet transaction detail reports, referred to as "day sheets." (CX0715-A (Gilbreth, Dep. at 42); *see, e.g.*, CX0087, *in camera*).

199. Day sheets are reports that were created, accessed, and printed electronically through LabMD's billing application, Lytec, to ensure payment had been received

and posted. (CX0733 (Boyle, IHT at 33); CX0715-A (Gilbreth, Dep. at 42); CX0714-A ([Former LabMD Employee], Dep. at 59-60)).

200. LabMD's billing department used computers to create day sheets of payments received from consumers, which may include consumers' names; SSNs; and methods, amounts, and dates of payments. (Answer ¶ 9(b); CX0715-A (Gilbreth, Dep. at 37-38, 46-49)).

201. Day sheets could include billing date; provider number; place of service; diagnosis code, which is a standardized code that identifies the symptoms leading to the procedure being performed; payment code; payment amount; charges; credits; and adjustments. (CX0714-A ([Former LabMD Employee], Dep. at 62-63); CX0715-A (Gilbreth, Dep. at 48-49); *e.g.*, CX0087, *in camera*).

202. Copies of patient checks were attached to day sheets. (CX0715-A (Gilbreth, Dep. at 50-51)).

203. Day sheets were created electronically but were not saved electronically. Day sheets were then printed almost every day. Once the day sheets were printed, "there is no electronic record in the system." (CX0733 (Boyle, IHT at 37-38); CX0715-A (Gilbreth, Dep. at 43); CX0714-A ([Former LabMD Employee], Dep. at 59-60)).

204. The printed day sheets were made part of batch reports. If a batch report did not balance, then the day sheet was shredded and a new day sheet was created. Only balanced day sheets were retained. (CX0714-A ([Former LabMD Employee]), Dep. at 61-62).

205. Day sheets could be printed by any of LabMD's billing employees who posted payments or by a LabMD billing manager. (CX0715-A (Gilbreth, Dep. at 42); CX0714-A ([Former LabMD Employee], Dep. at 64-65)).

206. Day sheets were stored in paper files at LabMD. (CX0733 (Boyle, IHT at 33-39); CX0710-A (Daugherty, LabMD Designee, Dep. at 60); CX0715-A (Gilbreth, Dep. at 43-

45); CX0714-A ([Former LabMD Employee], Dep. at 58-61)).

207. After day sheets were generated by LabMD through the Lytec system, although LabMD billing employees had the option to save or to print off day sheets, LabMD billing employees did not save them. (CX0714-A ([Former LabMD Employee], Dep. at 60-61 ("I don't know of anyone who actually saved them. . . . "I never saved [them]."")); CX0715-A (Gilbreth, Dep. at 43 (day sheet reports were not created in an electronic format such as an electronic file)).

208. Beginning in or around January 2013, LabMD began to electronically scan some of its documents for a medical records archiving project. This project began with archiving old insurance documents, such as Explanation of Benefits documents. The archiving project, which was ongoing, has also included scanning of some retained day sheet printouts and check copies. (CX0716 (Harris Dep. at 25-26); CX0733 (Boyle, IHT at 37, 46-47)).

3. Follow up to Discovery of the Sacramento Documents

209. After finding the Sacramento Documents, Detective Jestes performed an Internet search and learned that the FTC was investigating LabMD. Approximately one week after the October 5, 2012 discovery of the Sacramento Documents, Detective Jestes contacted the FTC regarding the Sacramento Documents. (CX0720 (Jestes, Dep. at 60-62)).

210. In December 2012, the SPD provided the Sacramento Documents to the FTC. The SPD made the determination not to return the Sacramento Documents to LabMD based on the FTC's investigation of LabMD. (CX0720 (Jestes, Dep. at 60-61)).

211. On January 30, 2013, the FTC notified LabMD that the FTC had the Sacramento Documents. (CX0227; Daughtery, Tr. 1013-1014).

212. On March 27 or 28, 2013, LabMD sent 682 letters to the consumers named in the Sacramento Documents notifying them of the Sacramento Incident, describing steps such as registering a fraud alert with credit bureaus, offering one year of free credit monitoring services, and inviting consumers to contact LabMD with questions or concerns. (CX0710-A (Daugherty, LabMD Designee, Dep. at 63, 68-69); CX0709 (Daugherty, Dep. at 120); CX0227).

4. Lack of Foundation for Admission of CX0451

213. Mr. Kevin Wilmer is an investigator with the FTC. (Wilmer, Tr. 331).

214. CLEAR (Consolidated Lead Evaluation and Reporting) is an investigative software database program, provided by Thompson Reuters Corporation (Thompson Reuters), that is used by investigators at the FTC to obtain information on individuals and corporations. Mr. Wilmer's "understanding," based on his training and experience with the CLEAR database, is that the information contained in the CLEAR database is an aggregation of information obtained from a variety of sources, including credit bureau information, utility information, information from civil judgments and criminal convictions, and other forms of publicly and privately available information. (Wilmer, Tr. 335, 359, 362, 364).

215. Mr. Wilmer was provided with an electronic copy of CX0085, which he was told consisted of copies of the Sacramento Documents (F. 182). (Wilmer, Tr. 338-339).

216. The first four pages of CX0085 are copies of the checks and a canceled money order found by the SPD during the search of 5661 Wilkinson on October 5, 2012 that comprise CX0088. Pages 5 through 44 of CX0085 are copies of the Day Sheets found by the SPD during the search of 5661 Wilkinson on October 5, 2012 that comprise CX0087. (CX0085, *in camera* (LabMD Day Sheets and Copied Checks).

217. Mr. Wilmer concluded, but did not confirm, that the nine digit numbers in pages 5 through 44 of CX0085 represented Social Security numbers. (Wilmer, Tr. 340).

218. Mr. Wilmer was asked by Complaint Counsel to determine whether Social Security numbers in pages 5 through 44 of CX0085 had been used by people with different names. He was not asked to confirm that the nine digit numbers appearing on CX0085 are Social Security numbers corresponding to the names that are listed on CX0085. (Wilmer, Tr. 341-342).

219. To perform the task set forth in F. 218, Mr. Wilmer issued a "query" to the CLEAR database. Specifically, Mr. Wilmer copied each number that he believed to be a Social Security number from CX0085 and pasted the number onto a CLEAR-provided spreadsheet. He then submitted the spreadsheet with a request that CLEAR use its "batching" function to query the CLEAR database to determine who used that apparent Social Security number and return the information to him. (Wilmer, Tr. 342-345, 359-360).

220. In response to Mr. Wilmer's CLEAR database query, described in F. 219, CLEAR returned a spreadsheet containing the nine digit numbers that Mr. Wilmer had entered, and CLEAR's data, drawn from its various sources, as to the names of people who used those numbers. The CLEAR spreadsheet also provided in some instances a date of birth, date of death, gender, home address and the first or last time a number was used. (Wilmer, Tr. 345-346, 361, 364).

221. Mr. Wilmer identified a document, marked for identification as CX0451, as the results returned to him by Thompson Reuters in response to his CLEAR database query, to which Mr. Wilmer added certain color coding to differentiate various names. (Wilmer, Tr. 350, 359).

222. Mr. Wilmer does not know whether the nine digit numbers he copied from CX0085 and entered into his CLEAR database query as apparent Social Security numbers

actually belonged to the associated names on CX0085. (Wilmer, Tr. 358).

223. CX0451 does not indicate which individual associated with a Social Security number is the true owner of the number, if any. CLEAR only indicates that an individual is associated with a Social Security number. (Wilmer, Tr. 363-364).

224. Mr. Wilmer did not ask CLEAR to identify the source(s) of the data that CLEAR used to populate the CLEAR spreadsheet, although he could have received this information if he asked, because that was not part of his assignment. (Wilmer, Tr. 365).

225. Mr. Wilmer does not know, and did not ask CLEAR, whether any of the numbers reported by CLEAR as a Social Security number associated with an individual had stemmed from bad keystrokes on the part of a reporting source such as a bank. (Wilmer, Tr. 366).

226. Mr. Wilmer does not know if some of the people listed on CX0085 had knowingly and willingly shared their personal information for others to use, or whether they had family members who may have taken their personal information without consent. Mr. Wilmer was not asked to determine these matters, and was not asked to and did not contact any of the individuals listed on CX0085. (Wilmer, Tr. 367-369).

227. Based on the failure to demonstrate the authenticity or reliability of the data returned by the CLEAR database, which is contained in proffered CX0451, the document cannot properly support any factual finding or any valid conclusion in this case. (*See* F. 217-226).

F. IDENTITY THEFT HARM

228. "Identity theft" refers to the use of another person's identity without his or her permission. This includes using another person's personal identifiers to impersonate that

person. (CX0742 (Kam Expert Report at 10); Kam, Tr. 394).

229. "Identity fraud" refers to the unauthorized use of another person's information to achieve illicit financial gain. Types of identity fraud are "new account fraud," "existing non-card fraud," and "existing card fraud." (CX0742 (Kam Expert Report at 10); CX0741 (Van Dyke Expert Report at 3)).

230. "New account fraud" ("NAF") is identity fraud perpetrated through the use of another person's personally identifiable information to open new, fraudulent accounts. (CX0741 (Van Dyke Expert Report at 3)).

231. "Existing non-card fraud" ("ENCF") is identity fraud perpetrated through the use of existing checking or savings accounts or existing loans, insurance, telephone, and utilities accounts. (CX0741 (Van Dyke Expert Report at 3)).

232. "Existing card fraud" ("ECF") is identity fraud perpetrated through use of existing credit or debit cards and/or their account numbers. (CX0741 (Van Dyke Expert Report at 3)).

233. "Medical identity theft," also known as "medical identity fraud," is the unauthorized use of a third party's personally identifiable information to obtain medical products or services, including but not limited to: office visits and consultations, medical operations, and prescriptions. Medical identity theft may also include attempts to fraudulently bill health insurance providers. (CX0741 (Van Dyke Expert Report at 3); CX0742 (Kam Expert Report at 11-12); Kam, Tr. 395).

234. A "data breach" refers to the unauthorized disclosure of personally identifying information. (Van Dyke, Tr. 589; Kam, Tr. 378).

235. As a matter of common usage, the generic term "identity theft" may include "identity fraud" (with its subsets, NAF,

ENCF, ECF, and medical identity theft). (Van Dyke, Tr. 577-579; CX0741 (Van Dyke Expert Report at 3)).

236. Identity theft and identity fraud are distinguishable from a "data breach," in that a data breach refers only to the unauthorized exposure of personal information, while identity theft and identity fraud refer to the improper use of personal information. (F. 228-229, 234).

237. Complaint Counsel's proffered expert on computer security, Dr. Raquel Hill (F. 4-5), acknowledged that she did not have an opinion with regard to the likelihood of consumer harm. Dr. Hill was instructed to "assume" that identity theft harm could occur if the information contained on LabMD's network was exposed. Dr. Hill further assumed, in assuming such harm could occur, that such harm was likely. (Hill, Tr. 216-219; CX0740 (Hill Expert Report at 20 ¶ 49)).

238. Complaint Counsel's proffered expert on the likelihood of consumer harm in this case, Mr. Rick Kam (F. 9-11) used the following four factors to examine "the likely risk of harm to consumers from unauthorized disclosure" of Personal Information: (1) the nature and extent of the sensitive Personal Information exposed; (2) the unauthorized person who obtained information or to whom the disclosure was made, to determine whether the person possessing the information presents a low risk of misuse, or a higher risk of misuse, such as an identity thief; (3) whether the sensitive Personal Information was actually acquired or viewed; and (4) the extent to which the risk from the exposure has been mitigated, including whether or not "the data is still available for others to misuse." (Kam, Tr. 404-406; CX0742 (Kam Expert Report at 17-18)).

239. Mr. Kam applied the four factor risk assessment test referenced in F. 238 to determine the likelihood of harm from the exposure of the 1718 File. (CX0742 (Kam Expert Report at 18-19)).

240. In applying the second and third factors of the four factor risk assessment test (F. 238) to determine the likelihood of identity theft harm from the disclosure of the 1718 File, Mr. Kam relied upon the discredited deposition testimony of Mr. Boback (F. 167) that the 1718 File was found at four IP addresses, along with unrelated sensitive consumer information that could be used to commit identity theft, and that law enforcement had apprehended someone suspected of identity theft of fraud using one of those IP addresses. (CX0742 (Kam Expert Report at 19); Kam, Tr. 409-410).

241. In applying the second and third factors of the four factor risk assessment test (F. 238) to determine the likelihood of identity theft harm from the disclosure of the 1718 File, Mr. Kam relied upon the discredited deposition testimony of Mr. Boback (F. 167) that the 1718 File had been found at four IP addresses on four different dates and had also been found by Tiversa just before Mr. Boback provided deposition testimony in November 2013. (CX0742 (Kam Expert Report at 19); Kam, Tr. 409-410).

242. In Mr. Kam's experience, in every data breach, some victim has come forward. Mr. Kam acknowledged that no evidence has been presented of any individual listed in the Sacramento Documents or in the 1718 File having come forward to report identity theft harm. (Kam, Tr. 532-533).

243. Mr. Kam was unaware of any actual victims of identity theft or fraud of any individuals listed on the 1718 File. (Kam, Tr. 507).

244. For the purposes of his analysis, Mr. Kam "assumed that LabMD failed to provide reasonable and appropriate security for consumers' personal information maintained on its computer networks." (CX0742 (Kam Expert Report at 5)).

245. Mr. Kam is not an expert in computer network security and did not analyze any of LabMD's specific practices with respect to LabMD's computer networks or assess the

probability that LabMD's computer networks will be breached in the future. (Kam, Tr. 518).

246. Mr. Kam based his opinion on the likelihood of medical identity theft harm primarily on the 2013 Survey on Medical Identity Theft by Ponemon Institute ("2013 Ponemon Survey"). (CX0742 (Kam Expert Report at 15, 19-20); Kam, Tr. 423).

247. The 2013 Ponemon Survey, conducted in September 2013, had a response rate of only 1.8 %, which the 2013 Ponemon Survey acknowledged, and which, Mr. Kam agreed, creates a non-response bias, *i.e.*, a failure to take into account that those who were surveyed but did not respond might have a different answer to the question. (Kam, Tr. 540-541; RX0528 (2013 Ponemon Survey at 31)).

248. The 2013 Ponemon Survey's sampling frame (the source from which a sample is drawn) contained individuals who were prescreened from a larger sample on the basis of their identity theft or identity fraud experience. The 2013 Ponemon Survey acknowledged, and Mr. Kam agreed, that this resulted in a sampling frame bias. (RX0528 (2013 Ponemon Survey at 28, 32); Kam, Tr. 541).

249. The 2013 Ponemon Survey compensated respondents to complete the survey within a set period of time, which the 2013 Ponemon Survey acknowledged was an inherent limitation to its survey research. (RX0528 (2013 Ponemon Survey at 32); *see also* Kam, Tr. 541).

250. The 2013 Ponemon Survey stated: "[m]any cases of medical identity theft reported in this study result from the sharing of personal identification with family and friends. In some cases, family members take the victim's personal credentials without consent. Rarely does it occur from data breaches, malicious insiders, an identity thief or loss of medical credentials." (RX0528 (2013 Ponemon Survey at 27)).

251. Mr. Kam acknowledged that medical identity theft rarely occurs from data breaches or the acts of an identity thief and acknowledged that most occurrences of medical identity theft were from someone knowingly sharing their personal information or medical credentials and from instances where a family member took another family member's personal information or medical credentials without consent. (Kam, Tr. 486-487).

252. Complaint Counsel's second proffered expert on the likelihood of consumer harm in this case, Mr. James Van Dyke (F. 12-15) based his analysis principally on identity theft statistics derived from the Javelin 2013 Identity Fraud Survey ("2013 Javelin Survey"). The 2013 Javelin Survey was conducted in October 2013 among 5,634 adults in the United States. Javelin's 2014 Identity Fraud Report ("2014 Javelin Report") is based on the results of the 2013 Javelin Identity Fraud Survey. The Javelin Identity Theft Survey is conducted annually. (CX0741 (Van Dyke Expert Report at 2-4, and Attachment 1); Van Dyke, Tr. 583, 602-604).

253. Mr. Van Dyke selected the 2013 Javelin Survey and 2014 Javelin Report to support his opinions and calculations of likely identity theft harm from the exposure of the 1718 File because of the discredited deposition testimony of Mr. Boback in November 2013 (F. 167) that Tiversa had located the 1718 File on peer-to-peer networks on IP addresses from four locations other than LabMD. (CX0741 (Van Dyke Expert Report at 6-8); Van Dyke, Tr. 668-669).

254. In connection with Javelin Research, Mr. Van Dyke has occasionally been provided with a list of names and asked to conduct a survey from among those individuals. (Van Dyke, Tr. 730).

255. Mr. Van Dyke did not conduct a survey of the 9,300 consumers listed on the 1718 File. (Van Dyke, Tr. 690, 726; *see also* CX0741 (Van Dyke Expert Report)).

256. Mr. Van Dyke did not conduct a survey of the 600 consumers listed in the Sacramento Documents. (*See* Van Dyke, Tr. 574-741; CX0741 (Van Dyke Expert Report)).

257. For the purposes of his analysis, Mr. Van Dyke "assumed that LabMD failed to provide reasonable and appropriate security for the personally identifiable information maintained on its computer networks" and that, therefore, all individuals whose information is maintained on LabMD's computer network are "at risk" of "exposure to a likelihood" of identity fraud and medical identity fraud. Mr. Van Dyke did not do any independent analysis of LabMD's network security. (CX0741 (Van Dyke Expert Report at 2, 13); Van Dyke, Tr. 695-696).

258. Mr. Van Dyke did not, and was unable to, provide any quantification of the risk of identity theft harm for the 750,000 consumers whose personally identifiable information is maintained on LabMD's computer networks, because he did not have evidence of any data exposure with respect to those individuals, except as to those that were listed on the 1718 File or in the Sacramento Documents. (Van Dyke, Tr. 631; *see also* Van Dyke, Tr. 610).

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 FTC enforcement actions. *In re Rambus, Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006); *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463-65 (May 17, 2012) (initial decision); *In re Adventist Health System/West*, 117 F.T.C. 224, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence . . ."). The Supreme Court has held that Section 7(c) of the APA, which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes "a standard of proof and . . . the standard adopted is the traditional preponderance-of-the evidence standard." *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981).

Section 5(n) of the Federal Trade Commission Act ("FTC Act") requires that FTC Complaint Counsel ("Complaint Counsel") prove, *inter alia*, that challenged conduct "causes or is *likely to cause* substantial injury to consumers." 15 U.S.C. § 45(n) (emphasis added). Respondent argues that, because Section 5(n) uses the phrase "likely to cause," Complaint Counsel has the burden of proving the likelihood of substantial consumer injury in this case by clear and convincing evidence. This argument contradicts clearly established law, stated above, and Respondent's own stipulations in this case. *See* Joint Stipulations of Fact, JX0001-A at 2-3 ("The standard of proof is preponderance of the evidence."). None of the authorities cited by Respondent suggests that the term "likely" means that clear and convincing evidence is required in this case. *E.g., Colorado v. New Mexico*, 467 U.S. 310, 315-17 (1984) (applying heightened standard of proof based on "the unique interests involved in water rights disputes between sovereigns," not because any statute involved required showing that any event was "likely"). Accordingly, Complaint Counsel has the burden of proving each factual issue supporting its claims against Respondent in this case by a preponderance of credible evidence.

B. JURISDICTION

Section 5 of the FTC Act grants the FTC the authority over "unfair or deceptive acts or practices in or affecting commerce" by "persons, partnerships, or corporations . . . ." 15 U.S.C. §

45(a)(1)-(2) (2012).[22] Respondent LabMD, Inc. ("Respondent" or "LabMD") is a privately held Georgia corporation, incorporated in 1996 by Mr. Michael J. Daugherty. F. 24. It is undisputed that Respondent is a corporation. Complaint ¶ 1; Answer ¶ 1. From at least 2001 through approximately January 2014, LabMD was in the business of conducting clinical laboratory tests on urological specimen samples and reporting test results to its physician clients. F. 26. Respondent stipulates that the acts and practices alleged in the Complaint are "in or affecting commerce." F. 30; *see* also F. 28-29.

In its order denying Respondent's November 12, 2013 Motion to Dismiss (*see* Section I.A.2. and footnote 1, *supra*), the Commission held that its jurisdiction over unfair practices extends to a "company's failure to implement reasonable and appropriate data security measures" and that it has jurisdiction over this case. *LabMD*, 2014 FTC LEXIS 2, at *3, *7. Believing the Commission's determination of its jurisdiction to be erroneous, Respondent reserves its jurisdictional challenge for its anticipated appeal to the federal court. RCL 146. Based on the foregoing, the issue of jurisdiction will not be revisited in this Initial Decision. *See In re North Carolina Bd. of Dental Examiners*, 2011 FTC LEXIS 137, at *180-82 (July 14, 2011) (declining to address respondent's state action immunity defense).

C. LEGAL FRAMEWORK FOR DETERMINING UNFAIR CONDUCT

The Complaint alleges that (1) Respondent failed to provide "reasonable" security for Personal Information[23] on its computer

[22] 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.

[23] The parties have stipulated that the term "Personal Information," as used by the parties, means: "Individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test

networks, including because Respondent failed to have in place the data security practices specified in the Complaint at ¶¶ 10(a)-(g); and that (2) Respondent's alleged unreasonable data security "caused, or is likely to cause, substantial injury to consumers that is not reasonably avoidable, or offset by benefits to consumers or competition." Complaint ¶¶ 10, 22. Therefore, the Complaint charges, Respondent's alleged unreasonable data security "constitute[s] an unfair practice in violation of Section 5(a) of the FTC Act." Complaint ¶ 23. As authority for finding unfair conduct liability, Complaint Counsel relies on Section 5(n) of the FTC Act, which provides that "[t]he Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

Congress amended the FTC Act in 1994 to add Section 5(n). FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695. The intent of the amendment was not to expand, but to establish an outer limit to the Commission's authority to declare an act or practice unfair. *See* H.R. CONF. REP. 103-617 at 5, FTC Act Amendments of 1994, 1994 WL 385368, at *11-12 (July 21, 1994) (stating that new Section 5(n): "[a]mends section 5 of the Act to *limit* unfair acts or practices to those that: (1) cause or are likely to cause substantial injury to consumers, (2) which is not reasonably avoidable by consumers themselves and (3) not outweighed by countervailing benefits to consumers or competition") (emphasis added). The three-part test in Section 5(n) was "intended to codify, as a *statutory limitation* on unfair acts or practices, the principles of the FTC's December 17, 1980, policy statement on unfairness, reaffirmed by a letter from the FTC dated March 5, 1982," in order to provide guidance and to prevent a future FTC from abandoning those principles. S. REP. 103-130, 1993 WL 322671, at *12 (Aug. 24, 1993) (emphasis added); *see* Letter from FTC to Senators Ford and Danforth (Dec.

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result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a "cookie" or processor serial number. F. 3.

17, 1980), appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *300 (Dec. 21, 1984) ("Policy Statement"); Letter from FTC Chairman J.C. Miller, III to Senator Packwood and Senator Kasten (March 5, 1982), reprinted in H.R. REP. No. 156, Pt. 1, 98th Cong., 1st Sess. 27, 32 (1983) ("1982 Policy Letter").

According to the Policy Statement, "[u]njustified consumer injury is the primary focus of the FTC Act." Policy Statement, 1984 FTC LEXIS 2, at *307. Moreover, the consumer injury must be substantial, and not "trivial or merely speculative." *Id*. In the 1982 Policy Letter, FTC Chairman Miller reiterated that the Commission's "concerns should be with substantial injuries; its resources should not be used for trivial or speculative harm." 1982 Policy Letter, *supra*. In adopting Section 5(n), Congress noted: "In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks." S. REP. 103-130, 1993 WL 322671, at *13. Furthermore, although a finding of unfair conduct can be based on "likely" future harm, "[u]nfairness cases usually involve actual and completed harms." *Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *248; *accord In re Orkin Exterminating Co.*, 108 F.T.C. 263, 1986 FTC LEXIS 3, at *50 n.73 (Dec. 15, 1986).

Section 5(n) is clear that a finding of actual or likely substantial consumer injury, which is also not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition, is a legal precondition to finding a respondent liable for unfair conduct. *See LabMD*, 2014 FTC LEXIS 2, at *52 (Commission Order on Motion to Dismiss) (holding that determining Respondent's liability in this case requires determining whether the alleged "substantial injury" occurred, and "also whether LabMD's data security procedures were 'unreasonable' in light of the circumstances"); *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 934-35 (N.D. Ill. 2008) ("[S]ubsection (n) . . . requires as a precondition to the FTC's authority to declare an act or practice to be 'unfair' that it be one that 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'"). *See also FTC v. Wyndham Worldwide Corp.*, 2015 U.S. App. LEXIS 14839, at

**54 (3rd Cir. Aug. 24, 2015) (noting that "[t]he three requirements in § 45(n) may be necessary rather than sufficient conditions" for finding unfair conduct). As explained below, the preponderance of the evidence in this case fails to show that Respondent's alleged unreasonable data security caused, or is likely to cause, substantial consumer injury. Accordingly, the Complaint must be dismissed, and it need not, and will not, be further determined whether or not Respondent's data security was, in fact, "unreasonable."[24]

D. CONSUMER HARM ANALYSIS

1. Terminology

As more fully detailed below, Complaint Counsel asserts that the "substantial consumer injury" at issue in this case consists of the monetary losses and other allegedly cognizable injuries that result from identity theft. Complaint Counsel also asserts intangible injuries that allegedly arise as a result of unauthorized disclosure of certain types of Personal Information through a data breach alone, apart from any resulting identity theft. "Identity theft" refers to the use of another person's identity without his or her permission. F. 228. "Identity fraud" refers to the unauthorized use of some portion of another person's information to achieve illicit financial gain. F. 229. Complaint Counsel uses the terms "identity theft" and "identity fraud" interchangeably. Identity theft and identity fraud are distinguishable from a "data breach," in that a data breach refers only to the unauthorized exposure of personal information, while identity theft and identity fraud refer to the improper use of personal information. F. 236.

As a matter of common usage, the generic term "identity theft" may include "identity fraud," new account fraud ("NAF"), existing non-card fraud ("ENCF"), existing card fraud ("ECF"), and medical identity theft. F. 229, 235. NAF is identity fraud

[24] As detailed in Section II.C.1., *supra*, LabMD wound down its operations beginning in January 2014, and as of May 2014, LabMD's operations were limited to maintaining tissue samples and providing copies of prior test data to its physician clients only via facsimile. F. 36-39. Accordingly, references to LabMD's operations, including with respect to data security, are in the past tense.

perpetrated through the use of another person's personally identifiable information to open new, fraudulent accounts. F. 230. ENCF is identity fraud perpetrated through the use of existing checking or savings accounts or existing loans, insurance, telephone, and utilities accounts. F. 231. ECF is identity fraud perpetrated through the use of existing credit or debit cards and/or their account numbers. F. 232. Medical identity theft, also referred to as medical identity fraud, is the unauthorized use of a third party's personally identifiable information to obtain medical products or services, including but not limited to: office visits and consultations, medical operations, and prescriptions. F. 233. Medical identity theft may also involve attempts to fraudulently bill insurance providers. F. 233.

Based on the foregoing, for ease of reference, unless the context indicates otherwise, "identity theft harm" as used in this analysis shall refer to injury arising from the misuse of personal information pursuant to identity theft, medical identity theft, and the other identity theft subtypes referred to above. Also, the terms "harm" and "injury" are used herein interchangeably, and, unless the context indicates otherwise, shall refer to all harms or injuries asserted by Complaint Counsel as meeting the "substantial injury" test set forth in Section 5(n).

2. Overview of Arguments on Substantial Consumer Injury

The Complaint alleges two "security incidents" in connection with Respondent's alleged unreasonable data security (hereafter "Security Incidents"). Complaint ¶¶ 17-21. As to the first Security Incident, the Complaint alleges that a "third party" informed LabMD that a June 2007 insurance aging report generated by LabMD was "available" on a peer-to-peer ("P2P") file-sharing network, through a file-sharing application called LimeWire. Complaint ¶ 17. This insurance aging report, consisting of 1,718 pages, is referred to herein as the "1718 File" and discussed in greater detail in Section III.D.5., *infra*. The second alleged Security Incident avers that, in October 2012, "more than 35 Day Sheets" and "a small number of copied checks" were found in the possession of individuals in Sacramento, California who subsequently pleaded "no contest" to identity theft charges. Complaint ¶ 21. The documents, referred

to herein as the "Sacramento Documents," are discussed in greater detail in Section III.D.6, *infra*.

The Order on Post-Trial Briefs, issued on July 16, 2015, specifically directed the parties to address the issue of the substantial consumer injury requirement of Section 5(n) as follows:

> Complaint Counsel shall fully and clearly articulate, and Respondent shall fully and clearly reply to, Complaint Counsel's theory of "substantial injury" in this case, including, without limitation: (1) the specific nature of the substantial injury or injuries asserted; (2) whether such asserted substantial injuries constitute present or future injuries; and, (3) as applicable, an assessment of the risk and/or likelihood of the asserted substantial injuries.

In re LabMD, Inc., 2015 FTC LEXIS 178, at *8-9 (July 16, 2015).

Having reviewed and considered the totality of Complaint Counsel's post-trial filings, including Complaint Counsel Post-Trial Brief, Proposed Findings of Fact and Conclusions of Law, and replies to Respondent's post-trial filings, Complaint Counsel's argument appears to assert the following as meeting the "substantial injury" requirement in Section 5(n):

- Likely identity theft harm for consumers whose Personal Information was exposed in the 1718 File and the Sacramento Documents, including monetary losses from NAF, ECF, and ENCF, based on an "increased risk" that consumers whose information is exposed in a data breach will suffer identity theft harm;

- Likely medical identity theft harm for consumers whose Personal Information was exposed in the 1718 File,[25] including monetary

[25] Complaint Counsel's brief and proposed findings of fact do not address the likelihood of medical identity theft from the exposure of the Sacramento Documents. *See* CCB at 71-72; CCFF § 8.4. To the extent Complaint Counsel

losses due to fraudulently procured medical products and services, and health and safety risks;

- "Significant risk" of reputational harm, privacy harm, and/or other harms based on stigma or embarrassment, caused by the unauthorized exposure of asserted "sensitive medical information" in the 1718 File; and,

- "Risk" of harm to all consumers whose information is maintained on LabMD's computer network, which Complaint Counsel variously describes as the "risk," "increased risk," or "significant risk," that Respondent's computer network will suffer a future data breach, resulting in identity theft harm, medical identity theft harm, and/or other harm.

See, e.g., CCB 63-72; CCCL 27, 30, 33, 35-40; CCFF §§ 8.2, 8.3, 8.4. *See also* CX0741 (Van Dyke Expert Report); CX0742 (Kam Expert Report).

On the issue of substantial consumer injury, Respondent contends, in summary, that Complaint Counsel has failed to meet its burden of proving actual or likely consumer harm as a result of Respondent's alleged unreasonable data security. Respondent asserts that there is no evidence that any consumer has suffered any actual harm as a result of Respondent's alleged unreasonable data security, and that the evidence fails to show that any harm is probable in the future. Complaint Counsel replies to this argument that: Section 5(n) does not require proof of actual, completed harms; proof of likely harm is sufficient under Section 5(n); consumers do not necessarily know or investigate when they have suffered identity theft harm; the evidence demonstrates actual harm in the form of reputational and other harms arising from the exposure of the 1718 File; and the evidence

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asserts that the exposure of the Sacramento Documents is likely to cause medical identity theft harm, as set forth below, the evidence fails to prove that such harm has occurred, or is likely to occur. *See* footnote 38, *infra*.

demonstrates increased risk and/or significant risk of data breach and resulting injury.

3. Actual or Likely Harm

The record in this case contains no evidence that any consumer whose Personal Information has been maintained by LabMD has suffered any harm as a result of Respondent's alleged failure to employ "reasonable" data security for its computer networks, including in connection with the Security Incidents alleged in the Complaint. Complaint Counsel presented no evidence of any consumer that has suffered NAF, ECF, ENCF, medical identity theft, reputational injury, embarrassment, or any of the other injuries Complaint Counsel describes. Complaint Counsel's response -- that consumers may not discover that they have been victims of identity theft, or even investigate whether they have been so harmed, even if consumers receive written notification of a possible breach, as LabMD provided in connection with the exposure of the Sacramento Documents (F. 212) -- does not explain why Complaint Counsel's investigation would not have identified even one consumer that suffered any harm as a result of Respondent's alleged unreasonable data security.

Complaint Counsel's response to the absence of evidence of actual harm in this case, that it is not legally necessary under Section 5(n) to prove that actual harm has resulted from alleged unfair conduct, because "likely" harm is sufficient, *see, e.g.*, CCRFF 295, 414, 455; CCRB at 131-132; CCCL ¶ 25, fails to acknowledge the difference between the burden of production and the burden of persuasion. The express language of Section 5(n) plainly allows liability for unfair conduct to be based on conduct that has either already caused harm, or which is "likely" to do so. *See Wyndham*, 2015 U.S. App. LEXIS 14839, at **21. However, as shown *infra*, the absence of any evidence that any consumer has suffered harm as a result of Respondent's alleged unreasonable data security, even after the passage of many years, undermines the persuasiveness of Complaint Counsel's claim that such harm is nevertheless "likely" to occur. This is particularly true here, where the claim is predicated on expert opinion that essentially only theorizes how consumer harm could occur. Given that the government has the burden of persuasion, the

reason for the government's failure to support its claim of likely consumer harm with any evidence of actual consumer harm is unclear.

In light of the inherently speculative nature of predicting "likely" harm, it is unsurprising that, historically, liability for unfair conduct has been imposed only upon proof of actual consumer harm. Indeed, the parties do not cite, and research does not reveal, any case where unfair conduct liability has been imposed without proof of actual harm, on the basis of predicted "likely" harm alone. For example, in *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988), the appellate court upheld the Commission's finding of substantial injury, based on undisputed evidence that Orkin's failure to honor consumers' contracts generated, during a four-year period, more than $7 million in revenues from renewal fees paid by consumers to which Orkin was not entitled. In *FTC v. Accusearch, Inc.*, 2007 U.S. Dist. LEXIS 74905 (Sept. 28, 2007), *aff'd*, 570 F.3d 1187 (10th Cir. 2009), on the issue of substantial injury, the court stated: "The range of injuries experienced by the consumers whose phone records were sold fits squarely within the categories of harm contemplated by the FTC's policy," including "documented economic harm" in the form of "actual costs associated with changing telephone carriers and addressing necessary upgrades to the security of the accounts." *Id.* at *23-24.

The substantial consumer injury supporting unfair conduct liability in *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1154 (9th Cir. 2010), was the issuance of fraudulent checks totaling over $4 million, caused by the defendant's faulty "Qchex" system. And, in *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1078 (C.D. Cal. 2012), the defendant's website marketing of its online auction product caused thousands of consumers to incur unauthorized monthly charges ranging from $29.95 to $59.95, with an approximate total of $18.2 million in consumer losses. *See also FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114 at *2, *31-32 (N.D. Ga. Sept. 30, 1997) (unauthorized demand drafts paid against consumers' bank accounts as a result of fraudulent telemarketing scheme); *Int'l Harvester*, 1984 FTC LEXIS 2, at *255 (death and serious injury resulting from failure to disclose known defects in respondent's tractors). Finally, in

Wyndham, 2015 U.S. App. LEXIS 14839, which is the only court case that has upheld the

FTC's authority to bring an unfair conduct claim based upon alleged unreasonable data security, the court, in denying the defendant's motion to dismiss, noted, *inter alia*, that "[o]n three occasions in 2008 and 2009 hackers successfully accessed Wyndham['s] computer systems . . . [and] stole personal and financial information for hundreds of thousands of consumers leading to over $10.6 million dollars in fraudulent charges." *Id.* at **3.

Section 5(n) does not define the meaning of "likely" injury. Where a statute does not define a term, it is construed in accordance with its ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (using Black's Law Dictionary to define the meaning of statutory term, "cognizable"). The Merriam-Webster dictionary states that "likely" is "used to indicate the chance that something will happen," and is primarily defined as "having a high probability of occurring or being true." *Merriam-Webster.com.*, *at* http://www.merriam-webster.com/dictionary/likely). In *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986), the court interpreted the Commission's deception standard, which required proof that a practice is "likely to mislead" consumers, to require proof that such deception was "probable, not possible . . . ." Based on the foregoing, "likely" does not mean that something is merely possible. Instead, "likely" means that it is probable that something will occur.

Complaint Counsel argues that the requirement of proving that injury is "likely" can be met by evidence of a "significant risk" of injury, citing a footnote in the Policy Statement in which the Commission stated: "An injury may be sufficiently substantial . . . if it does a small harm to a large number of people, *or if it raises a significant risk of concrete harm*." 1984 FTC LEXIS 2, at *307 n.12 (emphasis added); *see also LabMD*, 2014 FTC LEXIS 2, at *54. However, although Congress refers to the Policy Statement in explaining the meaning of Section 5(n), the Senate Report states in part: "Consumer injury may be 'substantial' under this section if a relatively small harm is inflicted on a large number of consumers *or if a greater harm is inflicted on a relatively small number of consumers*." S. REP. 103-130, 1993 WL 322671, at

*13 (emphasis added). The omission of the Commission's "significant risk" language in explaining "substantial injury" indicates that Congress considered but rejected this standard. Congress instead enacted the requirement that, to be declared "unfair," there must be proof that actual harm has occurred, or in the absence of proof of actual, completed harm, proof that the challenged conduct is "likely" to cause harm in the future. Moreover, although some courts have cited the "significant risk" language from the Policy Statement, *see, e.g.*, *Neovi*, 604 F.3d at 1157, the parties have not cited, and research does not reveal, any case in which unfair conduct liability has been imposed without proof of actual, completed harm, based instead upon a finding of "significant risk" of harm.[26]

Based on the foregoing, to the extent "significant risk," or "increased risk," of injury implies a lower standard of proof than "likely" injury, such a standard would conflict with the express language of Section 5(n). It is unnecessary to resolve any apparent conflict, however, because, as more fully explained below, even under Complaint Counsel's asserted "significant risk" standard for proving likely harm, Complaint Counsel has failed to prove that Respondent's alleged unreasonable data security is "likely" to cause substantial consumer injury.

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[26] In *American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia Circuit upheld a credit practices rule that prohibited wage assignments and household good security interests, finding substantial evidence that these practices were unfair. Regarding the evidence of substantial injury in the rulemaking record, the court stated: "The harms to consumers resulting from the use of HHG security interests and wage assignments identified by the Commission on the basis of the rulemaking record are neither trivial or speculative nor based merely on notions of subjective distress or offenses to taste [and therefore they] result in *or* create a significant risk of substantial economic and monetary harm to the consumer as well as potential deprivations of their legal rights." 767 F.2d at 975 (emphasis added). *American Financial Services* is not precedent that liability can be based on a "significant risk of harm" alone, since the rulemaking record in that case contained substantial evidence that the prohibited provisions had indeed caused financial and other harm to consumers. 767 F.2d at 973-75. It should also be noted that *American Financial Services* involved review of a rulemaking, not an adjudication of individual liability, and was decided before the 1994 enactment of Section 5(n). As noted above, the legislative history of Section 5(n) indicates that Congress rejected "significant risk" as a basis for finding substantial consumer injury.

Section 5(n) is a three-part test, and all three parts must be proven before an act or practice can be declared "unfair." 15 U.S.C. § 45(n). *See Orkin Exterminating Co.*, 849 F.2d at 1364 ("[T]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.") (*quoting* Policy Statement at 36); *see also Windward Mktg.*, 1997 U.S. Dist. LEXIS 17114, at *30. Accordingly, Complaint Counsel's failure to meet its burden of proving the first prong of the three part test – that Respondent's conduct caused, or is likely to cause, substantial consumer injury – is fatal to its case, and any factual determinations regarding the additional two prongs of the unfair conduct test – that substantial consumer injury is not reasonably avoidable by consumers, and is not outweighed by benefits to consumers or competition – would be superfluous and, accordingly, need not, and will not, be made.

4. Complaint Counsel's Proffered Consumer Injury Experts

As noted above, Complaint Counsel's contention that Respondent's alleged unreasonable data security is likely to cause harm is predicated upon expert opinion from two proffered experts, Mr. Rick Kam and Mr. James Van Dyke.

Mr. Kam is president and co-founder of ID Experts, a company specializing in data breach response and identity theft victim restoration, and is a Certified Information Privacy Professional. F. 9. According to Mr. Kam, his expertise includes "identifying and remediating the consequences of identity theft and medical identity theft" and "helping organizations develop policies and solutions" to safeguard sensitive personal information. F. 10. Mr. Kam was asked "to assess the risk of injury to consumers caused by the unauthorized disclosure" of their personal information. F. 11. For the purposes of this analysis, Mr. Kam assumed that LabMD failed to provide reasonable security for consumer information on its computer networks. F. 244. In summary, Mr. Kam opined that LabMD's alleged unreasonable data security "is likely to cause substantial injury to consumers and puts them at significant risk of identity

crimes." CX0742 (Kam Expert Report at 9). Mr. Kam's more detailed opinions are addressed *infra* in the context of the particular harms alleged in this case.

Mr. Van Dyke is the founder and president of Javelin Strategy & Research ("Javelin"), a research company whose activities include publishing results from an annual identity fraud survey and an associated report. F. 12. According to Mr. Van Dyke, he is experienced in how sensitive information is used and has expertise in identity theft. F. 14. Mr. Van Dyke was asked to "assess the risk of injury to consumers" whose personally identifiable information "has been disclosed by [LabMD] without authorization." F. 15. He was also asked to assess the risk of injury to those consumers whose information "was not adequately protected from unauthorized disclosure." F. 15. Mr. Van Dyke assumed, as did Mr. Kam, that LabMD failed to provide reasonable security for personal information maintained on its computer networks. F. 257. In general, Mr. Van Dyke opined that consumers whose information was disclosed in the 1718 File and the Sacramento Documents are significantly more likely to become victims of identity theft and its various subtypes. CX0741 (Van Dyke Expert Report at 3, 6). Mr. Van Dyke also prepared what he called "projections" of the number of such identity theft victims in this case and the financial losses that will result, were identity theft to occur. *Id*. at 6-14. Mr. Van Dyke further opined that LabMD's alleged unreasonable data security "risked exposing" all consumers whose personal information is maintained by LabMD to "a likelihood" of identity theft harm, even if such personal information has not yet been disclosed. *Id.* at 13. The specifics of Mr. Van Dyke's opinions are addressed in relation to the specific harms asserted by Complaint Counsel, *infra*.

5. The 1718 File Incident

a. Summary of facts

The "1718 File" is a LabMD insurance aging report, containing 1,718 pages, dated June 2007, with the filename "insuranceaging_6.05.071.pdf" and is the document identified as the "[peer-to-peer] insurance aging file" in Paragraphs 17, 18, 19, and 21 of the Complaint. F. 1, 73, 78. On or about February 25,

2008, Mr. Richard Wallace, a forensic analyst then employed by a breach detection and remediation services company known as Tiversa Holding Company ("Tiversa"), was performing searches on a peer-to-peer network when he discovered and downloaded the 1718 File. F. 100, 102-104, 121. The 1718 File was downloaded from an IP address in Atlanta, Georgia, which belonged to LabMD. F. 121. These events, further addressed below, are referred to herein as the "1718 File Incident." F. 78.

By way of background, peer-to-peer file-sharing applications enable one computer user to make a request to search for all files that have been made available for sharing by another (or "host") computer that is also using the same file-sharing application. F. 63. A file that is being "shared" or "made available for sharing," on a peer-to-peer network is available to be downloaded by another computer user on the same peer-to-peer network. F. 66. Typically, users will search using terms related to the particular file they hope to find and receive a list of files that are possible matches. F. 65. The user then chooses a file he or she wants to download from the list, which is then downloaded from the peers who possess that file. F. 65. The contents of a file are not exposed until the file is downloaded. F. 68.

Peer-to-peer networks are often used to share music, videos, pictures, and other materials. F. 64. In 2008, LimeWire was a peer-to-peer file-sharing application, and one of a number of applications that used a protocol called Gnutella. F. 69. Gnutella is a program that connects computers together in a direct peer-to-peer fashion to facilitate file sharing through searching and downloading. F. 70.

In May 2008, Tiversa contacted LabMD and told LabMD that the 1718 File was available through LimeWire. F. 88. LabMD investigated and determined that LimeWire was installed on a computer belonging to LabMD's billing manager (the "Billing Computer") and that the 1718 File was among the files made available for sharing. F. 89-91. After searching all of LabMD's computers, it was determined that no other LabMD computers had file-sharing applications installed. F. 90, 93-94. LabMD removed LimeWire from the Billing Computer in May 2008. F. 92. In addition, Mr. John Boyle, LabMD's vice president of operations and general manager from November 1, 2006 until the

end of August 2013, assigned LabMD Information Technology ("IT") Specialist Allison Simmons, and later, IT Manager Jeffrey Martin, to search peer-to-peer networks to look for the 1718 File. F. 95. Specifically, in May 2008, Ms. Simmons searched peer-to-peer networks from her home computer to look for the 1718 File. F. 96. She searched multiple times for at least a month thereafter for the file name insuranceaging_6.05.071.pdf, partial file names, and anything with the name LabMD associated with it. F. 96. In 2013, Mr. Martin searched peer-to-peer networks for the 1718 File multiple times over the course of a few months, using the file name, as well as the terms "LabMD," "patient," and "aging." F. 97. The searches performed by Ms. Simmons and Mr. Martin did not locate the 1718 File on any peer-to-peer network. F. 98.

In addition, in 2009, Mr. Wallace, of Tiversa, searched Tiversa's internal database of peer-to-peer sharing downloads (Tiversa's "Data Store") to determine if Tiversa's automatic searching system, which uses a series of algorithms to search all peer-to-peer networks, had downloaded the 1718 File. F. 100, 147. Mr. Wallace determined that the 1718 File had not been downloaded to the Data Store. F. 147. To Mr. Wallace's knowledge, the 1718 File never spread beyond the original disclosing source, LabMD. F. 154.

In 2008, Tiversa was a "research partner" of Professor Eric Johnson, then of Dartmouth College, in connection with an article that Professor Johnson was writing. F. 169, 170. Tiversa's role in the research was to conduct searches for Professor Johnson and to forward files to him for further analysis. F. 172. All the files examined in Professor Johnson's research for his article were provided to him by Tiversa. F. 172. Professor Johnson referred to the 1718 File in his article, published in February 2009, titled "Data Hemorrhages in the Health-Care Sector." F. 169, 171. Tiversa had provided the 1718 File to Professor Johnson. F. 178. However, the evidence fails to prove that the 1718 File was discovered as a product of Professor Johnson's search protocol, notwithstanding any contrary representation in his article. F. 173-175, 178-179. Professor Johnson did not share the sensitive information in the 1718 File with anyone. F. 181.

In 2009, Tiversa, who had been communicating with the FTC regarding peer-to-peer file-sharing matters (F. 133-134),

identified LabMD to the FTC as one of the entities that Tiversa discovered had shared personal information of consumers on peer-to-peer networks. F. 139-142. Tiversa also provided the 1718 File to the FTC.[27] F. 138.

b. Overview of analysis

Complaint Counsel argues that the exposure of the 1718 File on the Gnutella network constitutes evidence that Respondent's data security practices are likely to cause substantial harm, and that consumers whose Personal Information was exposed in the 1718 File are at "significantly higher risk than the general public of becoming a victim of identity theft and medical identity theft, or of experiencing other privacy harms[. Therefore,] the failure to secure the 1718 File is likely to cause them substantial injury." CCB 69. Respondent argues that other than Tiversa, Professor Johnson, and the FTC, no one outside of LabMD downloaded or viewed the contents of the 1718 File. Respondent further argues that there is no evidence that any consumer has suffered any harm from the exposure of the 1718 File.

The evidence shows that the 1718 File was available for peer-to-peer sharing through LabMD no earlier than June 2007 (the date of the document) until May 2008, when Respondent removed LimeWire from the Billing Computer. F. 78, 92, 99. Although the 1718 File was available for downloading during this period, the evidence fails to show that the 1718 File was in fact downloaded by anyone other than Tiversa, who obtained the

[27] Tiversa did not want the FTC to issue a formal information request, such as a Civil Investigative Demand ("CID"), directly to Tiversa because Tiversa had been in talks regarding a possible acquisition and Tiversa's chief executive officer, Mr. Boback, did not want Tiversa to be "in the middle of a civil investigative demand." F. 135. Instead, Mr. Boback wanted the CID to be issued to a third party to "separate" the CID from Tiversa, "to try to create some distance" from Tiversa. F. 135. Accordingly, Tiversa created an entity called "The Privacy Institute," so Tiversa could avoid providing information to the FTC under Tiversa's name. F. 136. The Privacy Institute was created only for the purpose of receiving the CID from the FTC. F. 136. Upon Tiversa's request, the FTC issued the CID for Tiversa's information and documents to the Privacy Institute. F. 137-138. Whether or not this entire process met the requirements of all applicable law, rules, and regulations has not been determined in the instant case.

document in February 2008. Tiversa provided the 1718 File to Professor Johnson and to the FTC. F. 138, 142, 178. Evidence in the record provided by Tiversa and its chief executive officer and corporate designee Mr. Robert Boback, claiming that Tiversa found the 1718 File in "multiple locations" on peer-to-peer networks, including at IP addresses belonging to suspected or known identity thieves, is given no weight. As summarized in Section I.B.2., and detailed in Section II.D.3. and 4., *supra*, such evidence, including without limitation, Mr. Boback's 2013 discovery deposition, Mr. Boback's 2014 trial deposition testimony, and a Tiversa-provided exhibit, CX0019, is unreliable, not credible, and outweighed by credible contrary testimony from Mr. Wallace. Furthermore, Complaint Counsel no longer argues, as it did in its pre-trial brief, that the 1718 File was in fact downloaded by anyone other than Tiversa. In summary, Complaint Counsel has failed to prove that the 1718 File was acquired, viewed, or otherwise disclosed to anyone other than Tiversa, Professor Johnson, and the FTC. Any other assertion or conclusion regarding the extent of the exposure of the 1718 File is pure, unsupported speculation.

As further discussed below, the evidence fails to demonstrate that the exposure of the 1718 File placed the consumers whose Personal Information was exposed in the 1718 File "at significantly higher risk" of harm, or that such exposure caused, or is likely to cause, identity theft harm, medical identity theft harm, or reputational or "other" harm, as argued by Complaint Counsel.

c. Identity theft harm

i. Mr. Rick Kam

Complaint Counsel's arguments, that consumers whose information was contained in the 1718 File are at "significantly higher risk" of becoming victims of identity theft, and are "likely" to suffer identity theft harm, rely on the opinion of its proffered expert, Mr. Kam. *See* CCB at 69, *citing* CCFF 1667, 1668. Mr. Kam evaluated the risk of identity theft harm resulting from an unauthorized disclosure of personal information on the basis of four risk factors, including: (1) the nature of the information exposed; (2) "to whom the disclosure was made [in order] to

determine whether the person possessing the information presents a low risk of misuse, or a higher risk of misuse, such as an identity thief"; (3) whether the information was "actually acquired or viewed"; and (4) whether "the data is still available for others to misuse." F. 238-239. Mr. Kam then applied the foregoing risk factors to conclude that the exposure of the 1718 File poses a significant risk of identity theft harm. CX0742 (Kam Expert Report at 18-19).

Although Complaint Counsel announced it would not rely on expert opinion based on the testimony of Mr. Boback or on CX0019, *see* Section I.B.2., *supra*, Mr. Kam's opinion, upon which Complaint Counsel does rely, is expressly based on evidence provided by Mr. Boback that Tiversa had found the 1718 File at various IP addresses between 2008 and 2011; that one of the IP addresses belonged to a suspected identity thief; and that Tiversa found the 1718 File to be still available on peer-to-peer networks in 2013. F. 240-241.[28] As discussed above, this evidence is unreliable, not credible, and outweighed by credible contrary testimony from Mr. Wallace. For this reason, Mr. Kam's opinions that the exposure of the 1718 File is likely to cause, or presents a "significant risk" of, identity theft harm is entitled to, and is given, no weight.

Indeed, applying Mr. Kam's four risk factors, above, to the facts of this case, it is at least as likely, if not more likely, that the exposure of the 1718 File presents a low risk of identity theft harm. In the instant case, the evidence fails to show that the 1718 File was disclosed to and viewed by anyone other than Tiversa, Professor Johnson, and the FTC, and there is no contention, or evidence, that the foregoing persons or entities present a threat of harming consumers. This is in stark contrast to cases relied upon by Complaint Counsel where Personal Information was allegedly obtained by computer hackers and used to commit credit card fraud. *See Wyndham*, 2015 U.S. App. LEXIS 14839, at **3 (court stating that hackers accessed Wyndham's computer systems on three occasions and stole personal and financial

[28] *See also* Kam, Tr. 519 (explaining that he relied upon a report published by the SANS Institute, the SANS Health Care Cyberthreat Report, published in 2014, based upon Mr. Boback's discredited testimony about the discovery of the 1718 File on a peer-to-peer network in 2013).

information leading to over $10.6 million dollars in fraudulent charges); *Remijas v. Neiman Marcus Group, LLC*, 2015 U.S. App. LEXIS 12487 at **2-3, **8-13 (7th Cir. July 20, 2015) (court stating that hackers accessed Neiman Marcus' computer systems and stole financial information leading to fraudulent use of 9,200 consumers' credit cards).

Significantly, the court in *Neiman Marcus*, in concluding that the plaintiffs had demonstrated sufficient injury to obtain Article III standing, remarked: "[I]t is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach. Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Neiman Marcus*, 2015 U.S. App. LEXIS 12487 at **12. Here, in contrast, the evidence fails to show any computer hack for purpose of committing identity fraud. Rather, the evidence shows that the 1718 File was obtained by Tiversa from a peer-to-peer network, F. 121-122, and that Tiversa's purpose in obtaining this and other files available from peer-to-peer networks was to then induce companies with an interest in protecting such information to purchase Tiversa's monitoring or remediation services. F. 100, 108-118. Unlike in *Neiman Marcus*, it cannot be presumed that the purpose of Tiversa's act of downloading the 1718 File from a peer-to-peer network was to make fraudulent credit card charges, assume identities, or otherwise harm the consumers whose information is contained in the 1718 File.

In addition, the evidence shows that the 1718 File was no longer available for sharing by LabMD as of May 2008 (F. 99), and the evidence fails to show that the 1718 File remained available on peer-to-peer networks after May 2008. *See* F. 95-98, 153-154. For this reason as well, the evidence fails to prove that the exposure of the 1718 File presents a significant risk of identity theft harm or is likely to cause identity theft harm.

ii. Mr. James Van Dyke

Complaint Counsel's assertion that consumers whose Personal Information was exposed in the 1718 File are at significantly higher risk than the general public of suffering identity theft harm

is also based upon the opinions of Mr. Van Dyke, which Mr. Van Dyke derived from the Javelin 2013 Identity Fraud Survey ("2013 Javelin Survey") and the Javelin 2014 Identity Fraud Report ("2014 Javelin Report"). CCB at 69, citing CCFF 1506-1512; F. 252. As noted above, Mr. Van Dyke, is the founder and president of Javelin. F. 12.

Specifically, Complaint Counsel relies on a statistic reported in the 2013 Javelin Survey that 30.5% of survey respondents who reported being notified within the 12 months preceding the survey that their "personal or financial information ha[d] been lost, stolen, or compromised in a data breach (*i.e.*, data breach victims)," also reported experiencing identity theft within the 12 months preceding the survey ("identity theft rate"). CX0741 (Van Dyke Expert Report at 6-8 and Attachment 1). The 2013 Javelin Survey further stated that 2.7% of those survey respondents who reported they had *not* been notified during the 12 months preceding the survey that they were data breach victims also reported suffering identity theft harm during that same 12-month period. CX0741 (Van Dyke Expert Report at 6-8). Accordingly, Complaint Counsel argues, consumers whose information was exposed in the 1718 File are at a "significantly higher risk" or have an "increased risk" of becoming identity theft victims, and are therefore likely to suffer identity theft harm.[29]

Complaint Counsel also relies on Mr. Van Dyke's projections of the number of 1718 File consumers that will become identity theft victims, and the monetary losses that these consumers will incur as a result. According to Mr. Van Dyke, based on the 2013 Javelin Survey: (1) 7.1% of survey respondents who reported being notified within the 12 months preceding the survey that their Social Security number ("SSN") was disclosed in a data breach also reported experiencing new account fraud within the preceding 12 months, at an average consumer loss of $449; (2)

[29] Mr. Van Dyke also opined that "[t]he circumstances of the unauthorized exposure of the" 1718 File "only stand to make identity fraud more likely" than the 30% identity theft rate found in the 2013 Javelin Survey, based on Mr. Boback's discredited testimony that the 1718 File "was found at four IP addresses, on each of which Tiversa found unrelated consumer identity information." CX0741 (Van Dyke Expert Report at 8). Complaint Counsel does not rely on this particular opinion in its brief or proposed findings of fact.

7.1% of survey respondents who reported being notified within the 12 months preceding the survey that their SSN was disclosed in a data breach also reported experiencing existing non-card fraud within the preceding 12 months, at an average consumer loss of $207; and (3) 13.1% of survey respondents who reported being notified within the 12 months preceding the survey that their SSN was disclosed in a data breach also reported experiencing existing card fraud within the preceding 12 months, at an average consumer loss of $106. CX0741 (Van Dyke Expert Report at 8-12). Mr. Van Dyke applied these percentages and figures to the number of consumers listed in the 1718 File to calculate the number of expected identity theft victims and the expected financial impact. *Id*. However, Mr. Van Dyke did not conduct a survey of the consumers listed on the 1718 File. F. 255.

For several reasons, the 2013 Javelin Survey, the 2014 Javelin Report, and Mr. Van Dyke's opinions based thereon, are not persuasive in proving that those consumers whose Personal Information was exposed in the 1718 File are likely to suffer identity theft harm. First, and perhaps most important, Complaint Counsel's suggested inference, based on the 2013 Javelin Survey, that 30% of the consumers whose data was contained in the 1718 File have suffered, or will suffer, identity theft harm, is unpersuasive, in light of the absence of any evidence that any such consumer, in fact, has been so harmed, despite the passage of more than seven years since exposure of the 1718 File. If it were true that 30% of the consumers affected by the 1718 File exposure are likely to suffer identity theft harm, logically, it would be expected that the government, in the many years of investigation and litigation of this matter, would have discovered and identified at least one such consumer who has experienced identity theft harm. The same logic renders unpersuasive Mr. Van Dyke's predictions of the number of consumers that will suffer NAF, ECF, or ENCF and resulting monetary losses.

As noted above, Complaint Counsel's assertion, based on expert opinion, that it may take "months or years" for a consumer to discover they have been victimized by identity theft (*see* CCFF 1578-1580), does not explain why the government, over the past seven years, in the course of investigating and litigating this case, would not have located and identified any such victims. *See* Section III.D.2., 3. In summary, in the instant case, the absence

of evidence that identity theft harm has occurred in the seven years since the exposure of the 1718 File undermines the persuasive value of expert opinion that such harm is, nonetheless, "likely" to occur. *See In re McWane, Inc.*, 2013 FTC LEXIS 76, at *730-31 (May 8, 2013) (finding that the absence of evidence that prices rose after alleged agreement to raise prices undermined assertion that such agreement existed). Fairness dictates that reality must trump speculation based on mere opinion.

Second, results from the 2013 Javelin Survey are not probative as a temporal matter. As discussed above, the 1718 File was made available for sharing no earlier than June 2007; LabMD discontinued its sharing of the document in May 2008; and the evidence fails to show that the 1718 File was available on peer-to-peer networks after May 2008. The 2013 Javelin Survey measured the effect of data breaches occurring five years later, in 2013, and Complaint Counsel points to no evidence from which it could be concluded that the incidence of identity theft for exposures in 2013 is predictive of identity theft harm for an exposure five years earlier, in 2008. Indeed, rather than select and use data from 2008, the most relevant point in time, Mr. Van Dyke selected the 2013 Javelin Survey and 2014 Javelin Report for the bases of his calculations specifically because, in 2013, Mr. Boback testified that Tiversa had located the 1718 File on peer-to-peer networks in four locations, which testimony has been thoroughly discredited. F. 253. Moreover, according to the yearly Javelin Identity Fraud surveys for 2010 through 2013, as set forth in Mr. Van Dyke's report, the identity fraud rate for data breach victims in 2013 was significantly higher than the identity fraud rate for data breach victims in 2010, a point closer in time to the exposure of the 1718 File. CX0741 (Van Dyke Expert Report at 8, Figure 1 (depicting 11.8% rate in 2010, 18.9% rate in 2011, 22.5% in 2012, and 30.5% in 2013)).

Third, it is not apparent that the data breach victims surveyed by the 2013 Javelin Survey are similarly situated to the consumers whose Personal Information was exposed in the 1718 File, such that any identity theft rate derived from the 2013 Javelin Survey can be extrapolated to predict identity theft harm for the 1718 File consumers. As noted above, the limited time duration that the 1718 File was available for downloading, and the limited extent of actual exposure of the 1718 File, including the fact that the

1718 File was downloaded by Tiversa for business purposes, and not for identity theft purposes, are factors that militate against the risk of identity theft harm in this case. The evidence fails to show the types of data breaches reported in the 2013 Javelin Survey are comparable to the type of data exposure that occurred in the 1718 File Incident.

For all the foregoing reasons, the evidence fails to show that the exposure of the 1718 File has caused, or is likely to cause, identity theft harm.

d. Medical identity theft harm

Relying on expert opinion, Complaint Counsel asserts that the exposure of the 1718 File is likely to result in medical identity theft harm. *See* CCB at 70-71. Specifically, Mr. Van Dyke opined that "medical identity fraud remains a threat to consumers," citing survey responses as to the frequency of medical identity theft. He further opined that health insurance policy information and SSNs, which are found in the 1718 File, "can be utilized" by criminals to commit medical identity frauds, such as procuring procedures, services, and products. CX0741 (Van Dyke Expert Report at 13-14). Mr. Van Dyke also opined that such frauds, when they occur, "can burden affected consumers with financial costs related to unpaid medical bills from unauthorized procedures, products, or services, as well as direct physical harm in those cases where a change is made to a consumer's medical records that could result in improper or unnecessary treatments." *Id.* The foregoing is not an opinion that medical identity theft is likely to result from the exposure of the 1718 File, but is little more than a statement of Mr. Van Dyke's belief that identity theft criminals "could" use information in the 1718 File, if they obtained it, and his opinion of the financial and other harms that "could" result, if medical identity theft were to occur. However, the evidence fails to show that any identity theft criminals have obtained the 1718 File, and therefore the projection of resulting harms from medical identity theft is pure theory and speculation.

Complaint Counsel also relies on predictions by Mr. Kam that the 1718 File consumers are subject to "health and safety" risks resulting from medical identity theft, such as misdiagnosis or

mistreatment of illness. CX0742 (Kam Expert Report at 20). Mr. Kam explained that if an identity thief's health information "merges" with that of the identity theft victim, inaccuracies in medical records could result and cause mistreatment or misdiagnoses. Kam, Tr. 426-430. Mr. Kam further predicted, derived from an "estimated base rate" for medical identity theft of 0.0082, that at least 76 of the 9,300 consumers identified in the 1718 File will become victims of medical identity theft, and that 36% of these individuals will each suffer out-of-pocket costs for fraudulently procured medical services among other expenses in the amount of $18,660. CX0742 (Kam Expert Report at 19-20).[30] Mr. Kam based these opinions on statistics as to the frequency and impact of medical identity theft reported by the 2013 Survey on Medical Identity Theft by the Ponemon Institute ("2013 Ponemon Survey"). F. 246. Mr. Kam's opinions are unpersuasive to demonstrate that the exposure of the 1718 File is likely to cause medical identity theft harm, as explained below.

As stated previously, there is no evidence that any consumer has suffered any of Mr. Kam's predicted harms as a result of the exposure of the 1718 File, notwithstanding the passage of more than seven years since the exposure of the 1718 File in 2008.[31] Furthermore, the 2013 Ponemon Survey lacks significant probative value, given that it measured the rate and impact of medical identity theft for 2013, five years after the 2008 disclosure of the 1718 File. *See* F. 246. Moreover, numerous facts detract from the reliability of the 2013 Ponemon Survey. The response rate to the 2013 Ponemon Survey was only 1.8%, which Mr. Kam agreed creates a non-response bias, *i.e.*, a failure to take into account that those who were surveyed, but did not respond, might have a different answer to the question. F. 247.

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[30] Mr. Kam opined that these losses from medical identity theft include payments required as a result of a "lapse" of health insurance. (Kam, Tr. 422). However, Mr. Kam failed to explain this assertion.

[31] Although Mr. Kam did not expressly rely on the discredited and unreliable testimony from Mr. Boback as to the "spread" of the 1718 File for his opinions on the likelihood of medical identity theft, this evidence was clearly considered by Mr. Kam (CX0742 (Kam Expert Report at 6)) and it cannot be assumed that Mr. Kam's opinions were not influenced by his review of Mr. Boback's testimony.

In addition, the 2013 Ponemon Survey had a sampling frame bias[32] and compensated respondents for completing the survey within a set time period. F. 248-249. Also significant is that, to the extent the 2013 Ponemon Survey is reliable, the accompanying report notes that medical identity theft rarely occurs from data breaches or the acts of an identity thief. F. 250. Rather, the 2013 Ponemon Survey reports that medical identity theft is far more likely to result from a consumer's knowingly sharing personal identification or medical credentials or the unauthorized use of such information by a family member. F. 250. Mr. Kam agreed that medical identity theft rarely occurs from data breaches or the acts of an identity thief and acknowledged that most occurrences of medical identity theft result from someone knowingly sharing their personal information or medical credentials and from instances where one family member took another family member's personal information or medical credentials without consent. F. 251.

For all the foregoing reasons, the evidence fails to support the conclusion that medical identity theft harm is likely to result from the exposure of the 1718 File that occurred in this case.

e. Reputational and other harms

Finally, relying on expert opinion from Mr. Kam, Complaint Counsel argues that the exposure of the 1718 File alone, without any resulting identity theft, is likely to cause "reputational and other harms" to those consumers. Specifically, Complaint Counsel asserts that the 1718 File disclosed some current procedural terminology ("CPT") codes that indicate testing for "sensitive conditions," such as sexually transmitted diseases, including HIV, prostate cancer and testosterone levels, and that disclosure of such testing causes harm in the form of stigma or embarrassment. *See* CCB at 71.

Mr. Kam opined that there is a "significant risk" of reputational harm for those consumers whose CPT codes indicate

[32] The 2013 Ponemon Survey's sampling frame contained individuals who were prescreened from a larger sample on the basis of their identity theft or identity fraud experience. The 2013 Ponemon Survey acknowledged, and Mr. Kam agreed, that this resulted in a sampling frame bias. F. 248.

tests for prostate cancer, herpes, hepatitis, HIV, and testosterone levels. Kam, Tr. 447-448; CX0742 (Kam Expert Report at 9). Further, he opined that disclosure of the mere fact that such a test was performed, even without disclosure of any associated condition or diagnosis, "could cause" consumers to feel embarrassed, upset, or stigmatized. Kam, Tr. 448; CX0742 (Kam Expert Report at 16, 21).[33] However, as Mr. Kam acknowledged, disclosure of a CPT code, by itself, does not disclose what test was performed. F. 83. In fact, Mr. Kam testified that he had to rely on a Google search to determine what the CPT codes stood for. F. 83. Moreover, given the subjective nature of feelings of stigma, upset, or embarrassment, and the fact that Complaint Counsel did not identify a single person affected by the 1718 File disclosure who experienced these feelings as a result of the 1718 File disclosure, expert opinion that these feelings "can" occur carries little or no weight. *Compare Accusearch,* 2007 U.S. Dist. LEXIS 74905, at *23-24 (noting undisputed fact that some consumers whose phone records were sold to stalkers and abusers had suffered actual and severe emotional harm).

In addition, subjective feelings such as embarrassment, upset, or stigma, standing alone, do not constitute "substantial injury" within the meaning of Section 5(n). According to the legislative history of Section 5(n), "[e]motional impact and more subjective types of harm alone are not intended to make an injury unfair." S. REP. 103-130, 1993 WL 322671, at *13; *see also* 1982 Policy Letter, *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 27, 32 (1983) ("As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress . . ."). While the Commission has stated that "[i]n an extreme case, . . . where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a finding of unfairness," Policy Statement, 1984 FTC LEXIS 2, at *308 n.16, in the instant case, there is no demonstrated tangible injury to consumers from the exposure of the 1718 File. *Compare*

[33] Mr. Kam also opined that exposure of CPT codes could lead to negative changes to life, health, and disability insurance. CX0742 (Kam Expert Report at 21). However, Mr. Kam failed to persuasively explain how disclosure of the mere fact that testing was performed, without further information, could result in negative changes to insurance.

Accusearch, 2007 U.S. Dist. LEXIS 74905, at *22-24 (finding conduct caused economic harm and health and safety risks in addition to emotional harm).

Accordingly, the evidence fails to prove that consumers are likely to suffer the asserted "reputational and other harms" as a result of the exposure of the 1718 File. Even if the evidence demonstrated such harms, because the evidence fails to show any tangible injury from the exposure of the 1718 File, the subjective "reputational and other harms" alleged by Complaint Counsel do not constitute sufficient "substantial injury" under Section 5(n).

f. Conclusion

For all the foregoing reasons, the evidence fails to prove that consumers whose information was contained in the 1718 File have suffered, or are likely to suffer, substantial injury as a result of the exposure of the 1718 File. Therefore, the exposure of the 1718 File does not support Complaint Counsel's assertion that Respondent's data security practices are likely to cause substantial consumer harm.[34]

6. The Sacramento Incident

a. Summary of facts

On October 5, 2012, officers of the Sacramento California Police Department (the "SPD") conducted a search of a house in Sacramento, California in connection with an investigation into possible utility bill fraud. F. 189-192. In that house, the SPD discovered what was believed to be evidence of utility billing theft and gas utility bill identity fraud, as well as narcotics

[34] Complaint Counsel also argues that consumer harm is likely from the 1718 File Incident because the 1718 File was made available for sharing on the Gnutella network where any Gnutella user "could" access it. CCB at 69. Evidence that anyone "could" have accessed the 1718 File during the limited period that the 1718 File was made available for sharing carries little probative weight, especially since the evidence fails to show that anyone other than Tiversa, Professor Johnson, and the FTC actually viewed the 1718 File; or that any consumer listed in the 1718 File, in the seven years since the exposure of the 1718 File, has actually suffered any harm as a result of the availability of the 1718 File.

paraphernalia and narcotics. F. 191. The SPD also discovered in that house approximately 40 LabMD day sheets, 9 copied checks payable to LabMD, and 1 money order payable to LabMD. F. 182. The day sheets found in Sacramento (the "Day Sheets"), together with the money order found in Sacramento, and the check copies found in Sacramento (the "Check Copies") are collectively referred to herein as the "Sacramento Documents," and this event is referred to herein as the "Sacramento Incident." F. 182.

The Personal Information contained in the Day Sheets consisted of names and what appear to be Social Security numbers for approximately 600 consumers. F. 183. All but two of the Day Sheets are dated between 2007 and 2008. F. 184. The remaining two Day Sheets are from March 2009. F. 184. The Check Copies contained names and bank account numbers for nine consumers, and addresses for all but one of the nine consumers. F. 185. The Check Copies are dated from May 2007 to March 2009. F. 186. The money order, dated August 2008, contained no Personal Information. F. 185, 187.

Two individuals found at the Sacramento house were arrested and charged with identity theft, receiving stolen property, possession of methamphetamine, and the possession of narcotics paraphernalia. F. 193. The Sacramento Documents were seized by the SPD and booked into evidence by the SPD. F. 195. The arrested individuals subsequently pled *nolo contendere*[35] to identity theft. F. 194.

After finding the Sacramento Documents, Detective Karina Jestes of the SPD performed an Internet search and learned that the FTC was investigating LabMD. F. 209. Approximately one week after the October 5, 2012 discovery of the Sacramento Documents, Detective Jestes contacted the FTC regarding the

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[35] "*Nolo Contendere*" is "Latin for 'no contest.' In a criminal proceeding, a defendant may enter a plea of *nolo contendere*, in which he does not accept or deny responsibility for the charges but agrees to accept punishment. The plea differs from a guilty plea because it cannot be used against the defendant in another cause of action." Wex Legal Dictionary, published by Legal Information Institute at Cornell Law School. *See* https://law.cornell.edu/wex/nolo_contendere.

Sacramento Documents. F. 209. In December 2012, the SPD provided the Sacramento Documents to the FTC. F. 210. The SPD made the determination not to return the Sacramento Documents to LabMD based on the FTC's investigation of LabMD. F. 210. On January 30, 2013, the FTC notified LabMD that the FTC had the Sacramento Documents. F. 211. On March 27 or 28, 2013, LabMD sent 682 letters to the consumers named in the Sacramento Documents notifying them of the Sacramento Incident, describing steps such as registering a fraud alert with credit bureaus, offering one year of free credit monitoring services, and inviting consumers to contact LabMD with questions or concerns. F. 212.

b. Summary of arguments

Relying on opinions from Mr. Kam and Mr. Van Dyke, Complaint Counsel argues that the disclosure of Personal Information for approximately 600 consumers in the Sacramento Documents is likely to cause identity theft harm. CCB at 71-72. Complaint Counsel contends that identity theft harm is likely because the types of personal information found in the Sacramento Documents, such as names and Social Security numbers on the Day Sheets, and bank routing and account numbers on the Check Copies, "can be used" by identity thieves to commit identity theft; Social Security numbers "can be used" fraudulently for extended periods of time because they are rarely changed; and there is a "likelihood" the Sacramento Documents "may have" been misused because the documents were found in the possession of individuals who later pleaded no contest to identity theft charges. CCB at 71-72. Complaint Counsel further contends, based on identity theft rates reported by the 2013 Javelin Survey, that "[c]onsumers will incur" approximately $36,000 in monetary losses from "164 cases of" NAF, ENCF, and ECF, and that "consumers will also spend 2,497 hours" resolving the resulting fraud. CCB at 72.

Respondent argues that the Sacramento Documents were found in paper form, and that Complaint Counsel has failed to prove how the documents were taken from LabMD, or how they ended up in California. Moreover, Respondent contends, there is no evidence of any consumer becoming a victim of identity theft because of the disclosure of the Sacramento Documents, which

casts doubt on Complaint Counsel's proffered expert opinions that such harm is "likely." Respondent also challenges the experts' methodology and the evidentiary bases for their opinions.

As explained below, Complaint Counsel has failed to prove that Respondent's alleged failure to reasonably secure data on its computer network caused, or is likely to cause, harm to consumers due to the exposure of the Sacramento Documents. First, Complaint Counsel has failed to prove that the Sacramento Documents were maintained on Respondent's computer network. *See* Complaint ¶ 10 (alleging Respondent failed to provide reasonable "security for personal information on its computer networks"). Second, even if there were a causal connection between Respondent's computer network and the exposure of the Sacramento Documents, the evidence fails to prove that the exposure of these documents has caused, or is likely to cause, any consumer injury.

c. Connection to LabMD's computer network

As part of its billing process, LabMD produced a report that it refers to as a "day sheet" transaction detail to ensure payments were received and posted. F. 198. Day sheets were created electronically through LabMD's billing application, Lytec. F. 199. Once day sheet reports were printed, there was no electronic record of the day sheet in LabMD's system. F. 203. Day sheets were not saved electronically. F. 203. Rather, day sheets were printed almost daily, and stored in paper files at LabMD. F. 203-204, 206. In addition, LabMD made paper copies of patient checks it received, which were retained by the billing department, and originals were shredded after six months. F. 61, 202. While the evidence shows that some LabMD day sheets and check copies may have been scanned and saved to LabMD's computer network as part of an archiving project undertaken by LabMD in or around January 2013 (F. 208), the evidence fails to show that the day sheets and copied checks *that were found in Sacramento* had been scanned and archived, or otherwise saved, onto LabMD's computer network. In fact, the Sacramento Documents were found in October 2012, months before LabMD even began to scan and archive any day sheets or check copies. F. 182, 208. These facts, combined with the fact that the Sacramento Documents were found in physical, and not electronic form (F.

197), weigh against any inference that the Sacramento Documents were even available from Respondent's computer network, much less exposed as a result of LabMD's alleged unreasonable computer security.[36]

Complaint Counsel asserts that billing employees had "the option" of saving day sheets electronically to a computer, CCFF 156, citing deposition testimony from a former LabMD employee who worked in LabMD's billing department, identified in this Initial Decision as "the Former LabMD Employee." *See* footnote 18. However, although the Former LabMD Employee testified that the software "allowed" a user to save a day sheet or to print it, the Former LabMD employee was clear that she never saved day sheets and did not know of any LabMD employee who had saved a day sheet. F. 207. Complaint Counsel points to no evidence that any employee did electronically save any day sheets, even if it were possible to do so. In addition, although Complaint Counsel points to evidence that the SPD conducted forensic examinations of computers found in the Sacramento house where the Day Sheets and Check Copies were found, *see* CCFF 1447-1452, Complaint Counsel does not assert that these examinations found any connection to LabMD, or to LabMD's computer network.[37] In summary, the evidence upon which Complaint Counsel relies fails to prove that the Sacramento Documents were either available on, or obtained from, LabMD's computer network.

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[36] The Complaint addresses Respondent's computer network security, and does not allege that Respondent's physical security was inadequate, or that inadequate physical security constitutes an "unfair" practice under Section 5. Accordingly, Complaint Counsel's insinuation in its post-trial briefing that Respondent failed to adequately secure paper copies of the Day Sheets and Check Copies (CCRB at 38, CCFF 157-159) is outside the scope of the Complaint and, therefore, will not be considered.

[37] Evidence that a laptop seized from the Sacramento house had LimeWire installed does not prove a connection between the Sacramento Incident and LabMD's computer network. *See* CCFF 1451. The evidence shows that LabMD removed LimeWire in May 2008, and there is no contention that LimeWire or any other peer-to-peer sharing application was present on any LabMD computer after May 2008, including at the time the Sacramento Documents were discovered in October 2012. Nor is there any contention that the Sacramento Documents were at any time made available for sharing via LimeWire or another peer-to-peer application.

Strangely, Complaint Counsel takes no position as to how the Sacramento Documents came into the possession of the individuals in Sacramento, and further admits that "there is no conclusive explanation of how LabMD Day Sheets were exposed." CCRB at 38; *see also* Transcript of Oral Argument at 54 ("We have not presented evidence of how those documents left the possession of LabMD"); Transcript of Oral Argument at 56 ("We have -- we have made no representations regarding how the information left LabMD."). In related litigation between the parties, in which Respondent sought a preliminary injunction against these administrative proceedings, the district judge stated that "the FTC informed the Court that it was unaware whether the alleged identity thieves arrested in Sacramento" received the Sacramento Documents "as a consequence of LabMD's data security failures." *LabMD, Inc. v. FTC*, 2014 U.S. Dist. LEXIS 65090, at *3 n.2 (N.D. Ga. May 12, 2014); *see also LabMD, Inc. v. FTC*, No. 1:14-cv-810, Hr'g Tr. at 77, 80-81 (N.D. Ga. May 9, 2014) (cited in Respondent's motion for sanctions, filed August 14, 2014) (court exclaiming, "holy cow" in response to FTC's failure to prove chain of custody with respect to the Day Sheets).

The burden is on Complaint Counsel to prove the allegations of the Complaint that the exposure of the Sacramento Documents was caused by Respondent's alleged failure to reasonably secure its computer networks. 16 C.F.R. § 3.43(a). *See* Complaint ¶¶ 10, 21, 22. Because the evidence fails to prove that the Day Sheets and Check Copies were taken from LabMD's computer network, it would require unacceptable and unsupported speculation to conclude that the Sacramento Documents were exposed because of LabMD's alleged unreasonable computer security. Accordingly, Respondent's alleged failure to reasonably secure data on its computer network cannot properly be deemed the "cause" of any resulting harm.

Moreover, even if there were a causal connection between Respondent's alleged unreasonable data security and the exposure of the Sacramento Documents, the evidence fails to prove that the disclosure of the Sacramento Documents has resulted, or is likely to result, in any identity theft harm, as explained below.

d. Identity theft harm[38]

i. Mr. Rick Kam

(a) Opinions

Mr. Kam opined that the consumers whose Personal Information was exposed in the Sacramento Documents are "at risk of harm from identity crimes." CX0742 (Kam Expert Report at 10). Mr. Kam applied his four factor risk assessment, summarized in Section III.D.5.c., *supra*, noting that the Sacramento Documents included names, Social Security numbers, and bank account information which "could be used to commit identity theft" and that "known identity thieves" were found in the possession of the documents, which "increases the possibility that the crime occurred," notwithstanding that Detective Jestes of the SPD "could not confirm that the identity thieves used this data to commit identity fraud." CX0742 (Kam Expert Report at 22). With respect to the mitigation factor of Mr. Kam's four factor risk assessment, Mr. Kam stated that LabMD's written notification to consumers about the Sacramento Incident, offering tools such as credit monitoring, mitigated "some of the risk," but there remains a "strong possibility some of the" affected consumers will still become identity theft victims. CX0742 (Kam Expert Report at 22). Mr. Kam's opinions, summarized above, do not constitute persuasive evidence that identity theft is likely to occur as a result of the exposure of the Sacramento Documents. Mr. Kam's

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[38] As noted in Section III.D.2 n.25, *supra*, Complaint Counsel's Post-Trial Brief and Proposed Findings of Fact do not address the likelihood of medical identity theft from the exposure of the Sacramento Documents. *See* CCB at 71-72; CCFF § 8.4. Mr. Kam's report does not contain an opinion on the likelihood of medical identity theft from the exposure of the Sacramento Documents. Mr. Van Dyke's expert report contained only a cursory opinion on the likelihood of medical identity theft generally (also referenced in Section III.D.5.d., *supra*) that "health insurance policy information and SSNs can be utilized by criminals to commit medical identity frauds . . ." CX0741 (Van Dyke Expert Report at 13). The Sacramento Documents do not contain health insurance policy information. F. 183, 185. To the extent Complaint Counsel asserts that the exposure of the Sacramento Documents is likely to cause medical identity theft harm, the evidence fails to prove that such harm has occurred, or is likely to occur.

opinions describe little more than the possibility of future harm, or an unquantified, inchoate "risk" of future harm.

Moreover, other evidence weighs against the conclusion that the exposure of the Sacramento Documents has caused, or is likely to cause, harm. In Mr. Kam's experience with data breaches, in each case some individual has come forward to report identity theft harm, which, as Mr. Kam acknowledged, is not the case here. F. 242. Furthermore, there is no evidence that the individuals found in possession of the Sacramento Documents had used the documents to commit identity theft prior to their arrest, and the likelihood of future misuse is reduced or eliminated by the fact that the Sacramento Documents were seized by the SPD and booked into evidence. F. 195.

In addition, Mr. Kam's opinion of the risk of harm from the exposure of the Sacramento Documents was based in part on the assertion that "approximately 100 SSNs . . . appear to have been used by people with different names," which according to Mr. Kam, "is an indicator that identity thieves may have used this information to commit identity theft." CX0742 (Kam Expert Report at 23). However, this assertion was based on an FTC staff analysis of information obtained from a Thompson Reuters Corporation (Thompson Reuters) database known as CLEAR,[39] which, as detailed below, was excluded for lack of foundation as to the authenticity and reliability of CLEAR's source data. (Tr. 372, *in camera*). For this reason as well, Mr. Kam's opinion regarding likely harm is given little weight.

(b) Exclusion of CX0451

To support Complaint Counsel's claim of identity theft harm resulting from the exposure of the Sacramento Documents, Complaint Counsel proffered a spreadsheet identified as CX0451. According to Complaint Counsel, CX0451 shows that apparent Social Security numbers appearing in connection with persons identified in the Day Sheets have been used by people with

[39] CLEAR (Consolidated Lead Evaluation and Reporting) is an investigative software database program, provided by Thompson Reuters, that is used by investigators at the FTC to obtain information on individuals and corporations. F. 214.

different names, which the Complaint alleges "may indicate that the SSNs have been used by identity thieves." *See* Complaint ¶ 21. Respondent objected to the admission of CX0451 on the ground, *inter alia*, of hearsay. Respondent noted that CX0451 is based upon multiple levels of hearsay; the CLEAR database, which forms the basis for CX0451, contains information from various sources that have not been substantiated; and no one had appeared from Thompson Reuters to provide a proper foundation for the reliability of the data contained in the CLEAR database. (Tr. 344, 348-351, 370, *in camera*). Complaint Counsel did not deny that CX0451 was being offered for the truth of the matter asserted, *i.e.*, that the Social Security numbers for individuals listed in the Day Sheets were being used by other individuals, implying possible identity theft, but maintained that CX0451 was admissible because it has "sufficient indicia of reliability to be admitted" pursuant to Rule 3.43(b). (Tr. 369, *in camera*). To address Respondent's objection, Complaint Counsel was given the opportunity to lay a foundation for the reliability of CX0451, which it sought to do through the testimony of FTC investigator Kevin Wilmer.

As set forth in detail in Section II.E.4., *supra*, Mr. Wilmer was asked by Complaint Counsel to determine whether the nine digit numbers appearing in the Sacramento Documents, which he presumed to be Social Security numbers, had been used by people with different names. F. 217-218. To perform his task, Mr. Wilmer issued a "query" to the CLEAR database. F. 219. Mr. Wilmer testified that it was his "understanding" that the CLEAR database is an aggregation of information obtained from a variety of sources, including credit bureau information, utility information, information from civil judgments and criminal convictions, and other forms of publicly and privately available information. F. 214. Specifically, Mr. Wilmer copied each number that he believed to be a Social Security number and pasted the number onto a CLEAR-provided spreadsheet. F. 219. He then submitted the spreadsheet to CLEAR with a request that CLEAR use its "batching" function to query the CLEAR database, determine who used that apparent Social Security number, and return the information to him. F. 219. In response to Mr. Wilmer's CLEAR database query, CLEAR returned a spreadsheet containing the nine digit numbers that Mr. Wilmer

entered, and CLEAR's data, drawn from its various sources, as to the names of people who had used that number as a Social Security number. F. 220. Mr. Wilmer identified CX0451 as the results returned to him by Thompson Reuters in response to his CLEAR database query, to which Mr. Wilmer added certain color-coding to differentiate the various names. F. 221.

After viewing proffered CX0451, hearing testimony from Mr. Wilmer, and considering the arguments of the parties, admission of CX0451 was denied on the ground that there was an insufficient foundation for determining the accuracy or reliability of the information in the CLEAR database, which provided the data for proffered CX0451. The ruling stated preliminarily: "I have concerns and I continue to have concerns about the reliability of the data comprising the spreadsheet [CX0451]. For example, I ruled earlier in this trial that I wouldn't allow sworn affidavits to be admitted into evidence. In this case, we are lacking even a sworn statement or certification that the . . . CLEAR data is in fact accurate. And in fact, I have no idea if there's a . . . disclaimer on the Website stating that the information is not accurate." (Tr. 371, *in camera*). The ruling concluded that the foundation laid by Complaint Counsel was "wholly and totally lacking to make [CX0451] sufficiently reliable" to show that apparent Social Security numbers in the Sacramento Documents are being used by other people and therefore indicative of identity theft having occurred in this case. *See also* Tr. 371-372, *in camera* ("[W]e don't know if the Social Security number on the day sheet was correct [and w]e don't know if the Social Security number that the CLEAR data reflected was accurate. . . . [T]he source of [the CLEAR database] is from so many varied areas, real estate documents, utility bills, law enforcement records, criminal indictments, whatever, someone could easily type incorrectly one of the digits of a Social Security number.").

The record amply supports the denial of admission of proffered CX0451 as probative evidence of potential or actual identity theft from the exposure of the Sacramento Documents. The reliability of proffered CX0451 turns on the authenticity, accuracy, and/or reliability of the CLEAR database, and specifically, the data that is entered into the public and private databases from which the CLEAR database draws its information.

However, Mr. Wilmer lacked sufficient knowledge of these matters. F. 224-226. In fact, Mr. Wilmer could not possibly authenticate or otherwise vouch for the reliability of the data in CX0451 since he has no personal knowledge of the CLEAR database itself, or the accuracy or reliability of the source data comprising the CLEAR database. F. 224-226. In addition, Mr. Wilmer, who had no connection to Thompson Reuters, which collects the source data upon which CX0451 is based, did not ask CLEAR to identify the source(s) of the data CLEAR used to populate the CLEAR spreadsheet, although he could have received this information if he had asked, because "that wasn't a part of [his] assignment." F. 224. Mr. Wilmer had no knowledge of, and did not ask CLEAR, whether some of the numbers reported by CLEAR had stemmed from bad keystrokes on the part of a reporting source, such as a bank. F. 225. Mr. Wilmer was not asked to determine any of the above, and was not asked to, and did not, contact any of the individuals listed in the Sacramento Documents. F. 226. In fact, Mr. Wilmer was not even asked to confirm that the nine digit numbers appearing on the Day Sheets in fact constituted Social Security numbers, or that the presumed Social Security numbers actually belonged to the associated names in the Sacramento Documents. F. 217-218, 222. The spreadsheet offered as CX0451 does not indicate which individual associated with a Social Security number is the true owner of the number, if any.[40] F. 223.

Based on the failure to demonstrate the authenticity or reliability of the data returned by the CLEAR database, which is contained in proffered CX0451, the document cannot properly support any factual finding or any valid conclusion in this case. Moreover, even if proffered CX0451 were sufficiently reliable to be admitted, at best, proffered CX0451 shows only that individuals with different names are using the same Social Security number. However, on the record presented, this fact does not demonstrate or even imply that consumers in the Sacramento Documents are victims of identity theft. As noted

[40] Indeed, even the relevance of CX0451 is questionable since Complaint Counsel failed to prove that the Sacramento Documents were even connected to Respondent's computer network security as alleged in the Complaint.

above, there is no evidence that the individuals associated with Social Security numbers in the Sacramento Documents are the true owners of those Social Security numbers, and this fact cannot properly be assumed. Moreover, the evidence fails to show whether or not some of the people listed in the Sacramento Documents had voluntarily shared their personal information for others to use, or whether family members had taken their personal information without consent.

For all the foregoing reasons, Complaint Counsel has failed to prove the allegation in Complaint ¶ 21 that Social Security numbers in the Sacramento Documents "are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves," and Mr. Kam's opinions of likely identity theft from the Sacramento Documents, to the extent they rely on the assertion that Social Security numbers in the Sacramento Documents have been used by people with different names, are entitled to no weight.

ii. Mr. James Van Dyke

In support of its claim that the exposure of the Sacramento Documents is likely to cause substantial consumer injury, Complaint Counsel also relies on statistics reported in the 2013 Javelin Survey, also referenced in Section III.D.5.c.ii., *supra* regarding the 1718 File, that (1) 7.1% of survey respondents who reported being notified within the 12 months preceding the survey that their SSN was disclosed in a data breach also reported experiencing new account fraud within the preceding 12 months, at an average consumer loss of $449; (2) 7.1% of survey respondents who reported being notified within the 12 months preceding the survey that their SSN was disclosed in a data breach also reported experiencing existing non-card fraud within the preceding 12 months, at an average consumer loss of $207; and (3) 13.1% of survey respondents who reported being notified within the 12 months preceding the survey that their SSN was disclosed in a data breach also reported experiencing existing card fraud with the preceding 12 months, at an average consumer cost of $106. CX0741 (Van Dyke Expert Report at 8-12). This evidence is unpersuasive, however. Mr. Van Dyke did not conduct a survey of the consumers listed in the Sacramento Documents. F. 256. The consumers whose Social Security

numbers were exposed in the Sacramento Incident were notified of the incident in March 2013. F.212. If the assumptions underlying Complaint Counsel's theory of likely harm were to be believed and applied to this incident, then at least some of these consumers would have become victims of identity theft within 12 months. Yet, Complaint Counsel fails to identify even one consumer who suffered identify theft or identity fraud, within that 12 month period, or at any time thereafter. These facts undermine the persuasive value of Mr. Van Dyke's opinions and the assertion that harm is likely in this case.

e. Conclusion

For all the foregoing reasons, the evidence fails to prove that Respondent's alleged failure to reasonably secure the data on its computer network caused the exposure of the Sacramento Documents, or that this exposure has caused, or is likely to cause, substantial consumer harm.

7. Risk of Harm to Consumers whose Personal Information is Maintained on LabMD's Computer Network

a. Introduction

Complaint Counsel argues that LabMD's alleged failure to employ reasonable security practices "placed all consumers whose Personal Information is on [LabMD's computer] network at risk." CCB at 68. In support of this contention, Complaint Counsel points to opinions of its experts that the types of personal data kept by LabMD, such as names, Social Security numbers, payment information, and health insurance information, "are the types of information needed to perpetrate frauds, and are the target of data thieves." CCB at 68. Therefore, Complaint Counsel concludes, the "risk of unauthorized exposure . . . is likely to cause" identity theft, medical identity theft, and other harms. CCB at 68. Put another way, Complaint Counsel argues that Respondent's alleged unreasonable data security creates an "elevated" or "increased" risk of an unauthorized disclosure, and that there is a "correlation" between being a data breach victim and being an identity theft victim; therefore, Respondent's alleged

unreasonable data security is "likely to cause" consumers harm. CCCL 27.

Respondent contends that Complaint Counsel's position, based upon expert opinion, constitutes speculation about possible future identity theft, while the record is devoid of evidence of actual or likely identity theft, and does not satisfy Complaint Counsel's burden under Section 5(n) to prove that Respondent's alleged conduct caused or is likely to cause substantial consumer injury. Respondent further argues that Complaint Counsel's proffered consumer injury experts were not qualified to assess the risk posed by Respondent's alleged unreasonable data security, and that their opinions as to risk were based on assumptions and speculation.

As explained further below, Complaint Counsel's theory that harm is likely for all consumers whose Personal Information is maintained on LabMD's computer network, based on a "risk" of a future data breach and resulting identity theft injury, is without merit. First, the expert opinions upon which Complaint Counsel relies do not specify the degree of risk posed by Respondent's alleged unreasonable data security, or otherwise assess the probability that harm will result. To find "likely" injury on the basis of theoretical, unspecified "risk" that a data breach will occur in the future, with resulting identity theft harm, would require reliance upon a series of unsupported assumptions and conjecture. Second, a "risk" of harm is inherent in the notion of "unreasonable" conduct. To allow unfair conduct liability to be based on a mere "risk" of harm alone, without regard to the probability that such harm will occur, would effectively allow unfair conduct liability to be imposed upon proof of unreasonable data security alone. Such a holding would render the requirement of "likely" harm in Section 5(n) superfluous, and would contravene the clear intent of Section 5(n) to limit unfair conduct liability to cases of actual, or "likely," consumer harm.

b. Analysis

As framed by Complaint Counsel, the likelihood of substantial consumer injury to the consumers whose Personal Information is presently maintained on Respondent's computer network is based on the asserted risk that identity thieves, targeting the types of

information held by LabMD, will successfully breach Respondent's computer network, take Personal Information, and misuse that information to commit identity theft harms. In the instant case, there is no evidence that this has happened in the past,[41] or that any consumer has suffered any harm as a result of Respondent's alleged unreasonable data security, including as a result of the alleged Security Incidents, as discussed above.

In *International Harvester*, upon which Complaint Counsel relies on the issue of risk (*see* CCCL 26), the Commission was required to assess the risk of consumer harm from certain safety defects in the respondent's tractors, to determine whether it was deceptive to fail to disclose such defects. "The implied warranty of fitness is not violated by all undisclosed safety problems. The critical issue is the degree of risk involved. . . . [A] seller impliedly warrants only that a product is reasonably safe, not that it is free of all hazards. We recognize that there is no such thing as a totally safe product, and especially not when dealing with relatively complex machinery." 1984 FTC LEXIS 2, at *252 and n.50. Similarly, as the Commission has acknowledged in this case, "[t]here is no such thing as perfect [computer] security." *LabMD*, 2014 FTC LEXIS 2, at *52. Accordingly, it was incumbent upon Complaint Counsel to demonstrate "the degree of risk involved." *See Int'l Harvester*, 1984 FTC LEXIS 2, at *252 and n.50. As the Commission stated in *International Harvester*, to suggest that there is a kind of risk that is separate from statistical risk "amounts really to no more than a conversational use of the term in the sense of 'at risk.' In this sense everyone is 'at risk' at every moment, with respect to every danger which may possibly occur. When divorced from any measure of the probability of occurrence, however, such a concept cannot lead to

[41] As noted above in Section III.D.6., the evidence fails to prove that the Sacramento Documents were obtained from a breach of Respondent's computer network security. In addition, as discussed above in Section III.D.5., while the 1718 File incident constituted a "data breach" in the broad sense of an unauthorized disclosure, the circumstances under which that disclosure occurred, through Tiversa's locating and downloading the 1718 File via peer-to-peer file sharing, are not analogous to the type of targeted intrusion of computer security by identity thieves posited by Complaint Counsel.

useable rules of liability." *Int'l Harvester*, 1984 FTC LEXIS 2, at *253 n.52.[42]

Judged against the principles for assessing risk set forth in *International Harvester*, the opinions of Complaint Counsel's experts, upon which Complaint Counsel relies, are insufficient because the experts failed to specify the degree of risk, or otherwise measure the probability or likelihood that Respondent's alleged unreasonable data security will result in a data breach and identity theft injury. Mr. Kam opined generally that Respondent's asserted failure to reasonably protect its consumers' Personal Information poses an "increased" or "elevated" risk of unauthorized disclosure of this information, which "in turn is likely to cause" identity theft harm. CX0742 (Kam Expert Report at 10, 23). He based this opinion on the further broad opinion that cyber-criminals in general target healthcare organizations for attack, and that inadequate data security by such organizations renders their data security systems "vulnerable" to an attack by these criminals. *Id.* at 23; *see also* Kam, Tr. 558. *See* CCFF 1646-1649; 1653-1656. Mr. Kam "assumed" that Respondent's data security was unreasonable, and did not undertake to assess the degree of risk presented by Respondent's particular practices, or to assess the probability or likelihood that Respondent's computer network will be breached in the future. F. 244-245. Indeed, Mr. Kam has no expertise in computer network security, and therefore could not properly opine on the risk posed by Respondent's computer security, or on the probability or likelihood of a breach. *See* F. 9-10, 245. Mr. Kam's opinions as to a generalized increased risk of cyber-attack on healthcare organizations whose data security systems are "vulnerable" to such criminals is "divorced from any measure of the probability" of such an occurrence in this case. *See Int'l Harvester*, 1984 FTC LEXIS 2, at *253 n.52. Accordingly, Mr. Kam's opinion in this regard is not persuasive evidence that any or all the consumers whose Personal Information is maintained by LabMD on its computer network are "likely" to suffer harm.

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[42] As noted above, as in *International Harvester,* risk is a critical issue for Complaint Counsel's claim. Accordingly, notwithstanding that the discussion of risk in *International Harvester* was in the context of a deception claim, as opposed to an unfair conduct claim, the Commission's framework for assessing risk is nevertheless instructive.

The opinion offered by Complaint Counsel's other consumer harm expert, Mr. Van Dyke, also fails to assess the probability or likelihood that Respondent's alleged unreasonable data security will result in a data breach and resulting harm. Mr. Van Dyke candidly admitted that he did not, and was not able to, provide any quantification of the risk of identity theft harm for the 750,000 consumers whose information is maintained on LabMD's computer networks, because he did not have evidence of any data exposure with respect to those individuals, except as to those that were listed on the 1718 File or in the Sacramento Documents. F. 258.

Moreover, Mr. Van Dyke's "risk" opinion is even more amorphous than that of Mr. Kam. Mr. Van Dyke states that, because consumer personal information in general is a "target of data thieves," LabMD's alleged unreasonable data security "risked exposing" consumers "to a likelihood" of harm. CX0741 (Van Dyke Expert Report at 12-13). Whatever the meaning of "likely" harm, as used in Section 5(n), surely it requires more than a mere "risk" of "an exposure" to "a likelihood" of harm. *See also* CCCL 30 (arguing that in "potentially exposing" consumers' Personal Information "to unauthorized disclosure," Respondent's conduct is "likely to cause injury . . .").

Furthermore, like Mr. Kam, Mr. Van Dyke did not assess Respondent's particular data security practices, having assumed that Respondent's data security was "unreasonable," F. 257, and his opinion is therefore also "divorced from any measure of the probability" that a data breach, and resulting identity theft harm, will occur in this case. *See Int'l Harvester,* 1984 FTC LEXIS 2, at *253 n.52. In addition, like Mr. Kam, Mr. Van Dyke is not qualified to assess Respondent's computer security. *See* F. 12-14.

The only expert proffered by Complaint Counsel who is arguably qualified to assess the degree of risk posed by Respondent's computer security practices, Dr. Raquel Hill, did not opine as to the probability or likelihood that Respondent's computer network would be breached, or whether Respondent's data security practices were likely to cause any consumer harm. When asked if she had an opinion as to the likelihood of consumer harm resulting from Respondent's asserted unreasonable data security, Dr. Hill responded that she did not

form such an opinion; that she was instructed to assume that identity theft harm "could occur" *if* consumers' personal information on LabMD's network was exposed; and that she "assumed" that such harm was likely. F. 237. The likelihood of such an exposure, and resulting consumer harm, cannot properly be assumed. This assumption by the government's only witness who arguably could have opined on the specific risk or probability that Respondent's particular data security practices will result in an unauthorized exposure – the logical prerequisite to any potential consumer harm – leaves virtually no evidence to support the contention that LabMD's alleged unreasonable security practices are likely to cause harm to consumers, simply because their Personal Information is maintained on Respondent's computer network.

Under the evidence presented, to conclude that consumers whose Personal Information is maintained on Respondent's computer network are "likely" to suffer a data breach and subsequent identity theft harm would require speculation upon speculation. Among other things, it would have to be assumed that, at some unknown point in the future, Respondent's computer system will be breached by a presently unknown third-party who, at some undetermined point thereafter, will use the stolen information to harm those consumers. [43] *Cf. Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3rd Cir. 2011) (finding alleged increased risk of future injury too attenuated for Article III standing purposes, even though there had been a prior security breach by an unknown hacker, because the likelihood of actual injury from the breach was "dependent on entirely speculative, future actions of an unknown third-party"). *See* Policy Statement, *supra,* at *307 (stating that injury must not be speculative); 1982 Policy

[43] Complaint Counsel's argument as to the likelihood of future harm for all consumers whose Personal Information is maintained by LabMD is premised on the asserted vulnerability of LabMD's computer network to infiltration by identity thieves who would then commit identity crimes. To the extent Complaint Counsel also argues a likelihood of emotional or other privacy harms, allegedly arising from an unauthorized exposure of sensitive medical information alone, such subjective harm, unaccompanied by any tangible injury such as monetary harm or health and safety risks, would not constitute "substantial injury" within the meaning of Section 5(n).

Letter, *supra* (stating that Commission's resources should not be used for speculative harm).

Moreover, if an unspecified, theoretical "risk" of a future data breach and resulting identity theft were sufficient to prove unfair conduct in the instant case, then the clear requirement in Section 5(n) that injury be "likely" would be vitiated. Under common law negligence principles, which both parties cite in connection with the meaning of "unreasonableness" (CCCL 16; RCL 97),[44] "unreasonable" conduct, by definition, is conduct that exposes another to an unreasonable "risk" of harm. *See, e.g.*, Restatement (Second) of Torts § 298 (reasonable conduct is that which a reasonable person would recognize as necessary to prevent creating an unreasonable risk of harm); *see also id.* at § 291 ("Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."). Thus, to contend that proof of risk of injury – even an elevated or increased risk – is sufficient to prove "unfair" conduct is tantamount to arguing that "unreasonable" data security, by definition, is an unfair practice. This is contrary to the theory of the Complaint, which alleges both unreasonable data security and likely injury. Complaint ¶¶ 10, 22. *See also LabMD*, 2014 FTC LEXIS 2, at *52 (holding that unfair conduct liability in the area of data security requires proof of unreasonable data security *and* actual or likely resulting injury) (emphasis added). In addition, to base unfair conduct liability upon proof of unreasonable data security alone would, on the evidence presented in this case, effectively expand liability to cases involving generalized or theoretical "risks" of future injury,

[44] The Commission also referred to negligence standards as relevant to the "unreasonable data security" claim in the instant case. *LabMD*, 2014 FTC LEXIS 2, at *47-48. In rejecting LabMD's contention that charging LabMD with employing unreasonable data security in the absence of promulgated data security standards violated due process, the Commission stated: "LabMD's due process claim is particularly untenable when viewed against the backdrop of the common law of negligence. Every day, courts and juries subject companies to tort liability for violating uncodified standards of care, and the contexts in which they make those fact-specific judgments are as varied and fast-changing as the world of commerce and technology itself."

in clear contravention of Congress' intent, in enacting Section 5(n), to limit liability for unfair conduct to cases of actual or "likely" substantial consumer injury. *See, e.g.,* H.R. CONF. REP. 103-617, 1994 WL 385368, at *11-12, FTC Act Amendments of 1994 (noting that Section 5(n) is to *limit* unfair acts or practices under the reach of Section 5 to those that, *inter alia*, "cause or are likely to cause substantial injury to consumers") (emphasis added); *see also* S. REP. 103-130, 1993 WL 322671, at *4 ("This section amends section 5 of the FTC Act to limit unlawful 'unfair acts or practices' to *only* those which cause or are likely to cause substantial injury to consumers . . .") (emphasis added).

It is also significant that the Commission, in rejecting Respondent's argument that the unfair conduct claim in this case violated its due process rights to fair notice of what conduct was prohibited, specifically held that "the three-part statutory standard governing whether an act or practice is 'unfair,' set forth in Section 5(n)," provided the required constitutional notice. *LabMD*, 2014 FTC LEXIS 2, at *46. That three-part statutory standard prohibits conduct that, *inter alia*, "causes or is likely to cause" substantial consumer injury. If unfair conduct liability can be premised on "unreasonable" data security alone, upon proof of a generalized, unspecified "risk" of a future data breach, without regard to the probability of its occurrence, and without proof of actual or likely substantial consumer injury, then "the three-part statutory standard governing whether an act or practice is 'unfair,' set forth in Section 5(n)," would not provide the required constitutional notice of what is prohibited.

Complaint Counsel asserts that Section 5 unfair conduct liability can be imposed based solely on the risk of a data breach and that proof of an actual data breach is not required. Transcript of Closing Arguments, Sept. 16, 2015, at 57. Fundamental fairness dictates that proof of likely substantial consumer injury under Section 5(n) requires proof of something more than an unspecified and hypothetical "risk" of future harm, as has been submitted in this case.[45]

[45] It should also be noted that Complaint Counsel's proffered data security expert, Dr. Hill, confined her opinions as to Respondent's alleged unreasonable data security to the time period from January 2005 through July 2010, referred

c. Conclusion

Proof of a "risk" of harm, alone, "[w]hen divorced from any measure of the probability of occurrence, . . . cannot lead to useable rules of liability." *Int'l Harvester*, 1984 FTC LEXIS 2, at *253 n.52. In the instant case, at best, Complaint Counsel's evidence of "risk" shows that a future data breach is possible, and that if such possible data breach were to occur, it is possible that identity theft harm would result. However, possible does not mean likely. Possible simply means not impossible. Such proof does not meet the minimum standard for declaring conduct "unfair" under Section 5 of the FTC Act, which requires that harm be "likely," and cannot lead to useable rules of liability. Accordingly, for all the foregoing reasons, the evidence fails to prove that Respondent's alleged unreasonable data security caused, or is likely to cause, substantial injury to consumers whose Personal Information is maintained on LabMD's computer network.

E. CONCLUSION

Section 5(n) of the FTC Act provides that "[t]he Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Accordingly, in the instant case, the burden was on Complaint Counsel to prove, initially, that Respondent's alleged failure to employ "reasonable and appropriate" data security "caused, or is likely to cause, substantial injury to consumers," as alleged in the Complaint. Complaint ¶¶ 10, 22. The evidence presented in this case fails to prove these allegations. As addressed in detail in this

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to as the "Relevant Time Period." Thus, whatever risk might be inherent in Respondent's alleged "unreasonable" data security during the Relevant Time Period, the record is devoid of expert opinion as to the degree of risk beyond that period. Also, relevant to the assessment of risk in this case is that LabMD wound down its operations beginning in January 2014, and, as of May 2014, LabMD's operations were limited to maintaining tissue samples, and providing copies of prior test data to its physician clients only via facsimile. F. 36-39.

Initial Decision, there is no evidence that any consumer has suffered any substantial injury as a result of Respondent's alleged conduct, and both the quality and quantity of Complaint Counsel's evidence submitted to prove that such injury is, nevertheless, "likely" is unpersuasive. In reaching these conclusions the totality of the record evidence has been fully considered and weighed.

In summary, there is no evidence that any consumer has suffered any injury as a result of the 2008 exposure of the 1718 File, and the evidence fails to show that this exposure, to Tiversa, Professor Johnson, and the FTC, is likely to cause any substantial consumer injury. In addition, the evidence further fails to show that the Sacramento Documents were exposed in 2012 as a result of any alleged computer security failure of Respondent, or that the exposure of these documents has caused, or is likely to cause, any substantial consumer injury. Finally, the theory that, there is a likelihood of substantial injury for all consumers whose information is maintained on Respondent's computer networks, because there is a "risk" of a future data breach, is without merit because the evidence presented fails to demonstrate a likelihood that Respondent's computer network will be breached in the future and cause substantial consumer injury. While there may be proof of possible consumer harm, the evidence fails to demonstrate probable, *i.e.*, likely, substantial consumer injury.

Because the evidence fails to prove that Respondent's alleged unreasonable data security caused, or is likely to cause, substantial consumer injury, as required by Section 5(n) of the FTC Act, Respondent's alleged unreasonable data security cannot properly be declared an unfair act or practice in violation of Section 5(a) of the FTC Act. Accordingly, the Complaint must be **DISMISSED**.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Section 5 of the FTC Act grants the FTC the authority over "unfair or deceptive acts or practices in or affecting commerce" by "persons, partnerships, or corporations . . . ." 15 U.S.C. § 45(a)(1)-(2).

2. Respondent is a corporation within the meaning of Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45.

3. The acts and practices alleged in the Complaint are "in or affecting commerce" under the FTC Act. 15 U.S.C. § 45(a)(1).

4. Complaint Counsel bears the burden of proving the allegations of the Complaint that Respondent engaged in unfair conduct in violation of Section 5(a) of the FTC Act by a preponderance of evidence.

5. Section 5(n) of the FTC Act provides that "[t]he Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

6. Complaint Counsel bears the burden of proving by a preponderance of the evidence the allegations of the Complaint that Respondent's failure to provide "reasonable and appropriate" security for personal information maintained on LabMD's computer networks, "caused or is likely to cause" substantial consumer injury that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

7. Congress amended the FTC Act in 1994 to add Section 5(n). Congress' intent in adding Section 5(n) to the FTC Act was to establish an outer limit to the Commission's authority to declare an act or practice unfair.

8. Section 5(n) of the FTC Act is a three-part test, and all three parts must be proven before an act or practice can be declared "unfair."

9. The three-part test in Section 5(n) was intended to codify, as a statutory limitation on unfair acts or practices, the

principles of the FTC's December 17, 1980 policy statement on unfairness, reaffirmed by a letter from the FTC dated March 5, 1982, in order to provide guidance and to prevent a future FTC from abandoning those principles.

10. Actual or likely substantial consumer injury, which is also not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition, is a legal precondition to finding a respondent liable for unfair conduct.

11. Unjustified consumer injury is the primary focus of the FTC Act.

12. The Commission has stated that its "concerns should be with substantial consumer injuries; its resources should not be used for trivial or speculative harm."

13. Consumer injury may be "substantial" under Section 5(n) if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers.

14. In most cases, substantial consumer injury involves monetary or economic harm or unwarranted health and safety risks.

15. Unfair conduct cases usually involve actual and completed harms.

16. Historically, liability for unfair conduct has been imposed only upon proof of actual consumer harm.

17. Complaint Counsel bears the burden of proving, initially, that Respondent's alleged failure to employ "reasonable and appropriate" data security "caused, or is likely to cause, substantial injury to consumers," as alleged in the Complaint.

18. Complaint Counsel has failed to meet its burden of proving that Respondent's alleged unreasonable data

security caused substantial consumer injury. The record in this case contains no evidence that any consumer whose Personal Information has been maintained by LabMD has suffered any harm as a result of Respondent's alleged conduct.

19. Section 5(n) does not define the meaning of "likely" injury. Where a statute does not define a term, it is construed in accordance with its ordinary meaning.

20. The Merriam-Webster dictionary states that "likely" is "used to indicate the chance that something will happen," and is primarily defined as "having a high probability of occurring or being true."

21. The Commission has interpreted its deception standard, which requires proof that a practice is "likely to mislead" consumers, to require proof that such deception was "probable, not possible . . . ."

22. The term "likely" in Section 5(n) does not mean that something is merely possible. Instead, "likely" means that it is probable that something will occur.

23. Complaint Counsel has failed to meet its burden of proving that Respondent's alleged unreasonable data security is "likely to cause" substantial consumer injury. There may be proof of possible consumer harm, but the evidence fails to demonstrate probable, *i.e.*, likely, substantial consumer injury.

24. Complaint Counsel has failed to prove that the 2008 exposure of the 1718 File caused, or is likely to cause, any substantial consumer injury.

25. Subjective feelings of harm, such as embarrassment, upset, or stigma, standing alone, without accompanying, clearly demonstrated, tangible injury, do not constitute "substantial injury" within the meaning of Section 5(n).

26. Evidence in the record provided by Tiversa and its chief executive officer and corporate designee Mr. Robert

Boback, claiming that Tiversa found the 1718 File in "multiple locations" on peer-to-peer networks, including at IP addresses belonging to suspected or known identity thieves, is entitled to no weight. Such evidence, including without limitation, Mr. Boback's 2013 discovery deposition, Mr. Boback's 2014 trial deposition testimony, and a Tiversa-provided exhibit, CX0019, is unreliable, not credible, and outweighed by credible contrary testimony from Mr. Richard Wallace.

27. Complaint Counsel has failed to prove that Respondent's alleged failure to reasonably secure data on its computer network caused, or is likely to cause, substantial injury to consumers due to the exposure of the Sacramento Documents because Complaint Counsel has failed to prove that the Sacramento Documents were maintained on Respondent's computer network.

28. Complaint Counsel has failed to prove that the Sacramento Documents were exposed in 2012 as a result of any alleged computer security failure of Respondent.

29. Even if there were a causal connection between Respondent's computer network and the exposure of the Sacramento Documents, Complaint Counsel has failed to prove that the exposure of these documents has caused, or is likely to cause, any substantial consumer injury.

30. Complaint Counsel has failed to prove the allegation in Complaint ¶ 21 that Social Security numbers in the Sacramento Documents "are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves," because the evidence upon which Complaint Counsel relies (proffered exhibit CX0451) is unreliable and entitled to no weight.

31. Complaint Counsel's assertion that there is a likelihood of substantial injury for all consumers whose information is maintained on Respondent's computer networks, regardless of whether their information has been exposed, on the theory that there is a "risk" of a future data breach, is without merit because Complaint Counsel has failed to

prove the likelihood that Respondent's computer network will be breached in the future and cause substantial consumer injury.

32. To suggest that there is a kind of risk that is separate from statistical risk amounts to no more than a conversational use of the term "risk." Proof of a "risk" of harm alone, when divorced from any measure of the probability of occurrence, cannot lead to useable rules of liability.

33. To find "likely" substantial consumer injury on the basis of theoretical, unspecified "risk" that a data breach will occur in the future, with resulting identity theft harm, would require reliance upon a series of unsupported assumptions and conjecture.

34. To allow unfair conduct liability to be based on proof of a generalized "risk" of harm alone – even an elevated or increased risk – without regard to the probability that such harm will occur would vitiate the requirement in Section 5(n) that substantial consumer injury be proven "likely" and would contravene the clear intent of Section 5(n) to limit unfair conduct liability to cases of actual, or "likely," substantial consumer injury.

35. Proof of likely substantial consumer injury under Section 5(n) requires proof of something more than an unspecified and hypothetical "risk" of future harm.

36. Based on the totality of the evidence presented, Complaint Counsel has failed to meet its burden of proving, by a preponderance of the evidence, that Respondent's alleged unreasonable data security caused, or is likely to cause, substantial consumer injury.

37. Because Complaint Counsel failed to meet its burden of proving the first prong of the three-part test in Section 5(n) – that Respondent's conduct caused, or is likely to cause, substantial consumer injury – Respondent's alleged failure to employ "reasonable and appropriate data security" for information maintained on its computer networks cannot

be declared an "unfair" act or practice in violation of Section 5(a) of the FTC Act.

ORDER

For the reasons stated above, **IT IS ORDERED** that the Complaint be, and hereby is, **DISMISSED**.

Complaint

IN THE MATTER OF

STEP N GRIP, LLC

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

Docket C-4561; File No. 151 0181
Complaint, December 7, 2015 – Decision, December 7, 2015

This consent order addresses Step N Grip, LLC's market manipulation. The complaint alleges that Step N Grip violated Section 5 of the Federal Trade Commission Act, by inviting a competitor in the sale of certain rug devices to set and raise prices. Step N Grip markets and sells a device called NeverCurl that is intended to keep the corners of a rug from curling. Step N Grip's closest competitor in the sale of such rug devices is Competitor A. For several months prior to June 1, 2015, Step N Grip generally priced NeverCurl at $13.95 per package, while Competitor A priced its product at $16.99 per package. As Competitor A lowered their prices, Step N Grip did the same. This went on and on for weeks and at one point Step N Grip sent an e-mail message to Competitor A. The communication, in its entirety, read: "We both sell at $12.95? Or, $11.95?" The consent order requires Step N Grip to cease and desist from communicating with its competitors about prices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Participants

For the *Commission: Michael Turner.*

For the *Respondent: Allan Wendling, CEO, pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Step N Grip, LLC, has violated the provisions of 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:

NATURE OF THE CASE

1. Step N Grip, LLC ("Step N Grip") markets and sells over the internet a rug device. Step N Grip invited its closest rival to fix and raise prices for the two companies' competing rug devices. By inviting collusion, Step N Grip endangered competition and violated Section 5 of the FTC Act.

RESPONDENT

2. Step N Grip is a limited liability corporation organized, existing, and doing business under and by virtue of the laws of Michigan with its principal place of business in New Lothrop, Michigan 48460.

3. Step N Grip markets and sells a device called NeverCurl that is intended to prevent the corner of a rug from curling. Step N Grip sells its rug device over the internet on Amazon.com. Step N Grip also sells from its own website.

JURISDICTION

4. At all times relevant herein, Step N Grip has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

5. The business practices of Step N Grip, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

INVITATION TO COLLUDE

6. The closest competitor to Step N Grip is Competitor A, a company that markets and sells a rug device similar to NeverCurl. For several months prior to June 1, 2015, Step N Grip generally sold NeverCurl on Amazon.com for $13.95 per package, and Competitor A sold its competing device on Amazon.com for $16.99 per package.

7. On June 1, 2015, Competitor A lowered its price on Amazon.com to $13.49 in order to compete more aggressively

with Step N Grip. Step N Grip responded by lowering its price on Amazon.com to $12.95.

8. On June 7, 2015, Competitor A lowered its price on Amazon.com to $11.95 in response to Step N Grip. That same day, Step N Grip lowered its price on Amazon.com to $11.95. Also on June 7, 2015, Step N Grip sent an email message to Competitor A. The communication, in its entirety, read: "We both sell at $12.95? Or, $11.95?" Step N Grip subsequently raised the price of NeverCurl to $12.95.

9. Competitor A reported the invitation to collude to the Federal Trade Commission.

VIOLATION CHARGED

10. As set forth in Paragraphs 6 through 9 above, Step N Grip invited its competitor to agree to fix and raise the price of rug devices in violation of Section 5 of the Federal Trade Commission Act, as amended.

11. The acts and practices of Step N Grip, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts and practices of Step N Grip will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of December, 2015, issues its complaint against Step N Grip.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Step N Grip, LLC ("Step N Grip"), a limited liability corporation, and Step N Grip having been furnished thereafter with a copy of the 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 Step N Grip with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Step N Grip and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Step N Grip 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 Step N Grip 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 Step N Grip has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Step N Grip, LLC, is a limited liability corporation organized, existing, and doing business under and by virtue of the laws of Michigan with its principal place of business in New Lothrop, Michigan.

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

ORDER

I.

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

A. "Step N Grip" means Step N Grip, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Step N Grip, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Rug device" refers to any device that is used with or in conjunction with a rug, and includes any device used for the purpose of preventing the corner of a rug from curling.

C. "Commission" means the Federal Trade Commission.

D. The term "communicating" means any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, and email.

E. The term "Competitor" means any Person actually or potentially engaged in the manufacture or sale of any rug device and includes its employees, agents, and representatives.

F. "Person" includes Step N Grip and means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.

II.

IT IS FURTHER ORDERED that in connection with the sale of any rug device in or affecting commerce, as "commerce"

is defined by the Federal Trade Commission Act, Step N Grip shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Communicating with any Competitor regarding prices or rates, or prospective prices or rates, of Step N Grip or any Competitor; *provided, however*, that for purposes of this Paragraph II.A, Communicating does not include the transfer or dissemination of information to the public through websites or other widely accessible methods of advertising such as newspapers, television, signage, direct mail or online and social media.

B. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, encouraging, offering or soliciting any agreement or understanding, express or implied, between or among Step N Grip and any Competitor:

1. To raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, or payment terms, or to engage in any other pricing action;

2. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories; or

3. To set, change, limit or reduce service terms or service levels.

C. Exhorting, requesting, suggesting, urging, advocating, encouraging, advising, or recommending to any Competitor, either publicly or privately, that such Competitor:

1. Set, change, raise, fix, stabilize or maintain its prices or price levels, rates or rate levels, or payment terms, or engage in any other pricing action; or

2. Set, change, reduce, limit, maintain, or reduce its service terms or service levels.

D. Instructing or otherwise encouraging any dealer, distributor, or seller of rug devices to engage in conduct that Respondents are prohibited from engaging in under Paragraphs II.A, II.B, and II.C. of this Order.

III.

IT IS FURTHER ORDERED that Step N Grip shall:

A. Within thirty (30) days after the date on which this Order becomes final, provide to each of Step N Grip's officers, directors and employees a copy of this Order and the Complaint.

B. For a period of four (4) years from the date this Order becomes final, provide a copy of this Order and the Complaint to any person who becomes a director, officer, or employee of Step N Grip, and provide such copies within thirty (30) days of the commencement of such Person's employment or term as an officer or director.

C. Require each person to whom a copy of this Order is furnished pursuant to Paragraph III.A. and III.B. above to sign and submit to Step N Grip within thirty (30) days of the receipt thereof a statement that (1) represents that the undersigned has read and understands the Order, and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Step N Grip to penalties for violation of the Order.

D. Retain documents and records sufficient to record Step N Grip's compliance with its obligations under Paragraph III of this Order.

IV.

IT IS FURTHER ORDERED that Step N Grip shall file a verified written report within sixty (60) days from the date this Order becomes final, annually thereafter for four (4) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. A copy of the acknowledgement(s) required by III.C. of the Order; and

B. A detailed description of the manner and form in which Step N Grip has complied and is complying with this Order.

V.

IT IS FURTHER ORDERED that Step N Grip shall notify the Commission:

A. Of any change in its principal address or place of business within twenty (20) days of such change in address; and

B. At least thirty (30) days prior to:

1. Any proposed dissolution of Step N Grip;

2. Any proposed acquisition, merger, or consolidation of Step N Grip; or

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

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written

request and upon five (5) days notice, Step N Grip shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

B. The opportunity to interview officers, directors, or employees of Step N Grip, who may have counsel present, related to compliance with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 7, 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 Step N Grip, LLC ("Step N Grip"). The Commission's Complaint alleges that Step N Grip violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor in the sale of certain rug devices to set and raise prices.

Under the terms of the proposed Consent Agreement, Step N Grip is required to cease and desist from communicating with its competitors about prices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

The 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 ("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.

I. The Complaints

The allegations of the Complaint are summarized below:

Step N Grip markets and sells a device called NeverCurl that is intended to keep the corners of a rug from curling. Step N Grip sells NeverCurl primarily through Amazon.com; Step N Grip also sells NeverCurl through its own website.

Step N Grip's closest competitor in the sale of such rug devices is Competitor A, a company that also sells its product on Amazon.com. For several months prior to June 1, 2015, Step N Grip generally priced NeverCurl at $13.95 per package, while Competitor A priced its product at $16.99 per package.

On June 1, 2015, Competitor A lowered its price on Amazon.com to $13.49 in an effort to compete more aggressively with Step N Grip. In response, Step N Grip lowered its price on Amazon.com to $12.95.

On June 7, 2015, Competitor A lowered its price on Amazon.com to $11.95 in response to Step N Grip. That same day, Step N Grip lowered its price to $11.95 on Amazon.com and sent an e-mail message to Competitor A. The communication, in its entirety, read: "We both sell at $12.95? Or, $11.95?"

Competitor A reported the communication to the FTC.

II. Analysis

Step N Grip's June 7 message to Competitor A is plainly an attempt to arrange an agreement between the two companies setting and increasing the price of their competing products. It is an invitation to collude. The Commission has long held that invitations to collude violate Section 5 of the FTC Act, and this is unaltered by the Commission's recent Statement on Section 5.

In a recent statement, the Commission explained that unfair methods of competition under Section 5 "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[1] Potential violations are evaluated under a "framework similar to the rule of reason."[2] Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.[3]

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[1] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) (Section 5 Unfair Methods of Competition Policy Statement), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. Commissioner Ohlhausen dissented from the issuance of the Section 5 Unfair Methods of Competition Policy Statement. *See* https://www ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy.

[2] Section 5 Unfair Methods of Competition Policy Statement.

[3] *See, e.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint.").

An invitation to collude is "potentially harmful and . . . serves no legitimate business purpose."[4] For this reason, the Commission treats such conduct as "inherently suspect" (that is, presumptively anticompetitive).[5] This means that an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power.[6]

The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.[7] There are various reasons for this. First, unaccepted solicitations may facilitate coordination between competitors because they reveal information about the solicitor's intentions or preferences.

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[4] *In re Valassis Commc'ns., Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *see also* Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015), *available at* https://www ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

[5] *See, e.g.*, *In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that inherently suspect conduct is such that be "reasonably characterized as 'giv[ing] rise to an intuitively obviously inference of anticompetitive effect.'" (citation omitted)).

[6] *See, e.g.*, *In re Realcomp II, Ltd.*, 148 F.T.C. ___, No. 9320, 2009 FTC LEXIS 250 at *51 (Oct. 30, 2009) (Comm'n Op.) (explaining that if conduct is "inherently suspect" in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it "without proof of market power or actual effects").

[7] *See*, *e.g.*, *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). *See also In re McWane, Inc.*, Docket No. 9351, *Opinion of the Commission on Motions for Summary Decision* at 20-21 (F.T.C. Aug. 9, 2012) ("an invitation to collude is 'the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5'") (citing the Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int'l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been endorsed by leading antitrust scholars. *See* P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69. In a case brought under a state's version of Section 5, the First Circuit expressed support for the Commission's application of Section 5 to invitations to collude. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

Second, it can be difficult to discern whether a competitor has accepted a solicitation. Third, finding a violation may deter similar conduct—conduct that has no legitimate business purpose.[8]

III. The Proposed Consent Order

The Proposed Order contains the following substantive provisions:

Section II, Paragraph A of the Proposed Order enjoins Step N Grip from communicating with its competitors about rates or prices, with a proviso permitting public posting of rates.

Section II, Paragraph B prohibits Step N Grip from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices**.**

Section II, Paragraph C bars Step N Grip from urging any competitor to raise, fix or maintain its price or rate levels or to limit or reduce service terms or levels.

Section II, Paragraph D forbids Step N Grip from instructing or encouraging a distributor or seller to engage in the conduct proscribed in Section II, Paragraphs A through C.

Sections III-VI of the Proposed Order impose certain standard reporting and compliance requirements on Step N Grip.

The Proposed Order will expire in 20 years.

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[8] *In re Valassis Comm'c, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).

Complaint

IN THE MATTER OF

KEYSTONE ORTHOPAEDIC SPECIALISTS, LLC
AND
ORTHOPAEDIC ASSOCIATES OF READING, LTD.

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

Docket C-4562; File No. 141 0025
Complaint, December 14, 2015 – Decision, December 14, 2015

This consent order addresses the 2011 merger of six independent physician groups to form Keystone. Those practices are Respondent Orthopaedic Associates, Advanced Orthopaedics of Reading, Arthritis & Joint Replacement Center of Reading, P.C., Berkshire Orthopedic Associates, Inc., Commonwealth Orthopaedic Associates, Inc., and Reading Neck and Spine Center, P.C. ("Keystone Component Practices"). The Keystone Component Practices became divisions of Keystone after the Merger. The Merger combined 19 out of 25, or 76 percent, of the orthopedists practicing in Berks County. Thus eliminating the robust competition among orthopedist in Berks County. After the Merger, Keystone negotiated prices with health plans on behalf of all the previously competing Keystone Component Practices, and health plans could not offer a commercially marketable network that would appeal to Berks County residents without Keystone. Under the terms of the settlement, Keystone and Orthopaedic Associates are required to obtain prior approval from the Commission before acquiring any interests in each other, before acquiring another orthopedic practice in Berks County, and before hiring or offering membership to an orthopedist who has provided services in Berks County in the past year. Keystone and Orthopaedic Associates also are prohibited from anticompetitive, illegal activity such as coordinating their prices with other orthopedists in the market and jointly negotiating with or refusing to deal with payors. They also must terminate, without penalty, any existing contracts with payors for the provision of orthopedic physician services at the payors' request.

Participants

For the *Commission: Robert S. Canterman, Malcolm Catt, Ellen Connelly, Gary H. Schorr,* and *Steve Vieux.*

For the *Respondents: Jeffrey Brennan, McDermott Will & Emery LLP; Jesse Robinson, Blakinger, Byler & Thomas.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Keystone Orthopaedic Specialists, LLC ("Keystone") and Orthopaedic Associates of Reading, Ltd. ("Orthopaedic Associates"), have violated 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 by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows.

NATURE OF THE CASE

1. This case challenges a consummated physician practice group merger among orthopedists in Berks County, Pennsylvania. In 2011, orthopedists affiliated with six independent physician groups merged their practices to form Keystone (the "Merger"). Those practices are Respondent Orthopaedic Associates, Advanced Orthopaedics of Reading, Arthritis & Joint Replacement Center of Reading, P.C., Berkshire Orthopedic Associates, Inc., Commonwealth Orthopaedic Associates, Inc., and Reading Neck and Spine Center, P.C. ("Keystone Component Practices").

2. The Merger combined 19 out of 25, or 76 percent, of the orthopedists practicing in Berks County. The Merger has substantially lessened competition for orthopedic physician services in Berks County, Pennsylvania.

3. The Merger eliminated price and non-price competition among the Keystone Component Practices and created a dominant orthopedic practice. Following the Merger, Keystone exercised unilateral market power to raise prices for orthopedic physician services. As a result, most health plans in Berks County are paying prices for orthopedic physician services that are significantly higher than prices they paid prior to the Merger.

4. Although health plans are usually the direct customers for orthopedic physician services provided to many patients, higher

prices for those services are passed on to employers and other group purchasers of health insurance plans. Such costs are ultimately borne by patients in Berks County through higher premiums, co-payments, and other out-of-pocket expenditures.

5. New market entry or expansion has not been sufficient to deter, prevent, or counter the anticompetitive effects of the Merger. Nor has the Merger produced merger-specific efficiencies sufficient to offset the actual anticompetitive harm from the Merger.

JURISDICTION

6. Keystone and Orthopaedic Associates are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within the meaning of the FTC Act and the Clayton Act. The Merger constitutes an acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

RESPONDENTS

7. Keystone is a professional limited liability company organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 1270 Broadcasting Road, Reading, Pennsylvania 19610. Keystone orthopedists have offices at various locations in Berks County.

8. Orthopaedic Associates is a professional corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 301 South Seventh Avenue, Suite 3220, West Reading, Pennsylvania 19611.

THE MERGER

9. On or about March 19, 2010, orthopedists from the Keystone Component Practices formed Keystone as a professional limited liability company. The Merger was consummated on or about January 1, 2011, when each orthopedist affiliated with the Keystone Component Practices entered into a Professional Services Agreement with Keystone to provide

orthopedic physician services exclusively through Keystone. The Keystone Component Practices became divisions of Keystone.

10. After the Merger, the Keystone Component Practices no longer competed to provide orthopedic physician services in Berks County, and the Keystone orthopedists ceased doing business through their respective independent practices and began doing business exclusively through Keystone.

11. Three years after the Merger, in 2014, six orthopedists left Keystone and resumed doing business as Orthopaedic Associates.

COMPETITION BETWEEN PHYSICIANS

12. Competition between physicians occurs in two stages. In the first stage, providers compete for selection by health plans as in-network providers. To gain in-network status, a physician engages in negotiations with each health plan and enters into a contract. One of the critical terms that a physician and a health plan agree upon during a negotiation are the prices that the health plan will pay to the physician when the health plan's members obtain care from the physician.

13. Physicians benefit from in-network status by gaining access to the health plans' members as patients. Health plans benefit by negotiating discounted prices and being able to create commercially marketable and appealing provider networks, with geographic coverage and a scope of services sufficient to attract and satisfy a localized group of members, typically employers and their employees. The availability and number of alternative physicians is the primary source of a health plan's bargaining power to negotiate competitive prices on behalf of its members. Thus, an acquisition that reduces a health plan's choice of providers for particular healthcare services in a particular area reduces the health plan's bargaining power when negotiating with physicians, and can lead to higher prices and reduced incentive to maintain or improve quality.

14. Changes in the prices negotiated between physicians and health plans impact the health plan's members (i.e., employers and their employees). Employers generally have two alternative funding mechanisms for purchasing health insurance for their

employees. Fully-insured employers and their employees pay premiums, co-pays, and deductibles in exchange for access to a health plan's provider network and for insurance against the cost of future care—that is, the health plan pays the insured-members' healthcare claims. Self-insured employers also have access to their health plan's network and negotiated prices but assume the risk for the costs of care provided to their employees. Self-insured employers must pay the entirety of their employees' health-care claims (aside from member cost-sharing, such as deductibles and co-payments) and, as a result, they immediately incur any price increases. Therefore, regardless of the funding mechanism, health plans act on behalf of employers and other health-plan members to create provider networks that offer convenience, high quality of care, and negotiated reimbursement rates. The costs to employers and health plan members are inextricably linked to the prices that health plans negotiate with each physician in their provider network.

15. In the second stage of competition, physicians compete with other in-network physicians to attract patients. Health plans typically offer multiple in-network providers with similar out-of-pocket costs, and those physicians compete primarily on non-price dimensions in this second stage to attract patients by competing on service, amenities, convenience, and quality of care.

THE RELEVANT MARKETS

16. For purposes of this Complaint, the relevant line of commerce is the provision of orthopedic physician services. Orthopedic physician services include surgery and other services provided by physicians who specialize as orthopedists to treat injuries and diseases of the musculoskeletal system.

17. The relevant geographic market in which to assess the effect of the Merger is Berks County, Pennsylvania. Health plans are unable to serve their members in Berks County without including Berks County orthopedists in their provider networks. Patients in Berks County generally do not leave the county to obtain orthopedic physician services.

MARKET STRUCTURE

18. Before the Merger, competition among orthopedists, including the Keystone Component Practices, in Berks County was robust. At that time, 25 orthopedists in 11 practices competed to serve orthopedic patients. The Merger substantially eliminated this competition by combining 19 orthopedists into one practice, leaving only six orthopedists as competitors. Following the Merger, Keystone had 76 percent of the orthopedists practicing in Berks County.

19. The Horizontal Merger Guidelines issued by the Commission and the U.S. Department of Justice measure market concentration using the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is presumed likely to create or enhance market power, and thus is presumed illegal, when the post-merger HHI exceeds 2500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels exceed these thresholds by a wide margin.

20. As a result of the Merger, health plans could not create a commercially marketable and appealing provider network without Keystone. Health plans were not able to attract and satisfy Berks County patients with a network that included only the few remaining non-Keystone orthopedists.

ANTICOMPETITIVE EFFECTS

21. The effects of the Merger have been to substantially lessen competition and create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways:

a. Eliminating actual, direct, and substantial competition between the orthopedists in the Keystone Component Practices;

b. Increasing the ability of the merged entity unilaterally to raise prices for orthopedic physician services; and

c. Reducing incentives to maintain or improve service and quality in the relevant market.

22. Before the Merger, the Keystone Component Practices competed and health plans could form a network with some, but not all, of the Keystone Component Practices. After the Merger, Keystone negotiated prices with health plans on behalf of all the previously competing Keystone Component Practices, and health plans could not offer a commercially marketable and appealing provider network to serve Berks County residents without Keystone. Thus, Keystone acquired substantial market power through the Merger, which it used to raise prices to most health plans operating in Berks County, including a Medicaid managed-care plan.

ENTRY CONDITIONS

23. Attracting new orthopedists to Berks County is difficult, expensive, and time intensive. Neither entry by new firms nor expansion by the remaining practices following the Merger has been timely or sufficient to deter, prevent, or counter the anticompetitive effects from the Merger.

EFFICIENCIES

24. In the more than four years since Keystone's formation, the Merger has not produced merger-specific efficiencies sufficient to offset the actual anticompetitive harm from the Merger.

VIOLATIONS CHARGED

25. The allegations of Paragraphs 1 through 24 above are incorporated by reference as though fully set forth.

26. The Merger substantially lessened competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an agreement constituting an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth, day of December, 2015, issues its Complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Keystone Orthopaedic Specialists, LLC, hereafter referred to as "Respondent Keystone," and Orthopaedic Associates of Reading, Ltd., hereafter referred to as "Respondent Orthopaedic Associates," and Respondent Keystone and Respondent Orthopaedic Associates 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 Keystone and Respondent Orthopaedic Associates with violating Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent Keystone and Respondent Orthopaedic Associates, their attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent Keystone and Respondent Orthopaedic Associates of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Keystone and Respondent Orthopaedic Associates 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 Keystone and Respondent Orthopaedic Associates have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Keystone is a for-profit professional limited liability company organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal place of business located at 1270 Broadcasting Road, Reading, Pennsylvania 19610.

2. Respondent Orthopaedic Associates is a for-profit professional corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal place of business located at 301 South Seventh Avenue, Suite 3220, West Reading, Pennsylvania 19611.

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

ORDER

I.

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

A. "Respondent Keystone" means Keystone Orthopaedic Specialists, LLC, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions (including,

without limitation, Advanced Orthopaedics of Reading, Arthritis & Joint Replacement Center of Reading, P.C., Berkshire Orthopedic Associates, Inc., Bone & Joint Care Center, Commonwealth Orthopaedic Associates, Inc., and Reading Neck and Spine Center, P.C.), groups and affiliates controlled by Respondent Keystone, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "Respondent Orthopaedic Associates" means Orthopaedic Associates of Reading, Ltd., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Respondent Orthopaedic Associates, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Centers for Medicare and Medicaid Services" or "CMS" means the federal agency that administers the Medicare**,** Medicaid and Child Health Insurance programs. As used in this Order, CMS does not include non-governmental Payors participating in CMS programs.

E. "Medical Group Practice" means a bona fide, integrated firm in which Physicians practice medicine together as partners, shareholders, owners, members, employees, or in which only one Physician practices medicine.

F. "Orthopedist" means a doctor of allopathic medicine or a doctor of osteopathic medicine who performs surgery and provides services to treat injuries and diseases of the musculoskeletal system.

G. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide

services, or offer to provide services to a Payor through such entity. This definition applies to all tenses and forms of the word "Participate," including, but not limited to, "Participating," "Participated" and "Participation."

H. "Payor" means any Person that pays, or arranges for the payment, for all or any part of any Physician services or hospital services for itself or for any other Person. Payor includes any Person that develops, leases, or sells access to networks of Physicians or hospitals.

I. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities and governments.

J. "Physician" means a doctor of allopathic medicine ("M.D."), a doctor of osteopathic medicine ("D.O."), a doctor of chiropractic medicine ("D.C."), or a doctor of podiatric medicine ("D.P.M.").

K. "Preexisting Contract" means a contract that was in effect on the date that a Payor that is a party to such contract receives the notice sent by Respondent Keystone or Respondent Orthopaedic Associates, pursuant to Paragraph VI.B of the Order, of such Payor's right to terminate such contract.

L. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

M. "Qualified Clinically-Integrated Joint Arrangement" means an arrangement to provide Physician services in which:

1. all Physicians who Participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the

Physicians who Participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

N. "Qualified Risk-Sharing Joint Arrangement" means an arrangement to provide Physician services in which:

1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate jointly to control costs and improve quality by managing the provision of Physician services, such as risk-sharing involving:

   a. the provision of Physician services to Payors at a capitated rate;

   b. the provision of Physician services for a predetermined percentage of premium or revenue from Payors;

   c. the use of significant financial incentives (*e.g.*, substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals; or

   d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice,

complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

O. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order is issued:

A. Respondent Keystone shall not, without receiving prior approval from the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership interest, or any other interest, in whole or in part, in Respondent Orthopaedic Associates; and

B. Respondent Orthopaedic Associates shall not, without receiving prior approval from the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership interest, or any other interest, in whole or in part, in Respondent Keystone.

III.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date the Order is issued:

A. Each Respondent shall not, without receiving prior approval from the Commission:

1. Acquire, directly or indirectly, through subsidiaries or otherwise, in whole or in part, any Orthopedist's practice located in Berks County, Pennsylvania; or

2. Enter into any employment, membership, or other agreement of affiliation with any Orthopedist who during the prior year provided orthopedic services through a Medical Group Practice or as an employee of a hospital located in Berks County, Pennsylvania; and

B. The purpose of Paragraph III of this Order is to ensure competition among Orthopedists to enter into contracts with Payors for the provision of orthopedic services in Berks County, Pennsylvania and to remedy the lessening of competition alleged in the Commission's Complaint.

IV.

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

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Orthopedists:

1. To negotiate on behalf of any Orthopedists with any Payor;

2. To refuse to deal or threaten to refuse to deal with any Payor;

3. Regarding any term, condition, or requirement upon which any Orthopedist deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or

4. Not to deal individually with any Payor or not to deal with any Payor through any arrangement other than through such Respondent.

B. Exchanging or facilitating in any manner the exchange or transfer of information among Orthopedists concerning any Orthopedist's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Orthopedist is willing to deal;

C. Attempting to engage in any action prohibited by Paragraph IV.A or IV.B above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs IV.A through IV.C above.

Provided, however, that nothing in this Paragraph IV shall prohibit any agreement involving or conduct by a Respondent:

1. that solely involves Physicians in the Respondent's Medical Group Practice; or

2. subject to the provisions of Paragraph V below, that is reasonably necessary to form, Participate in, or take any action in furtherance of a Qualified Arrangement.

V.

IT IS FURTHER ORDERED that:

A. For five (5) years from the date this Order is issued, pursuant to each Qualified Arrangement in which such Respondent is a Participant, such Respondent shall notify the Commission in writing ("Notification") at least sixty (60) days prior to:

1. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians in such Qualified Arrangement relating

to price or other terms or conditions of dealing with any Payor; or

2. Contacting a Payor, pursuant to a Qualified Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of any Physician in such Qualified Arrangement.

Provided, however, that any Notification required by this Paragraph V is not required for negotiations or agreements with subsequent Payors pursuant to any Qualified Arrangement for which such Notification was given; and

B. Each Respondent shall include the following information in the Notification:

1. For each Physician Participant, his or her name, address, telephone number, medical specialty, Medical Group Practice, if applicable, and the name of each hospital where he or she has privileges;

2. A description of the Qualified Arrangement, its purpose, function and area of operation;

3. A description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;

4. An explanation of the relationship of any agreement of prices or contract terms related to price to furthering the integration and achieving the efficiencies of the Qualified Arrangement;

5. A description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and

6. All studies, analyses and reports, which were prepared for the purpose of evaluating or analyzing competition for Physician services in Berks County, Pennsylvania, including, but not limited to, the notifying Respondent's market share, any Physician's or any Medical Group Practice's market share of Physician services in Berks County, Pennsylvania.

Provided, however, that the expiration of the waiting period described herein shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of the Order may not have occurred. In addition, the absence of notice to a Respondent that the Qualified Arrangement has been rejected shall not be construed as a determination by the Commission, or its staff, that the Qualified Arrangement has been approved.

Provided further that, receipt by the Commission from a Respondent of any Notification of a Qualified Arrangement is not to be construed as a determination by the Commission that any such Qualified Arrangement does or does not violate the Order or any law enforced by the Commission.

VI.

IT IS FURTHER ORDERED that each Respondent shall:

A. Within thirty (30) days after the date this Order issues, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation, a copy of this Order, the Complaint and the Analysis of the Proposed Order to Aid Public Comment to each:

1. Orthopedist who Participates, or has Participated, in Respondent since January 1, 2011; and

2. Officer, director, or manager of Respondent (including, but not limited to, the manager of each

Keystone division) and any employee of Respondent with responsibilities related to negotiating or contracting with a Payor.

B. Within thirty (30) days after the date this Order issues send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation a copy of this Order, the Complaint, the Analysis of the Proposed Order to Aid Public Comment and the notice specified in Appendix A to the Order to the chief executive officer of each Payor that Respondent has a record of having been in contact with since January 1, 2010.

C. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payor for the provision of Physician services at the earlier of: (1) receipt by Respondent of a written request from a Payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract.

Provided, however, that a Preexisting Contract may extend beyond any such termination or renewal date for a period of no longer than one year from the date on which the Order issues, if prior to such termination or renewal date: (i) the Payor submits to Respondent a written request to extend such contract to a specific date no later than one year after this Order is issued; and (ii) Respondent has determined not to exercise any right to terminate under its Preexisting Contract.

Provided further that any Payor making such request to extend a contract retains the right, pursuant to part 1 of this Paragraph VI.C, to terminate the Preexisting Contract at any time.

Provided further that for the purposes of Paragraphs VI.B and VI.C, Payor does not include CMS.

D. Within (10) days of receiving notification from a Payor to terminate, pursuant to Paragraph VI.C of the Order, notify in writing by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation each Orthopedist Participating in Respondent of the date such contract is to be terminated.

E. For three (3) years after the date on which this Order is issued, send by first-class mail, with return receipt or delivery confirmation, or by facsimile or electronic mail with return confirmation a copy of this order and the Complaint to each:

1. Orthopedist who begins Participating in Respondent for the provision of orthopedic services, and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that such Participation begins;

2. Payor who contracts with Respondent for the provision of Physician services, who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date such Payor enters into such contract; and

3. Person who becomes an officer, director, or manager of Respondent (including, but not limited to, the manager of each Keystone division) and any employee of Respondent with responsibilities related to negotiating or contracting with a Payor , and who did not previously receive a copy of the Order and the Complaint, within thirty (30) days of the date that he or she assumes such status with Respondent.

VII.

IT IS FURTHER ORDERED that each Respondent shall file a verified written report within sixty days after the date this Order is issued, annually thereafter for ten (10) years on the anniversary of the date this Order is issued, and at such other

times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. A detailed description of the manner and form in which Respondent has complied and is complying with the Order, including, as applicable but not limited to, seeking the prior approvals required by Paragraphs II and III of this Order;

B. The name of each Orthopedist who did not Participate in the practice of orthopedics in Berks County and who began Participating in Respondent during the one (1) year period preceding the date for filing such report;

C. The name, address, and telephone number of each Payor with which each Respondent has had any contact during the one (1) year period preceding the date for filing such report;

D. The identity of each Payor sent a copy of the letter attached as Exhibit A, the response of each Payor to that letter and the status of each contract to be terminated pursuant to that letter; and

E. A copy of each verification of the distributions required by Paragraph VI.A, B, and E of this Order.

VIII.

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

A. Any proposed dissolution of Respondent;

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

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

IX.

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

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on the fourteenth, day of December, 2025.

By the Commission.

Appendix A

[letterhead of Relevant Respondent]

[name of Payor's CEO] [address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade

Commission against Respondents Keystone Orthopaedic Specialists, LLC ("Keystone") and Orthopaedic Associates of Reading, Ltd. ("OAR").

Pursuant to Paragraph VI.C. of the Order, [Relevant Respondent] must allow you to terminate, upon your written request, without any penalty or charge, any contracts with [Relevant Respondent] that are in effect as of the date you receive this letter.

If you do not make a written request to terminate the contract, Paragraph VI.C. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask [Relevant Respondent] to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

[Relevant Respondent to fill in information in brackets]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Overview

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing a Consent Order ("Consent Agreement") with Keystone Orthopaedic Specialists, LLC ("Keystone"), and Orthopaedic Associates of Reading, Ltd. ("Orthopaedic Associates") (together "Respondents"). The Consent Agreement settles charges that Respondents violated 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 Consent Agreement has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

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

II. Background and Market Structure

Nineteen orthopedists affiliated with six independent orthopedic practices in Berks County, Pennsylvania, merged to form Keystone in January 2011 (the "Merger"). One of those practices is Respondent Orthopaedic Associates, and the other five practices are Advanced Orthopaedics of Reading, Arthritis & Joint Replacement Center of Reading, P.C., Berkshire Orthopedic Associates, Inc., Commonwealth Orthopaedic Associates, Inc., and Reading Neck and Spine Center, P.C. ("Keystone Component

Practices"). The Keystone Component Practices became divisions of Keystone after the Merger.

Before the Merger, competition among orthopedists in Berks County was robust. At that time, 25 orthopedists in 11 independent practices competed to provide orthopedic physician services. The Merger substantially eliminated this competition by combining 19 out of 25, or 76 percent, of the orthopedists practicing in Berks County into one practice. Only six other orthopedists remained as competitors. After the Merger, the Keystone orthopedists ceased to do business through their respective independent practices and began doing business exclusively through Keystone. Three years after the Merger, in 2014, six orthopedists left Keystone and resumed doing business as Orthopaedic Associates for business reasons independent of the Commission's investigation.

III. The Relevant Markets

The relevant line of commerce in which to analyze the Merger's effects is the provision of orthopedic physician services. Orthopedic physician services include surgery and other services provided by physicians who specialize as orthopedists to treat injuries and diseases of the musculoskeletal system.

The relevant geographic market in which to assess the competitive effects of the Merger is Berks County, Pennsylvania. Patients in Berks County generally do not leave the county to obtain orthopedic physician services, and health plans are unable to serve their members in Berks County without including Berks County orthopedists in their provider networks.

IV. Effects of the Merger

Before the Merger, the Keystone Component Practices competed with each other, and health plans could form a network with some of the Keystone Component Practices. The Merger eliminated this competition and created a dominant orthopedic practice in Berks County. After the Merger, Keystone negotiated prices with health plans on behalf of all the previously competing Keystone Component Practices, and health plans could not offer a commercially marketable network that would appeal to Berks

County residents without Keystone. Thus, Keystone gained substantial market power through the Merger, which it used to raise prices with most health plans with coverage in Berks County.

V. Entry

Recruiting new orthopedists to Berks County is difficult, expensive, and time intensive. Neither entry by new practices nor expansion by the remaining practices following the Merger has been timely or sufficient to offset the actual anticompetitive harm from the Merger. Nor is future entry to be timely, likely, or sufficient to do so.

VI. Efficiencies

The Merger has not produced merger-specific efficiencies sufficient to offset the actual anticompetitive harm from the Merger.

VII. The Decision and Order

The proposed Decision and Order ("Order") is designed to maintain competition in the relevant market, including by prohibiting future anticompetitive consolidation, and by allowing health plans to cancel and renegotiate the contracts they entered with Keystone after the Merger was consummated.

In evaluating the remedies in the proposed Order, it is important to note that market conditions have changed since the 2011 Merger. Market concentration levels are lower now than after the Merger was consummated in 2011 due to orthopedists leaving Keystone. Most significantly, for reasons independent of and pre-dating the Commission's investigation, six orthopedists separated from Keystone in 2014 and resumed doing business separately and independently as Orthopaedic Associates. Following the separation, Orthopaedic Associates has become a major player in the market with eight orthopedists. Keystone, in contrast, currently has 11 orthopedists, down from 19 when the Merger was consummated.

Analysis to Aid Public Comment

Had Orthopaedic Associates remained a part of Keystone, the Commission likely would have sought divestiture. As it is, the unique circumstance of Orthopaedic Associates' separation from Keystone for business reasons pre-dating the Commission's investigation resulted in structural changes that factored into the Commission's decision not to pursue further structural relief. But a recombination of the two groups could raise serious antitrust concern. Therefore, the proposed Order is designed to maintain competition in the relevant market by, among other things, preserving the Orthopaedic Associates' separation, and by allowing health plans to avail themselves of current market conditions by renegotiating existing Keystone contracts. Orthopaedic Associates is a named Respondent because its orthopedists helped form Keystone and benefitted from Keystone's post-merger price increases. Moreover, putting Orthopaedic Associates under Order is necessary to obtain appropriate relief, as discussed below.

Paragraph II of the proposed Order preserves Orthopaedic Associates' separation by requiring Keystone and Orthopaedic Associates to obtain prior approval from the Commission before acquiring any interest in each other.

Paragraph III requires Keystone and Orthopaedic Associates to obtain prior approval from the Commission before either practice may acquire another orthopedic practice located in Berks County. Keystone and Orthopaedic Associates also must obtain prior approval before entering into any employment, membership, or other agreement of affiliation with an orthopedist who during the prior year provided services in Berks County.

The proposed Order also prohibits Keystone and Orthopaedic Associates from engaging in illegal concerted activity apart from merging or acquiring other practices in Berks County. Under the Horizontal Merger Guidelines, mergers may harm competition where a "market shows signs of vulnerability to coordinated conduct." In this case, the Commission is concerned that the effects of this consummated merger could linger because of the close ties developed between Keystone and Orthopaedic Associates. Keystone and the orthopedists affiliated with Orthopaedic Associates jointly negotiated with payors and shared price information for over three years before the Orthopaedic

Associates orthopedists left Keystone. Therefore, Paragraph IV includes provisions prohibiting certain joint activity among competing orthopedists who are members of or employed by Keystone or Orthopaedic Associates in order to limit the risk of coordination.

Paragraph IV.A prohibits Keystone and Orthopaedic Associates from jointly negotiating or refusing to deal with payors, and from engaging in this conduct with other orthopedists in Berks County. Paragraph IV.B prohibits Keystone and Orthopaedic Associates from facilitating exchanges of information among orthopedists concerning whether, and on what terms, to contract with a payor. Paragraph IV.C bars attempts to engage in any action prohibited by Paragraphs IV.A or IV.B. Paragraph IV.D proscribes inducing anyone to engage in any action prohibited by Paragraphs IV.A through IV.C.

Certain kinds of agreements that do not raise antitrust concerns are excluded from the general bar on joint negotiations. Paragraph IV does not preclude Keystone or Orthopaedic Associates from engaging in conduct that is reasonably necessary to form or participate in "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the Order. Paragraph V requires Keystone and Orthopaedic Associates to notify the Commission before initiating certain contacts regarding contracts with payors pursuant to these joint arrangements. Paragraph V also sets out the information necessary to satisfy the notification requirement.

Paragraph VI imposes other notification obligations on Keystone and Orthopaedic Associates and requires the termination of certain contracts that were entered into after the Merger. Paragraphs VI.A and VI.B require Keystone and Orthopaedic Associates to distribute the Complaint and Order to their respective orthopedist members and personnel identified in the Order, and to each payor that they have a record of having been in contact with since January 1, 2010.

Paragraph VI.C requires Keystone and Orthopaedic Associates to terminate, without penalty, any existing contracts with payors for the provision of orthopedic physician services at the earlier of a written request from a payor to terminate or the

earliest termination or renewal date under the contract. Paragraph VI.C also allows a payor to extend a contract beyond the termination or renewal date for a period of no longer than one year from the date the order becomes final to allow payors sufficient time to renegotiate contracts with Keystone and Orthopaedic Associates. The contract termination requirement allows payors to avail themselves of current conditions in renegotiating contracts, where Keystone is no longer the dominant provider. Paragraph VI.D requires Keystone and Orthopaedic Associates to distribute payor requests for contract termination to their respective orthopedist members. Paragraph VI.E requires Keystone and Orthopaedic Associates to provide new orthopedists, payors, and various personnel not previously receiving a copy, a copy of the Order and the Complaint.

Paragraphs VII, VIII, and IX impose various obligations on Keystone and Orthopaedic Associates to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph X provides that the Order will expire in 10 years from the date it is issued.

Complaint

IN THE MATTER OF

CRAIG BRITTAIN

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

Docket No. C-4564; File No. 132 3120
Complaint, December 28, 2015 – Decision, December 28, 2015

This consent order addresses respondent Craig Brittain's operation of a "revenge porn" website. Mr. Brittain obtained his content by pretending to be a woman on Craiglist's "woman seeking woman" section and exposed this content for commercial gain. The Commission's complaint alleges two violations of the FTC Act. Count I alleges that Respondent unfairly disseminated photographs of individuals with their intimate parts exposed, along with personal information about them, for commercial gain and without the knowledge or consent of those depicted, despite the fact that he knew or should have known that the individuals had a reasonable expectation their image would not be disseminated in that manner. Count II alleges that Respondent deceptively solicited photographs from individuals of themselves with their intimate parts exposed by misrepresenting that he would use such photographs solely for his personal private use. The consent order requires the respondent from disseminating, through a website or online service, a video or photograph of an individual with his or her intimate parts exposed without: disclosing to the individual that he will disseminate the image through a website and for commercial gain; and obtaining affirmative express consent in writing from the individual for such dissemination. It also requires Mr. Brittain from misrepresenting his collection, identity, or the identity of those providing content. He can no longer benefit from the images and personal information obtain in connection with his website.

Participants

For the *Commission: Melinda Claybaugh*

For the *Respondent: Craig Brittain, pro se*

COMPLAINT

The Federal Trade Commission, having reason to believe that Craig Brittain ("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 Craig Brittain was the owner and operator of the website www.isanybodydown.com ("Website"). Individually

or in concert with others, Respondent controlled or had authority to control, or participated in the acts and practices alleged in this complaint. His principal office or place of business is in Colorado Springs, CO 80920.

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

3. For purposes of this complaint, the term "intimate parts" shall mean the naked genitals, pubic area, buttocks, or female nipple.

RESPONDENT'S BUSINESS PRACTICES

4. From November 2011 to April 2013, Respondent owned, operated, and conducted all business on behalf of the Website. On the Website, Respondent posted personal information and photographs of individuals with their intimate parts exposed.

5. Respondent used three different methods to obtain photographs for the Website. First, Respondent encouraged and solicited individuals to submit, anonymously, photographs of other individuals with their intimate parts exposed for posting on the Website. Most submitters were men sending photographs of women. Respondent required that all submissions include at least two photographs, one of which had to be a full or partial nude, as well as the subject's full name, date of birth (or age), town and state, a link to the subject's Facebook profile, and phone number. Respondent received and compiled the photographs and personal information, posted them on the Website, and in some instances, Respondent posted additional personal information that he independently located about the subjects.

6. Second, Respondent posed as a woman on the Craigslist advertising website and, after sending other women photographs purportedly of himself, solicited photographs of them with their intimate parts exposed in return. If they sent such photographs, Respondent posted them on the Website without their knowledge or permission.

7. Third, Respondent instituted a "bounty system" on the Website, whereby anyone could request that others find and post photos of a specific person in exchange for a reward of at least $100. Respondent collected a "standard listing fee" of $20 for each request and half of all rewards given.

8. After obtaining the photographs, Respondent grouped the photographs on the Website by the State of residence of the photograph's subject. Visitors to the Website could post comments about the photographs. Such comments often included derogatory and sexually explicit language directed at the subject of the photograph. Indeed, Respondent touted the Website as superior to similar websites because the Website produced a "higher level of hatred" than other websites. During the time the Website operated, Respondent posted personal information and photographs of over 1,000 people with their intimate parts exposed.

9. Women whose photographs appeared on the Website often contacted Respondent to request that he remove the images. They reported that they suffered significant harm from having their photographs and personal information, including location information, posted on the site. Some received unwelcome contacts from strangers, including requests for additional photographs. Many worried about harm to their reputations because their friends, family, and co-workers could easily see the photographs if they conducted a simple Internet search for the subject's name. Others were concerned that they might be fired from a current job, or not hired for a future job, if the photos were discovered. In many instances, Respondent did not remove the content in response to removal requests.

10. Respondent also advertised content removal services on the Website. In these advertisements, purported third parties identified as "Takedown Hammer" and "Takedown Lawyer" promised to have consumers' content removed from the Website in exchange for a payment of $200 to $500. The advertisements referred interested consumers to the websites, www.takedownhammer.com and www.takedownlawyer.com, for further information. In fact, Respondent himself owned such websites, and posed as a third party to obtain money to remove the same photographs that he had posted on the Website.

11. Respondent earned approximately $12,000 from operating www.isanybodydown.com.

12. Respondent has operated an additional website, www.obamanudes.com, which largely displayed the same content as www.isanybodydown.com.

COUNT I

RESPONDENT'S UNFAIR PRACTICES RELATING TO POSTING OF PHOTOGRAPHS AND PERSONAL INFORMATION

13. Through the means described in Paragraphs 4 through 12, Respondent disseminated photographs of individuals with their intimate parts exposed, along with personal information of such individuals, through the Website for commercial gain and without the knowledge or consent of those depicted, when he knew or should have known that the depicted person had a reasonable expectation that the image would not be disseminated through the Website for commercial gain.

14. Respondent's practices, as set forth in Paragraph 13, have caused or were likely to have caused substantial injury to consumers that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. These practices were, and are, unfair acts or practices.

COUNT II

RESPONDENT'S FALSE CLAIMS RELATING TO SOLICITATION OF PHOTOGRAPHS

15. Through the means described in Paragraph 6, Respondent has solicited photographs from individuals of themselves with their intimate parts exposed while representing, directly or indirectly, expressly or by implication, that he would use such photographs solely for his personal private use.

16. In fact, Respondent did not use such photographs solely for his personal private use, but disseminated them through the

Website with personal information about the individual and for commercial gain. Therefore, the representation set forth in Paragraph 15 is false or misleading.

VIOLATIONS OF SECTION 5

17. 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 December, 2015, has issued this complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of the 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 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, and having duly considered the comments received from 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 Craig Brittain owned and operated the website www.isanybodydown.com and has his principal office or place of business in Colorado Springs, CO 80920.

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

ORDER

DEFINITIONS

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

A. Unless otherwise specified, "Respondent" shall mean Craig Brittain, individually.

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

C. "Covered Websites" shall mean www.isanybodydown.com, www.obamanudes.com, www.takedownlawyer.com, www.takedownhammer.com, www.takedownhammer.net, and www.takedownhammer.org.

D. "Intimate parts" shall mean the naked genitals, pubic area, buttocks, or female nipple.

E. "Personal information" shall mean individually identifiable information from or about an individual, including but not limited to: (1) a first and last name; (2) a home or other physical address, including street name and name of city or town; (3) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (4) a telephone number; (5) date of birth; or (6) a photograph or video containing an individual's image.

I.

PROHIBITION ON DISSEMINATION OF VIDEOS OR PHOTOGRAPHS WITHOUT CONSENT

IT IS ORDERED that Respondent and Respondent's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with the marketing, promoting, or offering for sale of any good or service, is permanently restrained and enjoined from disseminating, through a website or online service, a video or photograph of an individual with his or her intimate parts exposed without:

A. clearly and prominently disclosing directly to that individual, and not as part of a "privacy policy," "terms of use," or similar document posted on a website or online service, that Respondent will disseminate the video or photograph for commercial gain and through a website or online service; and

B. obtaining affirmative express consent in writing from the individual for such dissemination.

II.

PROHIBITION ON MISREPRESENTATIONS

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this order, whether acting directly or indirectly, in connection with the marketing, promoting, or offering for sale any good or service, is permanently restrained and enjoined from misrepresenting through a website or online service, expressly or by implication, any material fact, including but not limited to:

A. Respondent's collection, use, disclosure, or deletion of personal information;

B. Respondent's identity; and

C. the identity of those providing content or sponsoring advertising displayed on or through a website or online service.

III.

DISPOSITION OF PERSONAL INFORMATION

IT IS FURTHER ORDERED that Respondent is permanently restrained and enjoined from directly or indirectly:

A. disclosing, using, transferring, or benefitting from personal information obtained prior to entry of this Order in connection with or displayed on any of the Covered Websites; and

B. failing to destroy such personal information in all forms in Respondent's possession, custody, or control within 30 days after entry of this Order.

Provided, however, that such personal 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.

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:

A. affirmative express written consent obtained from each individual whose intimate parts are exposed in a photograph or video shared by Respondent on a website or through an online service;

B. all representations about Respondent's collection, use, disclosure, or sharing of personal information in connection with marketing, promoting, or offering for sale any good or service that involves the collecting or posting of personal information on a website or online service, including but not limited to the terms of use, frequently-asked questions, and privacy policies of such website or online service, for a period of five (5) years from the date of preparation or dissemination, whichever is later;

C. all consumer complaints and content removal requests received by or on behalf of Respondent relating to Respondent's collection, use, disclosure, or sharing of personal information, for a period of five (5) years from the date received;

D. all responses to the complaints and requests set forth in Part IV.C, for a period of five (5) years from the date sent;

E. copies of all subpoenas and other communications with law enforcement entities or personnel relating to Respondent's collection, use, disclosure, or sharing of personal information in connection with operating a website or online service, for a period of five (5) years from the date received or sent; and

F. all documents prepared by or on behalf of Respondent that contradict, qualify, or call into question

Respondent's compliance with this order, for a period of five (5) years from the date received or created.

V.

IT IS FURTHER ORDERED that Respondent shall deliver a copy of this order 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. 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.

VI.

IT IS FURTHER ORDERED that Respondent, 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 the 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 the Matter of Craig Brittain,* FTC File No. 132 3120.

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, Respondent shall submit an additional true and accurate written report.

VIII.

This order will terminate on December 28, 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 respondent Craig Brittain.

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.

From November 2011 to April 2013, Respondent owned and operated the website www.isanybodydown.com, on which he posted personal information and photographs of individuals with their intimate parts exposed. Respondent used three different methods to obtain photographs for posting on the Website. First, he requested that submitters send him nude photographs of other people along with personal information about the subject of each photograph, including the subject's first and last name, city, state, phone number, and link to their Facebook profile. Second, Respondent obtained photographs by posing as a woman on the Craigslist advertising website and, after sending women photographs purportedly of himself, solicited photographs of them with their intimate parts exposed in return. When they did provide such photographs, Respondent posted them on his website without their permission. Third, Respondent instituted a "bounty system" on the Website, whereby anyone could request that others find and post photos of a specific person in exchange for a reward of at least $100. Respondent posted the photographs and personal information he obtained without the permission of the subject of each photograph. In some instances, he added other personal information about the subjects based on his own research. In total, Respondent posted photographs and accompanying personal information of more than 1,000 people, the vast majority of whom were women. Respondent also advertised content removal services called "Takedown Hammer" and "Takedown Lawyer," which promised to remove consumers' content from the website for a substantial sum of money. In fact,

Respondent himself owned these services, thereby attempting to obtain money to remove the same photographs that he had posted.

The Commission's complaint alleges two violations of the FTC Act. Count I alleges that Respondent unfairly disseminated photographs of individuals with their intimate parts exposed, along with personal information about them, for commercial gain and without the knowledge or consent of those depicted, despite the fact that he knew or should have known that the individuals had a reasonable expectation their image would not be disseminated in that manner. Count II alleges that Respondent deceptively solicited photographs from individuals of themselves with their intimate parts exposed by misrepresenting that he would use such photographs solely for his personal private use.

The proposed order contains provisions designed to prevent Respondent from engaging in the future in practices similar to those alleged in the complaint. Part I prohibits Respondent from disseminating, through a website or online service, a video or photograph of an individual with his or her intimate parts exposed without: (1) disclosing to the individual that he will disseminate the image through a website and for commercial gain; and (2) obtaining affirmative express consent in writing from the individual for such dissemination.

Part II of the proposed order prohibits Respondent from, in connection with offering for sale any good or service, misrepresenting: (1) his collection, use, disclosure, or deletion of personal information; (2) his identity; or (3) the identity of those providing content or sponsoring advertising on a website. Part III of the proposed order prohibits Respondent from disclosing or benefitting from the images and personal information he obtained in connection with his website. Further, it requires him to destroy such images and personal information within 30 days of entry of the order.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Respondent to retain documents relating to his compliance with the order for five years. Part V requires dissemination of the order to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VI ensures

notification to the FTC of changes in Respondent's business or employment. Part VII mandates that Respondent submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision "sunsetting" the order after 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.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

PANASONIC CORPORATION
AND
SANYO ELECTRIC CO., LTD.

Docket No. C-4274. Order, July 13, 2015

Letter approving the divesture of certain assets related to the manufacture of NiMH batteries to FDK Corporation.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Ann Malester, Esq.
Weil, Gotshal & Manges LLP
Adam C. Hemlock, Esq.
Weil, Gotshal & Manges LLP

Re: *In the Matter of Panasonic Corporation and Sanyo Electric Co., Ltd., Docket No. C-4274*

Dear Ms. Malester and Mr. Hemlock:

This is in reference to the Petition of Panasonic Corporation and Sanyo Electric Co., Ltd., for Approval of Sale of Assets to FDK Corporation that was filed by Panasonic Corporation ("Panasonic") on May 14, 2015. Pursuant to the Decision and Order in Docket No. C-4274, Panasonic requests prior Commission approval of its proposal to sell certain assets related to the manufacture of NiMH batteries to FDK Corporation.

After consideration of Panasonic's Application and other available information, the Commission has determined to approve the proposed sale as set forth in the Petition. In according its approval, the Commission has relied upon information and representations by Panasonic and FDK Corporation in connection

with Panasonic's Petition and has assumed the information and representations to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HOLCIM LTD.
AND
LAFARGE S.A.

Docket No. C-4519. Order, July 29, 2015

Letter approving the divesture of the Canada/Great Lakes Assets and the Trident Assets to an affiliate of CRH International.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Andrew M. Lacy, Esquire
Simpson Thacher & Bartlett LLP

Re: *In the Matter of Holcim Ltd. and Lafarge S.A., Docket No. C-4519*

Dear Mr. Lacy:

This letter responds to the Application for Approval of Proposed Divestiture ("Divestiture Application") filed by Holcim Ltd. on June 3, 2015. The Divestiture Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Holcim's proposed divestiture of the Canada/Great Lakes Assets and the Trident Assets to an affiliate of CRH International. The Application was placed on the public record for comments until July 10, 2015, and one comment was received.

After consideration of the proposed divestiture as set forth in Holcim's Divestiture Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Holcim's Divestiture Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting.

Interlocutory Orders, Etc.

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358. Order, July 31, 2015.

Commission order extending the time period for issuing a final decision and order until October 2, 2015.

ORDER EXTENDING TIME PERIOD FOR ISSUING FINAL DECISION AND ORDER

In order to ensure that it can give full consideration to the many issues presented by the cross-appeals in this proceeding, including the matters addressed in supplemental briefing submitted in response to the Commission's May 29, 2015 Order, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend the time period for issuing a final decision and order until October 2, 2015.

IT IS SO ORDERED.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, August 14, 2015.

Commission order denying respondent's motion to disqualify Chairwoman Ramirez from participating as an adjudicator in the proceeding.

OPINION AND ORDER DENYING RESPONDENT LABMD, INC.'S AMENDED SECOND MOTION TO DISQUALIFY CHAIRWOMAN EDITH RAMIREZ

By WRIGHT, for a unanimous Commission:[1]

On June 15, 2015, the Commission denied LabMD's motion to disqualify Chairwoman Ramirez from participation in this proceeding, finding that LabMD's claims had no merit.[2] LabMD has now filed a second and very similar motion to disqualify Chairwoman Ramirez from this matter.[3] This second Motion rests on essentially the same factual assertions and merely reformulates LabMD's already-rejected claims. Having considered the Motion and Complaint Counsel's July 23, 2015 opposition, we deny the Motion. We have also considered and agree with the Chairwoman's August 6, 2015 statement declining to recuse herself from participation in this administrative adjudication.[4] In addition, we hereby incorporate the analysis of our June 15, 2015 Opinion and Order.

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[1] The Commission approved this Opinion and Order on August 14, 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] Opinion and Order Denying Respondent LabMD, Inc.'s Motion to Disqualify Chairwoman Edith Ramirez (June 15, 2015).

[3] Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act (July 15, 2015).

[4] Chairwoman Ramirez's Statement is available on the public record accompanying this Opinion and Order.

The Motion first alleges that Chairwoman Ramirez engaged in *ex parte* communications with the Oversight Committee and failed to disclose them in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d). The crux of the allegation is that the Oversight Committee's inquiry has "improperly shaped" the Chairwoman's judgment and thereby "compromised" her ability to participate in this adjudicative proceeding.[5] The Commission rejected this very claim when it ruled against LabMD's previous motion to disqualify Chairwoman Ramirez. As we discussed in the Opinion and Order on that motion, the Oversight Committee's correspondence did not focus upon – or even address – Chairwoman Ramirez's decisionmaking process on the merits of the adjudication. Further, as we concluded before, no evidence shows that the Chairwoman took part in addressing the questions raised by the Oversight Committee or that she engaged in *ex* parte communications regarding the merits of this case.[6]

The APA's provisions governing *ex parte* communications are designed to enable an administrative litigant to "know[] the arguments presented to a decisionmaker," so it can "respond effectively and ensure that its position is fairly considered."[7] Here, the correspondence from the Oversight Committee did not prejudice LabMD or compromise Chairwoman Ramirez's ability to participate in this administrative adjudication. To the contrary, LabMD had timely knowledge of the Oversight Committee's letters and filed motions with the Administrative Law Judge to admit them into evidence.[8] In fact, as noted in the Chairwoman's

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[5] *See* Amended Second Motion to Disqualify at 2, 4.

[6] Opinion and Order at 2-3.

[7] *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982).

[8] *See* Respondent's Motion to Admit RX-542 (June 16, 2014) (moving to admit the June 11, 2014 letter into evidence); Respondent LabMD, Inc.'s Motion to Admit RX-543–RX-548 (Dec. 23, 2014) (Public Version) (moving to admit the December 1, 2014 letter into evidence, among other documents); Respondent LabMD, Inc.'s Motion to Admit Select Exhibits (June 12, 2015) (moving to admit into evidence various exhibits, including the July 18, 2014 letter).

Statement, LabMD acknowledges that the Oversight Committee's letters have been "submitted into the record."[9]

LabMD next argues that Chairwoman Ramirez must be disqualified because the agency "improperly created a discrete body of secret law" when, in response to a Freedom of Information Act request, it invoked the deliberative process privilege to withhold certain agency communications.[10] The claim has no basis in fact or law. Contrary to LabMD's repeated assertions, the agency's reliance on the deliberative process privilege to withhold certain communications does not establish, or even imply, that Chairwoman Ramirez addressed the merits of this case. As the Commission previously explained, 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.[11]

In conclusion, we find no merit to LabMD's claims that Chairwoman Ramirez should be disqualified.

Accordingly,

IT IS ORDERED THAT LabMD's Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act is **DENIED**.

By the Commission, Chairwoman Ramirez and Commissioner Brill not participating.

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[9] *See* Amended Second Motion to Disqualify at 5 n.13.

[10] *Id.* at 6-7.

[11] Opinion and Order at 4.

Concurring Statement

STATEMENT OF CHAIRWOMAN EDITH RAMIREZ

Respondent LabMD, Inc. once again seeks my recusal from this administrative proceeding.[1] On June 15, 2015, the Commission denied LabMD's first motion to disqualify me, concluding, as I did, that there is no merit to LabMD's claim that my limited involvement in the agency's response to correspondence relating to this matter from the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") disqualifies me from participating.[2] LabMD's current motion is predicated on the same essential factual assertions and is just as baseless.

Recasting its previous arguments, LabMD first claims that I engaged in *ex parte* communications with the Oversight Committee and failed to disclose them in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d). Underlying LabMD's contention is the suggestion that the Oversight Committee's inquiry has "improperly shaped" my judgment and "compromised" my ability to participate in this matter.[3] LabMD argues further that the failure to make the Oversight Committee's correspondence part of the public record of this proceeding itself "creates a presumption of bias."[4] These assertions are without foundation.

The provisions of the APA governing *ex parte* communications in agency adjudications are designed to protect an administrative litigant's right to "know[] the arguments presented to a decisionmaker" in order that the litigant can "respond effectively and ensure that its position is fairly

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[1] *See* Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act (July 15, 2015).

[2] Opinion and Order Denying Respondent LabMD, Inc.'s Motion to Disqualify Chairwoman Edith Ramirez (June 15, 2015) (hereafter "Opinion and Order") at 1-2; Statement of Chairwoman Edith Ramirez In the Matter of LabMD, Inc. (May 20, 2015) (published June 15, 2015) (hereafter "Statement of Chairwoman Ramirez").

[3] Amended Second Motion to Disqualify at 2, 4.

[4] *Id.* at 2.

considered."[5] They are "common-sense guidelines" to ensure fair decision-making, not "woodenly applied rules."[6] Even putting aside that I have not engaged in any *ex parte* communications concerning the merits of this proceeding, LabMD had timely knowledge of the Oversight Committee's letters and asked the Administrative Law Judge to admit them into evidence.[7] Indeed, LabMD concedes the correspondence in question has been placed in the administrative record.[8]

Moreover, the Commission previously concluded when it denied LabMD's prior disqualification motion that the communications from the Oversight Committee have not prejudiced LabMD or compromised my ability to participate in this administrative proceeding.[9] As I have previously made clear, I did not take any part in addressing the substantive questions raised by the Oversight Committee. To the contrary, I carefully limited my role and that of the staff in my office, ensuring only that the Oversight Committee received full and prompt cooperation from the agency.[10] LabMD's appeal to the APA notwithstanding, the fact remains that there is no evidence supporting its claim of supposed bias.

LabMD next argues that I should be disqualified because the agency "improperly created a discrete body of secret law" when, in response to a Freedom of Information Act request, it invoked the deliberative process privilege to withhold certain internal

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[5] *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982).

[6] *Id.*

[7] *See* Respondent's Motion to Admit RX-542 (June 16, 2014) (moving to admit the June 11, 2014 letter into evidence); Respondent LabMD, Inc.'s Motion to Admit RX-543–RX-548 (Dec. 23, 2014) (Public Version) (moving to admit the December 1, 2014 letter into evidence, among other documents); Respondent LabMD, Inc.'s Motion to Admit Select Exhibits (June 12, 2015) (moving to admit into evidence various exhibits, including the July 18, 2014 letter).

[8] *See* Amended Second Motion to Disqualify at 5 n.13.

[9] *See* Opinion and Order at 2-3.

[10] *See* Statement of Chairwoman Ramirez.

communications.[11] Here too LabMD is wrong. The agency's reliance on the deliberative process privilege to withhold certain privileged communications does not establish, or even remotely suggest, that I addressed the merits of this case in any way. Rather, as has been previously explained, the deliberative process privilege applies to different types of agency deliberations involving officials at various levels within the agency, including deliberations regarding congressional inquiries.[12]

In sum, LabMD's latest disqualification motion, like its predecessor, is without merit. Accordingly, I decline to recuse myself from participation in this matter.

[11] Amended Second Motion to Disqualify at 6-7.

[12] Opinion and Order at 4; Statement of Chairwoman Ramirez at 2.

Interlocutory Orders, Etc.

IN THE MATTER OF

ZF FRIEDRICHSHAFEN AG
AND
TRW AUTOMOTIVE HOLDINGS CORP.

Docket No. C-4520. Order, August 21, 2015

Letter approving the divesture of the TRW L&S Business to THK Co., Ltd.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Peter C. Thomas, Esquire
Simpson Thacher & Bartlett LLP

Re: *In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., Docket No. C-4520*

Dear Mr. Thomas:

This letter responds to the Application for Approval of Divestiture of the TRW L&S Business ("Divestiture Application") filed by TRW Automotive Holdings Corp. ("TRW") on May 29, 2015. The Divestiture Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, TRW's proposed divestiture of the TRW L&S Business to THK Co., Ltd. The Application was placed on the public record for comments until July 6, 2015. No comments were received.

After consideration of the proposed divestiture as set forth in TRW's Divestiture Application, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with TRW's Divestiture Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, September 14, 2015.

Commission order denying respondent's motion to dismiss the complaint filed in the administrative proceeding. In July 2015, the respondent moved for the dismissal of the complaint on the grounds that the process for appointing the administrative law judge presiding on the case violated the Appointments Clause. The Commission ruled that the Appointments Clause does not apply to the hiring of Commission administrative law judges.

OPINION AND ORDER DENYING RESPONDENT LABMD, INC.'S MOTION TO DISMISS

By Chairwoman RAMIREZ, for a unanimous Commission:[1]

On July 14, 2015, Respondent LabMD, Inc. moved for leave to add a new affirmative defense claiming this administrative proceeding is unconstitutional because the appointment of the presiding administrative law judge, Chief Administrative Law Judge D. Michael Chappell, allegedly violates the Appointments Clause.[2] Concurrent with its motion for leave, LabMD also moved to dismiss the proceeding.[3] On July 27, Judge Chappell allowed LabMD to add the defense and ordered the parties to address the merits of LabMD's motion to dismiss in their post-trial briefs.[4] The parties have now fully briefed the issue. Exercising our plenary authority over this adjudication, we have chosen to address LabMD's motion to dismiss now rather than on appeal and hereby deny it.[5]

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[1] Commissioner Brill did not take part in the consideration or decision herein.

[2] Respondent's Motion for Leave to Amend Affirmative Defenses and to Dismiss This Proceeding (July 14, 2015).

[3] *Id.*

[4] Order Granting Respondent's Motion for Leave to Amend Affirmative Defenses (July 27, 2015).

[5] In addition to the briefing on Respondent's motion to dismiss this proceeding, in making this ruling we have considered the relevant portions of the following submissions: LabMD Inc.'s Corrected Post-Trial Brief (August 11, 2015);

The Appointments Clause provides that Congress may vest the appointment of "inferior officers" "in the President alone, in the courts of law, or in the heads of departments." U.S. Const. Art. II., § 2, cl. 2. Government employees who are not "inferior officers" need not be hired in accordance with the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976); *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). LabMD argues Judge Chappell is an improperly appointed "inferior officer" because he was not appointed by the President, a department head, or a court, in violation of the Appointments Clause. We conclude there has been no such violation.

Specifically, we reject LabMD's contention that the administrative law judges employed by the Commission are "inferior officers" for purposes of the Appointments Clause. An inferior officer is one who "exercis[es] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. The Commission has discretion to hear particular administrative matters itself or assign them instead to a Commission-employed ALJ or to one or more Commission members. 5 U.S.C. § 556; 16 C.F.R. § 3.42 (a)-(b). Even when it delegates the oversight of an evidentiary hearing to an ALJ, the Commission retains full authority over any adjudication conducted pursuant to section 5(b) of the Federal Trade Commission Act. 15 U.S.C. § 45(b).

When overseeing an administrative hearing, the assigned ALJ issues an opinion known as an "initial decision." The Commission reviews that initial decision *de novo*. 16 C.F.R. §§ 3.52, 3.53.[6] The Commission may "adopt, modify, or set aside" the initial decision in whole or in part and may exercise "all the powers which it could have exercised if it had made the initial

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Respondent LabMD, Inc.'s Corrected Proposed Conclusions of Law (August 11, 2015); Complaint Counsel's Reply to Respondent's Post-Trial Brief (September 4, 2015); Complaint Counsel's Reply to Respondent's Proposed Conclusions of Law (September 4, 2015); Respondent LabMD, Inc.'s Post-Trial Reply Brief (September 4, 2015); and Respondent LabMD, Inc.'s Corrected Reply to Complaint Counsel's Conclusions of Law (September 4, 2015).

[6] An appeal from an initial decision can be initiated by the parties or *sua sponte* by the Commission. 16 C.F.R. §§ 3.52, 3.53.

decision." 16 C.F.R. § 3.54(a).[7] Commission administrative law judges are therefore employees with limited authority; they are not "inferior officers" subject to the Appointments Clause. *Cf. Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000) (holding that FDIC ALJs are employees rather than "inferior officers" subject to the Appointments Clause due to their limited authority).

Nonetheless, although we conclude that the Appointments Clause does not apply to the hiring of Commission administrative law judges, the Commission, purely as a matter of discretion, has ratified Judge Chappell's appointment as a Federal Trade Commission administrative law judge and as the Commission's Chief Administrative Law Judge.[8] This action by the Commission puts to rest any possible claim that this administrative proceeding violates the Appointments Clause.

We also take this opportunity to reject another new argument presented by LabMD. In its corrected post-trial brief, LabMD asserts for the first time in passing that Article II of the Constitution prohibits the so-called "dual for-cause" removal rules for independent federal agencies, which provide that Commissioners may only be removed for cause and may themselves only remove ALJs for cause. *See* 5 U.S.C. § 7521(a)-(b); 15 U.S.C. § 41. LabMD argues that this infringes on the power of the executive by restricting the ability of the President to remove an "inferior officer."[9] LabMD did not properly raise this argument, which appears neither in its motion for leave to amend its affirmative defenses nor in the affirmative defense itself. In fact, the argument does not even rest on the Appointments Clause, which is the sole stated ground for LabMD's new affirmative

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[7] In addition, when an ALJ serves as a presiding officer for an informal hearing in a Section 18 rulemaking proceeding, 15 U.S.C. § 57a(c)(1)(A), only the Commission, and not the ALJ, has authority to promulgate a final agency rule. 16 C.F.R. §1.13(g) (presiding officer issues recommended decision); *id*. at § 1.14(a) (after reviewing rulemaking record, Commission may issue, modify, or decline to issue any rule).

[8] *See* Commission Minute dated September 11, 2015, attached as Exh. A.

[9] Respondent LabMD, Inc.'s Post-Trial Reply Brief at 13 n.11.

defense.[10] Consequently, LabMD has waived any argument relating to "dual for-cause" removal. In any event, the argument is without merit for the reasons set forth in *Duka v. SEC,* No. 15-cv-357, __ F. Supp. 3d __, 2015 WL 1943245 (S.D.N.Y. Apr. 15, 2015) (holding that "dual for-cause" restrictions on the power to remove SEC ALJs do not unlawfully impede the power of the executive).[11]

For the reasons explained above, we find that the instant proceeding does not contravene the Constitution and therefore that LabMD's motion to dismiss is without merit.

IT IS HEREBY ORDERED THAT LabMD, Inc.'s Motion to Dismiss is **DENIED**.

By the Commission, Commissioner Brill not participating.

[10] *See* Respondent's Motion for Leave to Amend Affirmative Defenses and to Dismiss This Proceeding; First Amended Answer and Defenses to Administrative Complaint (July 31, 2015).

[11] *See also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010) (indicating that concerns about dual for-cause protections do not arise with administrative law judges because they "perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers").

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

P130500 **Federal Trade Commission Minute**: Ratification of Appointment of Administrative Law Judge and Chief Administrative Law Judge

Circulation: On September 11, 2015, on Motion by Chairwoman Ramirez, the Commission ratified the appointment of D. Michael Chappell as a Federal Trade Commission Administrative Law Judge and as the Commission's Chief Administrative Law Judge.

Vote: For the public record, Chairwoman Ramirez, Commissioner Ohlhausen, and Commissioner McSweeny voted in the affirmative, and Commissioner Brill did not participate.

Donald S. Clark
Secretary

Interlocutory Orders, Etc.

IN THE MATTER OF

CERBERUS INSTITUTIONAL PARTNERS V, L.P., AB ACQUISITION LLC, AND SAFEWAY INC.

Docket No. C-4504. Order, September 25, 2015

Letter approving a waiver to one provision of the Asset Purchase Agreement between Albertson's LLC, Albertson's Holdings LLC, and Haggen Holdings LLC.

LETTER ORDER APPROVING WAIVER

Paul T. Denis, Esquire
Dechert LLP

Re: *In the Matter of Cerberus Institutional Partners V, L.P., AB Acquisition LLC, and Safeway Inc.*,
Docket No. C-4504

Dear Mr. Denis:

This letter responds to the Application for Approval of Waiver Agreement to the Haggen Divestiture Agreement, filed by Albertson's on September 24, 2015. Pursuant to the Decision and Order in this matter, Albertson's requests approval of a proposed change to one of the divestiture documents incorporated by reference into the Order.

After consideration of Albertsons' Application and other available information, the Commission has determined to approve the proposed change as set forth in Albertson's Application. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with Albertson's Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358. Order, October 2, 2015.

Commission order extending the time period for issuing a final decision and order until October 9, 2015.

ORDER EXTENDING TIME PERIOD FOR ISSUING FINAL DECISION AND ORDER

In order to give full consideration to the issues presented by the cross-appeals in this proceeding, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend the time period for issuing a final decision and order until October 9, 2015.

IT IS SO ORDERED.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

STERIS CORPORATION
AND
SYNERGY HEALTH PLC

Docket No. 9365. Order, October 7, 2015.

Commission order dismissing the complaint.

ORDER WITHDRAWING MATTER FROM ADJUDICATION PURSUANT TO RULE 3.26(C) OF THE COMMISSION RULES OF PRACTICE

On October 1, 2015, the Respondents in this matter filed a Motion to withdraw this matter from adjudication, pursuant to Commission Rules 3.26(b)(1) and 3.26(c), 16 C.F.R. §§ 3.26(b)(1), 3.26(c) (2015). At 11:59 p.m. on October 6, 2015, the time period within which Complaint Counsel could file "an objection asserting that the conditions of [Rule 3.26(b)] have not been met . . ." expired, and no such objection was filed. Accordingly,

IT IS ORDERED, pursuant to Commission Rule 3.26(c), that this matter in its entirety be, and it hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be, and they hereby are, stayed.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, December 3, 2015.

Commission order extending the deadline to file appeal briefs.

ORDER GRANTING JOINT MOTION TO EXTEND DEADLINES FOR FILING APPEAL AND ANSWERING BRIEFS

Complaint Counsel and Respondent in this matter have filed a Joint Motion to extend the deadlines to file appeal briefs from December 15, 2015 to December 23, 2015 and answering briefs from January 14, 2016 to February 5, 2016. The parties request these extensions due to longstanding holiday commitments and state that they do not believe these extensions will result in any undue delay in the adjudication of this case.

Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), the Commission has determined, for good cause shown, to grant the Joint Motion.[1] Accordingly,

IT IS ORDERED THAT any appeal brief must be filed on or before December 23, 2015, and if a party files an appeal brief by that date, its appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b)(2); and

IT IS FURTHER ORDERED THAT any answering brief must be filed on or before February 5, 2016 and any reply brief must be filed on or before February 18, 2016.

By the Commission, Commissioner Brill not participating.

[1] Commissioner Brill did not take part in the consideration or decision herein.

Interlocutory Orders, Etc.

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358. Order, December 8, 2015.

Commission order staying enforcement of its Final Order pending review of the Commission's decision by the Sixth Circuit Court of Appeals.

ORDER GRANTING RESPONDENT'S APPLICATION TO STAY FINAL ORDER PENDING JUDICIAL REVIEW

In an October 15, 2015 decision, the Commission found Respondent ECM BioFilms, Inc. ("ECM") liable under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 for making deceptive claims about the biodegradability of plastics treated with its additive. The Commission's Final Order enjoins ECM from making an unqualified claim that a plastic product is degradable unless the claim is truthful and not misleading, ECM has competent and reliable scientific evidence substantiating the claim, and the item will completely decompose within five years after customary disposal. The order allows qualified degradability claims that are truthful and not misleading if (i) ECM has competent and reliable scientific evidence that substantiates the claim; and (ii) the claim is qualified by either the time to complete decomposition, or the rate and extent of decomposition; and, if the product will not decompose in a customary disposal facility or by a customary disposal method, information about the non-customary disposal facility or method.[1] On November 9, 2015, ECM applied for a stay pending judicial review of the Final Order. Complaint Counsel oppose the granting of a stay. On December 4, 2015, ECM filed a petition for review with the Sixth Circuit Court of Appeals. For the reasons stated below, the Commission stays enforcement of its

[1] The Commission's opinion in this matter is available at https://www.ftc.gov/system/files/documents/public_statements/819651/151019ecmbiofilmsopinioncomm.pdf. The order is available at https://www.ftc.gov/system/files/documents/cases/151019ecmorder.pdf.

Final Order, effective immediately and until the Sixth Circuit issues a ruling disposing of ECM's petition for review.[2]

APPLICABLE STANDARD

Section 5(g) of the FTC 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). Service of the Commission's Opinion and Final Order was accomplished on October 19, 2015. Thus, absent a stay, the Final Order will become effective on December 18, 2015.

Under Commission Rule 3.56(c) an application for 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); *McWane, Inc.*, 2014 WL 1630460, at *1 (FTC Apr. 11, 2014). The required showing of the likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay." *See, e.g.*, *North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006). We consider these factors below.

ANALYSIS

Addressing the first factor, ECM focuses solely on the Commission's determination that ECM's unqualified claim that its additive makes plastics "biodegradable" (without reference to time period) is false and unsubstantiated.[3] ECM first argues that

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[2] ECM filed a motion for *in camera* treatment of certain information contained in its application for a stay. The Commission also grants that motion.

[3] Commissioner Ohlhausen agreed with the majority that ECM was liable for the express "nine months to five years" claim and the "some period greater than a year" claim, but she disagreed on the unqualified "biodegradable" claim. Her partial dissent is available at https://www.ftc.gov/system/files/documents/public_statements/819661/151019ecmbiofilmsmkopartialdissent.pdf. Therefore, she supports the grant of this

the Commission erroneously construed this claim as implying complete biodegradation in a landfill within a reasonably short period of time (five years or less). It also contends that the Commission's Final Order violates the First Amendment because it bars ECM from making what ECM maintains are scientifically verifiable claims that its additive accelerates biodegradation of plastic products. Third, ECM argues that the Commission violated its due process rights by failing to provide prior notice that an implied claim of biodegradation within five years was at issue in this case. Finally, ECM also asserts that a stay is warranted because this case is complex and involves novel issues.

ECM made similar arguments in its appeal to the Commission, and the Commission carefully considered and rejected them, for the reasons explained at length in our opinion. Although ECM now relies on the partial dissent by Commissioner Ohlhausen in support of its stay application, its repetition of the dissent's views neither changes the Commission's conclusions that ECM's unqualified biodegradable claim was misleading and unsubstantiated nor establishes a likelihood of success on appeal. However, while we are not persuaded that ECM is likely to succeed in its appeal, we do find that the issues in this case are sufficiently complex to tend to support a stay pending appeal.

With regard to the equities, ECM argues that issuance of a stay would risk no harm to consumers and is in the public interest because there is no evidence that the purchasers of its additive (as opposed to end-use consumers) were deceived by its implied biodegradability claims. We are not persuaded. The Commission found that ECM's customers purchased its additive because they wanted to make biodegradability claims to their own customers – that is, ECM's claims were important to the purchasing decisions of those in ECM's commercial supply chain. Allowing marketing claims that the Commission found to be misleading, unsubstantiated, and material to purchasing decisions is not in the public interest.[4]

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stay, but rejects the majority's reasoning on factors one, three, and four to the extent that reasoning conflicts with her partial dissent.

[4] Although ECM asserts that it will not continue to make unqualified biodegradability claims if the Commission stays the Final Order, *see* ECM

On the issue of harm absent a stay, ECM claims that it will suffer two types of irreparable injury: first, damage to its business that will leave it financially unable to pursue its appeal and, second, injury to its First Amendment right to make truthful claims about its product. As noted above, the Commission already rejected ECM's claim of First Amendment harm in its decision on the merits and ECM's argument fares no better now. ECM, moreover, overstates the order's prohibitions: the Final Order does not prohibit all claims of biodegradability. ECM remains free to market its product provided that it adequately qualifies its claims so that they are not misleading.

Nonetheless, ECM makes a credible claim, supported by the declarations of its President and Chief Financial Officer, that in its unique circumstances it will be unable to fund an appeal of the Commission's decision if the Final Order is not stayed. Complaint Counsel do not seriously challenge that assertion. Because ECM's day in court may be foreclosed in the absence of a stay, we find ECM has made an adequate showing of irreparable injury that, along with the complex issues presented by this case, justifies the exercise of our discretion to stay the Final Order.

CONCLUSION

Our decision to stay the Final Order is a close one. But ECM has shown unique circumstances that, in our view, justify a stay pending appellate review. We therefore grant the stay. Accordingly,

IT IS ORDERED THAT Respondent ECM BioFilms' Application for Stay Pending Judicial Review and Motion for In Camera Treatment of Information in ECM's Application for Stay are **GRANTED**.

By the Commission.

Reply Br. at 18, we have found that its proposed qualifier – that there is no known precise rate of biodegradation – is inadequate to prevent consumer deception. *See* Opinion at 57.

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, December 18, 2015.

Commission order increasing the word limit for respondent's answering brief, denying respondent's request to file an opening appeal brief, and granting complaint counsel leave to file a reply brief.

ORDER ADDRESSING AND RESOLVING APPELLATE BRIEFING ISSUES

In an Initial Decision and Order issued on November 13, 2015, Chief Administrative Law Judge D. Michael Chappell dismissed the complaint against Respondent LabMD, Inc., finding that Complaint Counsel failed to prove that the alleged conduct at issue caused or was likely to cause substantial injury to consumers. We address two motions filed by the parties relating to the ensuing appeal to the Commission.

On November 24, 2015, Complaint Counsel filed a Notice of Appeal of the Initial Decision. Despite having prevailed before the ALJ, Respondent filed a "Notice of Conditional Cross-Appeal" a week later, arguing that a "conditional, protective cross-appeal in response to Complaint Counsel's notice of appeal is proper even where, as here, the administrative law judge's initial decision and proposed order dismissed the complaint in its entirety." Cross-Appeal Notice at 1. Thereafter, on December 7, 2015, Complaint Counsel filed a "Motion to Enforce Limits on Appeal Briefing" arguing that LabMD's "cross-appeal" is improper and seeking an order requiring that LabMD present all of its arguments in support of the Initial Decision in its answering brief, including any alternate grounds for affirming. On December 14, 2015, LabMD filed its opposition to Complaint Counsel's motion; alternatively, LabMD seeks leave to file an over-length answering brief. LabMD also moved to strike Complaint Counsel's Notice of Appeal claiming it is too indefinite. On December 17, 2015, Complaint Counsel filed its opposition to LabMD's motion to strike.

While our rules plainly permit the filing of cross-appeals[1] – that is, appeals challenging all or part of a given initial decision or order that are filed by parties other than the party that filed the first notice of appeal – LabMD is not challenging any part of the ALJ's Initial Decision. LabMD states instead that the ALJ's Initial Decision and Order "were both correct and should be affirmed." Cross-Appeal Notice at 2. Moreover, we disagree with LabMD's argument that it must file a "protective cross-appeal" in order to preserve issues for appeal to a federal circuit court. 16 C.F.R. § 3.54(a). Under LabMD's reasoning, every case in which one party prevails could result in an appeal by the unsuccessful party and a second, purported "protective cross-appeal" by the victor. Such a result would be inconsistent with general appellate practice and would prove highly burdensome and wasteful for all involved. Consequently, LabMD is not entitled to file an opening appeal brief.

Of course, LabMD is certainly entitled to make, in an answering brief, conditional arguments setting forth alternate grounds for affirmance of the ALJ's decision. In view of the number of issues that may be raised in connection with Complaint Counsel's appeal, we find that LabMD's request for leave to file a longer answering brief is justified in this case. We have determined to increase the word limit for LabMD's answering brief by 7,000 words. We likewise increase Complaint Counsel's word limit for its reply brief by 7,000 words and extend by a few days the deadline by which it must be filed.

We now turn to LabMD's cross-motion to strike Complaint Counsel's Notice of Appeal. We disagree with LabMD's assertion that Complaint Counsel's notice is deficient due to a lack of specificity. Commission Rule of Practice 3.52 requires only that a notice of appeal "specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from." 16 C.F.R. § 3.52(b)(1). There is no

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[1] *See* Commission Rule of Practice 3.52, 16 C.F.R. § 3.52(b)(1); *see also* Federal Trade Commission Amendments to Parts 3 and 4 of its Rules of Practice, 74 Fed. Reg. 1804, 1819 (Jan. 13, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/federal_register_notices/rules-practice-16-cfr-parts-3-and-4/090113rulesofpractice.pdf.

question that Complaint Counsel's Notice of Appeal complies with Rule 3.52. There is thus no basis for striking it.[2]

Accordingly,

IT IS HEREBY ORDERED THAT while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before February 5, 2016; and

IT IS FURTHER ORDERED THAT Complaint Counsel may file a reply brief that shall not exceed 14,000 words. Any such reply brief must be filed on or before February 23, 2016.

By the Commission, Commissioner Brill not participating.

[2] Commissioner Brill did not take part in the consideration of, or decision regarding, any of the issues herein.

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